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CON Section
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October 29, 2010

By Hand Delivery

Certificate of Need Section - DHR
Attn: Ms. Dalizza Marques, Project Analyst
NC Department of Health and Human Services
701 Barbour Drive
Raleigh, NC 27603

Re: Project ID No. F-8584-10
Total Renal Care of North Carolina, LLC
d/b/a Copperfield Dialysis Center
Comments on CON Application

Dear Ms. Marques:

On behalf of our client Renal Advantage, Inc. and pursuant to N.C. Gen. Stat. § 131E-185(a1)(1), enclosed please find written comments and exhibits concerning the above-referenced Certificate of Need application currently under review.

Sincerely,
Nelson Mullins Riley & Scarborough LLP



Franklin Scott Templeton

Enclosures

cc Jon M. Sundock, Esq.

~#4819-6163-7127 v.2 - 27620/09002~

With twelve office locations in the District of Columbia, Florida, Georgia, Massachusetts, North Carolina, South Carolina, and West Virginia

**COMMENTS FILED BY RENAL ADVANTAGE, INC.
IN OPPOSITION TO PROJECT I.D. NO. F-8584-10
TOTAL RENAL CARE OF NORTH CAROLINA, LLC
d/b/a COPPERFIELD DIALYSIS CENTER**

Renal Advantage, Inc. (“RAI”) submits the following Comments and exhibits in opposition to the above-referenced Certificate of Need (“CON”) Application filed on September 14, 2010 by Total Renal Care of North Carolina, LLC d/b/a Copperfield Dialysis Center (“TRC”) to expand its existing dialysis facility by six (6) stations, based upon the county need determination in the July 2010 Semiannual Dialysis Report. RAI is a provider of dialysis services similar to those proposed to be provided by TRC, and is also applying to develop a dialysis facility in Cabarrus County at this time.

As it reviews the Application, the Agency should keep in mind that TRC and its other DaVita affiliates in North Carolina are a huge healthcare organization, a dominating provider of dialysis services in North Carolina, and the only provider of dialysis services in Cabarrus County. Awarding a CON to TRC will allow a dominant provider to grow even larger, and capture even more of the market. On the other hand, awarding the CON to another applicant, specifically RAI, would enhance competition, with the result being improved access to better healthcare in Cabarrus County.

TRC’s Application fails to conform to the requirements of the CON law for at least the following reasons, and must therefore be disapproved. For the Agency’s convenience, these comments generally follow the organization of TRC’s Application.

The Application Fails to Disclose its Co-Owner, Fails to Identify the True Property Owner, Fails to Identify the Close, Substantial Relationship Between the Applicant and its Facility Developer, and Fails to Report and Include Associated Costs in its Calculations

I. Identification

While TRC’s Application contains a number of nonconformities, the most glaring failure of the Application is this: **TRC fails to identify its co-owner, fails to correctly identify the landowner from which it leases the building housing the dialysis facility, fails to disclose its close and substantial**

relationship with the then-landowner and developer who developed the facility building, and fails to report and include the base cost of the land and the building shell in its Application and financial calculations, all thereby substantially violating multiple provisions of the CON law, as described below.

The sole applicant on the Application is TRC, which is a Delaware limited liability company. *App. p. 2; Ex. 2.*¹ TRC identifies DaVita, Inc. as the holding company that owns Total Renal Care, Inc. and eighty-five percent (85%) of the applicant TRC. *App. p. 2.* TRC fails to identify, however, that fifteen percent (15%) of TRC is owned by a company named **Neil Realty Co.** *See App. p. 4.* In one of TRC's *other* CON Applications currently pending for Cabarrus County, however (Project I.D. No. F-8581-10), at page 4 TRC states that "*The members [owners] of Total Renal Care of North Carolina, LLC are Total Renal Care, Inc. at 85% and Neil Realty, Co. at 15%.*" The public record supports that Neil Realty Co. is a co-owner of TRC. *CE 1.* TRC's failure to identify Neil Realty Co. in response to Section I, Item 12, fails to appropriately inform the Agency regarding the Applicant, and is nonconforming with Criteria 4 and 5. While TRC's co-owner **Neil Realty Co.** is not mentioned at all in this Application, it is important, for the reasons discussed below.

Land and Building Owners

TRC identifies a company named "Palestra Properties, Inc." [or "Polestra Properties"] as the property and building owner in which the dialysis stations will be located. *App. pp. 3, 60.* Confusingly, Exhibit 22 contains lease documents indicating that, *since 2004*, the landowner/landlord has been "KLR Investments, LLC, MKP Investments, LLC and CER Investments, LLC" (as joint owners of the property), and that these joint owners purchased the property from a company named "Net Lease Holdings, LLC." *Ex. 22.* While Exhibit 22 also includes references to an entity named "Palestra Real Estate Partners, Inc.," a search of the Cabarrus County land and tax records does not indicate that any entity with Palestra [or Polestra] in its name has ever owned the land on which the facility is built.² While TRC identifies Palestra Properties as the owner of its building, that is incorrect.

¹ For the reader's convenience, citations to the Application are identified by page number or as *App. p. ___*; Exhibits to the Application are *Ex. ___*; and the Exhibits to these Comments are *CE ___*.

² <http://www.co.cabarrus.nc.us/ClairsPC/search.aspx>, searched on October 27, 2010.

The Cabarrus County land and tax records do establish that the land containing the dialysis facility has been owned since 2004 by the joint owners named above, and that they bought the property from Net Lease Holdings, LLC in January 2004. *CE 2, 3.* Net Lease Holdings, LLC had bought the property in October 2004 from **Hill/Gray Seven, LLC**, a company with an address in Boca Raton, Florida, via a deed signed by **Gregg Hill** as manager of Hill/Gray Seven. *CE 4.* Hill/Gray Seven, LLC had bought the land in February 2003 from Sycamore Development, LLC.

When Hill/Gray Seven, LLC bought the land from Sycamore Development, LLC in 2003, it was an undeveloped “new parcel” (just subdivided) and no street address had been established. *CE 6.* The 2003 appraised value was \$60,600, although the sale price was \$382,500. *CE 6.* When Net Lease Holdings, LLC bought the land from Hill/Gray Seven, however, the current dialysis facility building had been constructed, and the sale price was \$1,200,000. *CE 7.* Net Lease Holdings then sold the land and building approximately three months later to its present joint owners, for \$2,200,000. *CE 8.* The latest appraised value of the parcel is \$2,108,400. *CE 8.*

Hill Gray Seven, LLC

As noted in the preceding paragraph, **Hill/Gray Seven, LLC** owned the dialysis facility property at the time the building was constructed. Hill/Gray Seven was also the landowner on September 11, 2003, the commencement date of TRC’s lease of the building. *See Ex. 22 (at “First Amendment to Lease Agreement”); CE 4, 5 (property transfer dates to and from Hill/Gray).* It appears that Palestra Real Estate Partners, Inc. was perhaps only a property manager for the true landowner.

Hill/Gray Seven, LLC is a Florida limited liability company managed by **R. Gregg Hill** and Marsha Gray Hill. *CE 9.* Hill/Gray Seven, LLC’s registered agent in North Carolina is Robert E. Langdon, II, in Garner. *CE 10.* Hill/Gray Seven’s website identifies the company as a private commercial development firm founded by Gregg Hill, and the company’s “development team” appears to include a number of Hill family members – Gregg, Gregg, Jr., Gray, and Drew. *CE 11.* DaVita is identified as a “regular client” of the company. *CE 11.* In fact, Hill/Gray Seven’s website identifies approximately *twenty (20)* North Carolina dialysis facilities, *including this Copperfield Dialysis Center*, as being

developed by the company. *CE 11*. The documentary evidence thus establishes that Hill/Gray Seven, LLC, a family business founded and run by Gregg Hill, was the landowner and developer at the time TRC's dialysis facility was constructed.

Neil Realty Co.

The preceding background is relevant and important for this reason: according to the attached article from Business North Carolina titled "*How to Keep it in the Family*," **Neil Realty Co.** - the 15% co-owner of the applicant TRC - is the family owned business of Robert O'Neil Hill, Sr. and his three sons Robert Jr., Stephen, and **Gregg Hill**. *CE 12*³; *see CE 13 (supporting public record)*. When Neil Realty Co. changed from its former name of Dialysis Care of North Carolina, Inc. to Neil Realty Co., Gregg Hill was vice-president of the company. *CE 13*. Neil Realty and Hill/Gray Seven share the same registered agent. *CE 10, 14*. Neil Realty Co. also previously identified, as its business address, the same Boca Raton business address as Hill/Gray Seven. *Cf. CE 1, 9*.

This chart summarizes the documented relationships:

Company	TRC Co-Owner <u>Neil Realty Co.</u>	Facility Developer and then-Landowner Hill/Gray Seven, LLC
Executives Include	R. Gregg Hill	R. Gregg Hill
	Stephen Hill	Gregg Hill, Jr.
	Robert O'Neil Hill, Jr.	Marsha Gray Hill
	Robert O'Neil Hill, Sr.	Gray Hill
	Lucy Hill	Drew Hill
Office Addresses Include	4580 NW 23 rd Court Boca Raton, FL and 1435 US Hwy 258 N, Kinston, NC and 223 Hwy 70 East, Suite 100 Garner, NC	4580 NW 23 rd Court Boca Raton, FL
Registered Agent	Robert E. Langdon, II 223 Hwy 70 East, Suite 100 Garner, NC	Robert E. Langdon, II 223 Hwy 70 East, Suite 100 Garner, NC
Supporting Exhibits	<i>CE 1, 12, 13, 14</i>	<i>CE 4, 5, 6, 7, 9, 10, 11</i>

³ Online at http://www.contentneacreek.com/about_article1.html

In addition to Gregg Hill, the common executive (*and almost certainly owner*), the same office addresses, and the same registered agent shared by TRC's co-owner and TRC's developer, the applicant TRC itself was originally named "Dialysis Care of North Carolina, LLC," and at that time listed its office address as 223 Highway 70 East in Garner, an address common to the entities shown above. *CE 15.* (Note that Neil Realty Co.'s original name was also "Dialysis Care of North Carolina, Inc." *CE 13.*) **In summary, there is a clear, close, and relevant relationship between the applicant TRC, its co-owner Neil Realty Co., and Hill/Gray Seven, LLC, the company that owned the land and built the facility at the time it was initially leased to TRC.**

The existence of Neil Realty Co. as a co-owner of TRC was required to have been disclosed in the Application, yet TRC failed to do so. As a related party, Hill/Gray Seven, LLC was required to have been named as a co-applicant on TRC's application to develop the facility, but TRC likely failed to do so, just as it has done on its other applications currently pending in Cabarrus County. As a related party, any and all costs incurred by Hill/Gray Seven relating to the Project - including the land acquisition and building shell if not previously included - were required to have been reported and accounted for in the Application. As stated by former CON Section Chief Lee Hoffman, and as recently quoted with approval by the North Carolina Court of Appeals, the Agency's long-standing position has been "*if the builder is a party which is related to the provider of the health service, the CON Section considers the builder to be developing the health service facility, and therefore, the entire cost of the facility [including the developer's base cost] would be considered.*" Mission Hospitals, Inc. v. N.C. Dep't of Health and Human Servs., ___ N.C. App. ___, ___, 696 S.E.2d 163, 175 (2010) (quoting Lee Hoffman) (attached as CE 12).

TRC's Application provides the Agency with absolutely no information, however, regarding the contributions, including the land and the building, that TRC's co-owner and related developer are contributing to the Project. It appears from the public record that Hill/Gray Seven purchased the land in 2003 for \$382,500, *CE 6*, and built a building on it that was valued in 2004 at \$753,450. *CE 7.* The actual costs to prepare the land and construct the building are, however, unknown. While TRC openly associates itself with DaVita and uses DaVita information throughout the Application (DaVita being the owner of Total Renal Care, Inc., a co-owner of TRC), Neil Realty Co.'s and Hill/Gray Seven, LLC's contributions to the Project are not likewise disclosed to the Agency. As

the landowner and developer related to TRC, Hill/Gray Seven, LLC should have been a co-applicant on TRC's initial Copperfield application. As related parties to TRC, any unreported costs that Neil Realty Co. and Hill/Gray Seven, LLC have incurred or would incur to develop the Project should have been reported and accounted for in the Application. Mission Hospitals, ___ N.C. App. at ___, 696 S.E.2d at 175 (CE 16). Regardless of why this information was not reported in the Application, TRC's failure to do so is fatal to the Application. These omissions cannot be addressed by requesting additional information or conditioning a CON in this competitive review. See 10A NCAC 14C .0204 (an application cannot be amended).

TRC's failure to disclose Neil Realty Co. as a co-owner, TRC's failure to disclose its close relationship with Hill/Gray Seven, LLC, TRC's failure to name its landowner/developer as a necessary co-applicant on the appropriate application, and TRC's failure to report and account for the related party's (or parties') contributions to the Project, including the land and base building costs, each violate provisions of the CON law and render the Application nonconforming with Criteria 1 (Policy GEN-3), 4, 5, 7, 12, and 18a, and the related rules. See N.C. Gen. Stat. § 131E-183(a)(1, 4, 5, 7, 12, 18a). These failures further violate concepts that form the very foundation of the CON law: free market competition, cost control, transparency, and accountability. See *id.* § 131E-175(1, 2, 7).

The Application Contains Multiple Additional Nonconformities

In addition to the fatal failures described above, TRC's Application contains a number of additional errors that render the Application further nonconforming.

II. Scope of Services/Quality of Care

In response to 10A NCAC 14C.2203(b), TRC is required to document how it will meet the utilization requirement of 3.2 patients per station per week at the end of the first operating year. TRC's response begins on Application page 10. In the middle of page 13, TRC refers to a chart showing the projected Harrisburg (not Copperfield) facility's projected growth from July 1, 2010 through the end of operating year two. TRC then uses those assumptions to project the population of the Application's Copperfield facility over three years.

The problem, however, is that the referenced chart on page 13 is not provided. This same error also occurs on page 28. Based upon the missing information, there is no way for the Agency to determine whether TRC has reasonably documented the need for the additional stations sought at this facility, and its application is therefore nonconforming with 10A NCAC 14C.2203(b) and Criterion 3.

III. Need/Demand

At Section III, Question 9 of the Application (page 30), TRC is required to identify whether alternative methods of meeting the need for the Project exist, and to explain that the least costly or most effective alternative has been proposed. As described in Section I of these Comments, TRC has failed to disclose its co-owner, failed to disclose the close, substantial and relevant relationship with its developer, and failed to address facility costs incurred by the related party. As such, it is impossible for the Agency to determine that the least costly or most effective alternative has been proposed. TRC has also filed *three* current applications to address, in piecemeal fashion, the identified need for 23 stations in Cabarrus County. TRC did not, however, identify the option of developing all 23 stations at one facility and using an unrelated developer and landlord – the option that is represented by RAI’s single competing application. TRC has therefore failed to identify a reasonable alternative that could be less costly or more effective, and its Application is nonconforming with Criterion 3. As the Application’s cost and revenue projections are also based upon this error, the Application is also nonconforming with Criterion 5.

IV. Historical Experience

In response to Section IV, Question 3, note that TRC does not propose at this facility to provide services to patients who dialyze at home. *App. p. 32*. In contrast, RAI-Concord will provide a home dialysis training room with exam rooms, and will provide a follow-up program for those patients who are capable of performing home dialysis. *See* the competitive CON Application of RAI Care Centers of North Carolina II, LLC, proposing RAI-Concord, at p. 48.

V. Coordination With Existing Healthcare Providers

A. At Section V, Item 1, TRC indicates that Northeast Medical Center will provide diagnostic evaluation, x-ray, blood bank, and vascular surgery

services, referring to Exhibit 7. *App. p. 35.* Exhibit 7, however, is only a transfer agreement between Northeast Medical Center and TRC, and does not identify diagnostic evaluation, x-ray, blood bank, and vascular surgery services as specified services to be provided. The Application is therefore nonconforming with Criteria 7 and 8, 10A NCAC 14C .2204, and 42 CFR 405.2100.

B. Section V, Question 2(b) requires TRC to provide a signed written agreement with an acute care hospital that specifies the relationship and describes the services to be provided. *App. p. 36.* TRC's response again refers to Exhibit 7, which is the transfer agreement with Northeast Medical Center. As discussed in item A above, that agreement does not address the provision of several specified services. TRC's Application is therefore nonconforming with 42 CFR § 405.2100, Criteria 7 and 8, and 10A NCAC 14C .2204.

C. TRC's Application pays little attention to the information requested by the Agency regarding TRC's relationship with training programs and with other healthcare providers in the area. In Section V, beginning with Question 3 (on page 37), TRC says that it has sent a letter to the local community college offering its facility as a clinical rotation site for nursing students. Since this facility opened several years ago, it appears that TRC has continued to have no relationship with the local nursing program, because otherwise they would already have a working relationship with that program. The Application reflects no knowledge that TRC may have regarding the health professional training programs in the area, beyond that there is apparently a nursing program at Rowan-Cabarrus Community College. *App. p. 37.* Likewise, where Section V, Question 3(b) requires that TRC "*Indicate the extent to which the health professional training programs in the area will have access to the facility*" for training purposes, TRC's response is nonresponsive, stating only that "*Copperfield Dialysis Center will provide access to any health professional training program upon execution of an agreement.*" The response does not at all describe the *extent* of the access that may be provided, which is what the question asks. It appears that the only thing that TRC has done, in an effort to establish relationships with the local training programs, is to send a letter to the head of the local community college.

D. Similarly, Section V, Question 5 requires TRC to "*Describe efforts made by the applicant to develop relationships with other local healthcare and social service providers.*" *App. p. 37.* TRC's response is only that it "*has had an ongoing working relationship with many of the local healthcare providers for*

several years through our operation of our existing dialysis facilities in Cabarrus County” – a response that provides no specifics, and makes no effort to educate the Agency to TRC’s activities.

E. In Section V, Question 6(a) (page 38), TRC is required to “*Describe the efforts made by the Applicant to involve the community in the planning and development of the facility’s services.*” TRC responds that it has an ongoing working relationship with local providers. TRC’s response describes no efforts whatsoever.

F. Section V, Question 7 requires TRC to explain the expected effects of the project on competition in the service area, including how any enhanced competition will have a positive impact on the cost effectiveness, quality and access to the proposed services. *App. p. 38.* TRC responds that the project will have no impact on cost effectiveness or quality, and that TRC is not trying to compete with other providers in surrounding counties. *App. pp. 38-39.*

What TRC does not discuss, however, is how TRC and the other DaVita affiliates are a huge healthcare organization in North Carolina, a dominating provider of dialysis services in North Carolina, and currently the *only* provider in Cabarrus County. TRC identifies 87 facilities in operation or under review in North Carolina. *Ex. 3, 5.* To award the CON to TRC will do *nothing* for competition in the free market, a foundation of the CON law at N.C. Gen. Stat. § 131E-173(1). Approving TRC’s Application would only permit a dominant, and Cabarrus County’s only, dialysis provider to grow even larger, and capture even more of the market. On the other hand, awarding the CON to another applicant, specifically RAI, would enhance competition, and would place RAI and the other nearby providers (in adjoining counties) in a position of competing for the opportunity to provide services to Cabarrus County residents. This would pressure *all* of the affected providers to provide the best services possible, at the lowest possible costs, with the result being improved access to better healthcare in Cabarrus County. TRC fails to recognize this fact, however, and its nonresponsive and inadequate responses to the Section V questions, as discussed in the preceding subsections, render its Application nonconforming with Criteria 7, 8, 14, 18a and the related Rules.

VI. Accessibility to Services

A. Section VI, Question 5(c) (page 43) requires TRC to describe any working agreements with referral and/or transfer agencies. TRC's response includes that its existing facility has a medical director agreement with Dr. Halstenberg, and that the agreement is included at Exhibit 14. Exhibit 14, however, is only a letter of support for the expansion. TRC's response is therefore non-responsive to the question, and is nonconforming with Criterion 8.

B. Section VI, Question 5(d) (page 43) requires TRC to describe efforts to establish working agreements with referring agencies. TRC's response is that it is "*working with several schools of nursing as potential rotation training sites for their RN programs.*" TRC does not identify the schools, however, nor does TRC identify these schools in response to Section V, Questions 3(a-c) on page 37. The Application should therefore be found nonconforming with Criterion 8.

VII. Staffing and Operation

A. TRC's staffing table at Section VII, Question 1 (page 44) proposes unusual, fractional staffing ratios, without explaining how the staffing will work. TRC proposes to add, for example, 0.2 bio-medical technicians, dieticians, and social workers, and 0.5 of a reuse staff member. *App. p. 44.* Nowhere does TRC explain where these fractional staff members are going to be found, or whether this staffing level is sufficient. If these are fractional personnel that would be reassigned from DaVita's other nearby dialysis facilities, TRC fails to identify that, or to provide any assurance that the loss of these resources at its other facilities will have no adverse impact on patient care and safety at those locations. The Application is therefore nonconforming with Criterion 7.

B. Section VII, Question 9 (page 46) asks two straightforward questions regarding the number of physicians presently serving the facility, and the number projected should the project be approved. TRC's entire response is that "*All of the Nephrologists associated with Central Carolina Nephrology have admitting privileges at Copperfield Dialysis Center.*" It is impossible to determine from TRC's response the *quantity* of physicians currently serving or projected to serve patients in the facility, and it is thus impossible to determine that the facility will be adequately staffed. The Application is therefore nonconforming with Criteria 7, 8 and 20.

VIII. Capital Costs and Financing

A. Question 1(c) in Section VIII requires TRC to identify the equipment to be purchased and the cost of each item included in the Project. *App. p. 48.* TRC fails to identify dialysis machines, and identifies the cost of a TV as \$13,200. This is inconsistent with the related information provided on Application page 49. Based on the conflicting information, the Application is nonconforming with Criterion 5.

B. On the capital cost form at page 49, TRC represents that there are no Site Costs, and that the Lessor will incur no costs relating to the Project. As previously described in Section I of these Comments, however, this Application involves an applicant that has a close and substantial relationship with its developer and former landlord. The Application should be found nonconforming with the multiple CON Criterion as discussed in that section.

C. Section VIII, Questions 5 and 6 (page 51) require TRC to document the availability and commitment of funds for the Project. TRC's response refers to a letter at Exhibit 19. While TRC states that the letter is from the chief accounting officer of both DaVita, Inc. and TRC, *App. p. 51*, Mr. Hilger's letter instead states that he is the CAO of DaVita and Total Renal Care, Inc. – not the applicant TRC. *Ex. 19.* Further, while the letter states that DaVita, Inc. will make the funds available to TRC, there is no documentation of the availability and commitment of funds by the applicant TRC itself. TRC's "*not applicable*" response to Question 6 is also inaccurate; the question is applicable, as TRC proposes to fund the Project through reserves. The applicant has therefore failed to document the availability and commitment of funds, and the Application is nonconforming with Criterion 5.

D. Section VIII, Question 7 (page 51) requires TRC to provide copies of its two most recent audited financial reports. TRC refers to Exhibit 20, which is a Securities and Exchange Commission Form 10K filing for the fiscal year ended December 31, 2009. TRC's response is nonconforming with the Application's requirement, however, because while TRC provides audited financial statements of DaVita, Inc. (the owner of Total Renal Care, Inc., which is a co-owner of TRC), TRC has not likewise provided financial statements for either Neil Realty Co., the other co-owner of TRC, or of TRC itself. The Application is therefore nonconforming with Criterion 5.

E. Section VIII, Question 9(c) (page 52) requires TRC to “*Provide supporting evidence that the lease and/or management contract amounts are reasonable from a prudent buyer’s perspective.*” TRC’s response, in its entirety, is “Not Applicable.” *App. p. 52.* This question, however, is not only applicable to the Project, but it also highlights the concerns related to the close and substantial relationship between TRC and its landowner/developer at the time the lease was entered, as discussed in Section I of these Comments. There is no evidence that the TRC’s lease is reasonable, and TRC’s summary dismissal of this question further renders its Application nonconforming with Criteria 4 and 5.

IX. Start-Up and Initial Operating Expenses/Financing

Section IX, Question 2 (page 53) requires TRC to provide an estimate of the initial operating expenses, i.e., that period of time from initial certification of the expansion stations until the cash inflow exceeds the cash outflow. In response, TRC “*projects that the expansion of six stations to this facility . . . will have no effect on the operating budget of the facility.*” It is impossible, however, that a twenty-nine percent (29%) increase in dialysis stations (from 21 to 27), 4.1 additional staff positions (*App. p. 44*), and nineteen (19) new patients immediately upon certification (*App. p. 57*)⁴ will have “*no effect*” on the initial operating expenses. TRC has failed to adequately address the operating expenses and financing associated with the facility, and the Application is nonconforming with Criterion 5.

X. Charges and Estimated Annual Operating Costs

In Section X, on page 57 TRC discusses that its year-one revenue projections are based upon an average of 87.5 in center patients during year one, based on a beginning census of 84 patients and an ending census of 91 patients during that year. This assumes an increase of nineteen (19) patients (from 65 to 84) immediately upon the certification of six new stations. *App. p. 57.* TRC does not indicate, however, where these nineteen (19) patients will come from, although TRC does state that it does not expect this Project to have any impact on DaVita’s other facilities, and it is not trying to compete with other providers in adjoining counties. *App. p. 39.* TRC’s application fails to adequately support the assumptions underlying its volume projections, rendering those projections,

⁴ 84 patients as beginning of “year one”, less 65 patients at end of current year = 19 new patients on “day one” of operations.

along with the financial projections flowing therefrom, unreliable and unreasonable, in violation of Criteria 3, 5, and 18a.

XI. Site Information/Construction Design

Section XI, Question 1, requires TRC to identify the owner of its existing site. *App. p. 60.* TRC states that *“The property is owned and leased from Polestra Properties. See a copy of the lease in Exhibit 22.”* As discussed in Section I of these Comments, that statement is entirely incorrect. No company named Polestra [or Palestra] Properties appears to have ever owned the site. At the time TRC’s lease became effective in 2003, the site was owned by Hill/Gray Seven, LLC, the facility developer and a related entity to TRC. Since 2004, the site has been owned jointly by three LLC entities identified in Section I above, whose relationship to TRC, if any, is unknown at this time. In addition to the related nonconformities discussed in the Section I of these Comments, for these reasons TRC’s application is also nonconforming with Criterion 12.

The Application Fails to Comply With Federal Law

The Disclosure of Ownership Standard at 42 CFR § 405.2136(a) requires TRC to supply *“full and complete information to the State survey agency as to the identity of (1) each person who has any direct or indirect ownership interest of 10 per centum or more in the facility, or who is the owner (in whole or in part) of any mortgage, deed of trust, note, or other obligations secured (in whole or in part) by the facility or any of the property or assets of the facility.”* CE 17. TRC’s failure to identify Neil Realty Co. as a *direct* owner of fifteen (15%) percent of TRC, along with its failure to identify each shareholder in Neil Realty Co. (who thereby holds an *indirect* ownership in TRC) is in direct violation of this federal rule. Further, any party (such as Hill/Gray Seven or the current joint owners, as possible examples) *“who is the owner (in whole or in part) of any mortgage, deed of trust, note, or other obligations secured (in whole or in part) by the facility or any of the property or assets of the facility”* must also be identified. TRC’s application fails to meet this federal rule, in addition to the multiple CON nonconformities discussed in these Comments.

Conclusion

Based on the information contained in Section I of these Comments, the Agency should closely examine the relationship between DaVita, TRC, and the various other Hill-related companies named herein, because there is a close, substantial, and relevant relationship between the entities that is not disclosed in this Application. TRC's failure to identify its co-owner Neil Realty Co. and the relationship with Hill/Gray Seven, LLC described herein, potentially involving the failure to account for the base cost of the land and the building shell in its facility, substantially violates multiple provisions of the CON law. For these reasons, along with the other errors in its Application, TRC's Application must be disapproved.

EXHIBITS

TRC

COPPERFIELD



**LIMITED LIABILITY COMPANY (LLC)
ANNUAL REPORT**

SOSID: 0438652
Date Filed: 4/5/2001 3:55 PM
Effective: 5/18/2001
Elaine F. Marshall
North Carolina Secretary of State

210951066

NAME OF LIMITED LIABILITY COMPANY (LLC):
TOTAL RENAL CARE OF NORTH CAROLINA, LLC

STATE OF REGISTRATION: DE

SECRETARY OF STATE RLLP ID NUMBER 0438852

FISCAL YEAR ENDING: 12/31/2000
MONTH/DAY/YEAR

FEDERAL EMPLOYER ID NUMBER:

IF THIS IS THE INITIAL ANNUAL REPORT FILING, PLEASE COMPLETE THE ENTIRE FORM. IF YOUR REGISTERED LIMITED LIABILITY PARTNERSHIP INFORMATION HAS NOT CHANGED SINCE THE PREVIOUS REPORT, PLEASE CHECK THE BOX AND COMPLETE LINE 7 ONLY.

1. REGISTERED AGENT & REGISTERED OFFICE MAILING ADDRESS:

*C T Corporation System
225 Hillsborough Street
Raleigh, NC 27603*

2. STREET ADDRESS AND COUNTY OF REGISTERED OFFICE:

*225 Hillsborough Street
Raleigh, NC 27603
County: Wake*

3. IF THE REGISTERED AGENT CHANGED, SIGNATURE OF THE NEW AGENT:

SIGNATURE CONSTITUTES CONSENT TO THE APPOINTMENT

4. PRINCIPAL OFFICE STREET ADDRESS:

*21250 HAYTHORNE BL. #800
TORRANCE, CA 90503*

5. ENTER PRINCIPAL OFFICE TELEPHONE NUMBER HERE: 310-792-2600
PLEASE INCLUDE AREA CODE

6. ENTER NAME, TITLE, AND BUSINESS ADDRESS OF MANAGER(S) HERE:

NAME- *TOTAL RENAL CARE, INC.*

ADDRESS- *21250 HAYTHORNE BL. #800*

TITLE- *MEMBER*

CITY- *TORRANCE* ST- *CA* ZIP- *90503*

NAME- *NEIL REALTY CO*

ADDRESS- *4580 NW 29th COURT*

TITLE- *MEMBER*

CITY- *BOCA RATON* ST- *FL* ZIP- *33431*

NAME-

ADDRESS-

TITLE-

CITY - ST - ZIP -

7. BRIEFLY DESCRIBE THE NATURE OF BUSINESS:

*TO ENGAGE IN THE ESTABLISHMENT - OPERATION OF MULTIPLE
DIALYSIS CENTERS WITHIN THE STATE OF NORTH CAROLINA*

8. CERTIFICATION OF ANNUAL REPORT MUST BE COMPLETED BY ALL LIMITED LIABILITY COMPANIES

FORM MUST BE SIGNED BY A GENERAL PARTNER

DATE

[Signature]
STEVEN J. WIDJIOUS
TYPE OR PRINT NAME

3-16-01
V.P. GENERAL COUNSEL & SECRET
TYPE OR PRINT TITLE

Tax Administration

CabarrusCounty.us



Search Results

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	Number	Road	Type	Suffix	Prefix	City	State	Pin
Select	1030	VINEHAVEN	DR	NE		CONCORD	NC	56228656410000

Disclaimer:

Cabarrus County shall not be held liable for any errors in the data represented on this record. This includes errors of omission, commission, concerning the content of the data, and relative positional accuracy of the data. The data cannot be construed to be a legal document. Primary sources from which this data was compiled must be consulted for verification of information represented on this map document.

Disclaimer:

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disclaimer. The official records
of the Cabarrus County Register
Of Deeds are located at the
Cabarrus County Register Of
Deeds office.

Tax Administration

CabarrusCounty.us



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Owner Info

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Pin	56228656410000
Old Pin	00000000000000
Parent Real ID	
City	
Fire District	
Real ID	04-087F-0008.00
Combined with?	
Plat Book	
Plat Page	
Retire Card?	<input type="checkbox"/>

Annexation Information	
Effective Date	
Deed Book	
Deed Page	
Ordinance #	
City	

Property Description	LT 8 COLDWATER COMMERCIAL SUBD PH III
Lot Size/Acreage	
Comments	
Update Date	4/27/2006

Open Card In New Window

Width 700

+

-

Height 500

+

-

Reset

Hide Card

These cards are for tax billing history purposes only. They are not a legal chain of title.

SHEET	BL	PIN	SUB SHEET				
Pin No. _____			Twp No. <u>4</u>				
MAP	PARCEL	LOT SIZE OR ACREAGE		DIST. <u>CITY OF CONCORD</u>			
87F	8.00	249.92 X	234.34	1.21 AC.			
BRIEF DESCRIPTION							
LOT # 8 COLDWATER COMMERCIAL SUB. PH III 41-25, 74							
OWNER'S NAME				STAMPS	DATE ACQUIRED	DEED BOOK	PAGE NO.
1. SYCAMORE DEVELOPMENT, LLC					6-6-95 6-25-99	1451 2581	309 9
2. HILL/GRAY SEVEN, LLC				765.00	2-12-03	4313	157
3. NET LEASE HOLDINGS, LLC				2400.00	10-30-03	4953	203
4. KLR INVESTMENTS, LLC 90% INT.; MKP INVESTMENTS, LLC 5% INT.				4400.00	1-30-04	5117	206
5.							
6.							
7.							
8.							
9.							
10.							
11.							
12.							

More Ownership Data Exists than what is shown on card image! Click OWNER INFO for more information!

CABARRUS COUNTY
FILED
01/30/2004 2:02 PM
LINDA F. MCABEE
Register Of Deeds
By. _____ Deputy/Asst.
EXCISE TAX \$4400.00

Excise Tax \$4,400.⁰⁰

Recording Time, Book and Page

Tax Lot No. _____ Parcel Identifier No. 04 087F0008
Verified by Cabarrus County on the _____ day of _____, 2004
by _____

Mail after recording to Johnston, Allison & Hord, P.A. (SPG)
610 East Morehead Street
Charlotte, NC 28236

This instrument was prepared by Chalgne M. O'Brien
Greensfelder, Hemker & Gale, P.C.
10 S. Broadway, Suite 2000
St. Louis, MO 63102

Brief Description for the index Lot 8, Coldwater Commercial Subdivision,
Phase III, Map Book 41 at Page 74.

NORTH CAROLINA SPECIAL WARRANTY DEED

THIS DEED made this 28th day of January, 2004, by and between

GRANTOR

Net Lease Holdings, L.L.C., a Missouri limited liability company
955 Executive Parkway, Suite 220
St. Louis, Missouri 63141

GRANTEE

KLR Investments, LLC, a South Carolina limited liability company (90% undivided interest), CER Investments, LLC, a South Carolina limited liability company (5% undivided interest), and MKP Investments, LLC, a South Carolina limited liability company (5% undivided interest), all having the following address:
2100 Old Airport Rd., Building I-1
Greer, SC 29651

Enter in appropriate block for each party: name, address, and, if appropriate, character of entity, e.g., corporation or partnership.

The designation Grantor and Grantee as used herein shall include said parties, their heirs, successors, and assigns, and shall include singular, plural, masculine, feminine or neuter as required by context.

WITNESSETH, that the Grantor, for valuable consideration paid by the Grantee, the receipt of which is hereby acknowledged, has and by these presents does grant, bargain, sell and convey unto the Grantee in fee simple, all that certain lot or parcel of land situated in the City of Charlotte, Mecklenburg County, North Carolina and more particularly described as follows:

See Exhibit A, attached hereto.

The property hereinabove described was acquired by Grantor by instrument recorded in Book 4953, Page 203, Cabarrus County Public Registry.

A map showing the above described property is recorded in Map Book 41, Page 74.

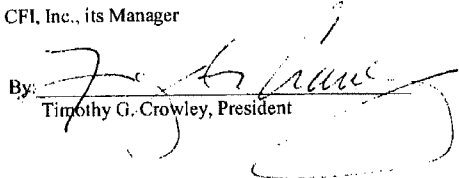
TO HAVE AND TO HOLD the aforesaid lot or parcel of land and all privileges and appurtenances thereto belonging to the Grantee in fee simple.

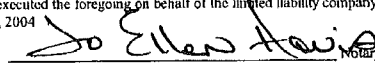
And the Grantor covenants with the Grantee, that Grantor has done nothing to impair such title as Grantor received, and Grantor will warrant and defend the title against the lawful claims of all persons claiming by, under or through Grantor, but none other, except for the lien of real estate taxes for the year 2004 and thereafter and special taxes becoming a lien after the date hereof, the lease to Total Renal Care of North Carolina, all easements, covenants, restrictions and reservations of record and zoning and other governmental ordinances.

IN WITNESS WHEREOF, the Grantor has caused this instrument to be signed in its limited liability company name by its duly authorized officers, the day and year first above written.

NET LEASE HOLDINGS, L.L.C., a Missouri limited liability company

By: CFI, Inc., its Manager

By: 
Timothy G. Crowley, President

MISSOURI, St. Louis County.
I, the undersigned, a Notary Public of the County and state aforesaid, certify that Timothy G. Crowley personally appeared before me this day and acknowledged that he is the President of CFI, Inc., being the Manager of Net Lease Holdings, L.L.C., a Missouri limited liability company, and that in such capacity, being authorized to do so, executed the foregoing on behalf of the limited liability company. Witness my hand and official stamp or seal, this 28 day of January, 2004
SEAL: **JOBLEN HOVIS**
Notary Public - Notary Seal
STATE OF MISSOURI
Washington County
My Commission Expires: 9-12-06 My commission expires: 9-12-06
 Joblen Hovis, Notary

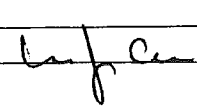
nc. Cabarrus
The foregoing Certificate(s) of Joblen Hovis, a notary public,
is/are certified to be correct. This instrument and this certificate are duly registered at the date and time and in the Book and Page shown on the first page hereof.
LINDA F. MCABEE
REGISTER OF DEEDS REGISTER OF DEEDS FOR Cabarrus COUNTY
By:  Deputy/Assistant Register of Deeds.
1-30-2004

Exhibit A

All of Lot 8 of Coldwater Commercial Subdivision shown on a map thereof recorded in Plat Book 41 at Page 74 of the Cabarrus County Public Registry and being in the City of Concord, NO. 4 Township, Cabarrus County, North Carolina at the southeast corner of the intersection of Vinehaven Drive, NE and Sycamore Ridge Road, NE and being more particularly described as follows:

Commencing at the northwest corner of Lot No. 1 of Sycamore Ridge, Phase I, (MB, 37 PG. 13) on the eastern side of Sycamore Ridge Road and runs thence with the eastern edge of the 60 foot right of way of Sycamore Ridge Road, in a northwesterly and counterclockwise direction an arc having a radius of 230.00 feet for a distance of 19.94 feet (chord bearing N 66-37-24 W, chord length 19.93 feet) to an existing #5 rebar; thence continuing with the eastern edge of the 60 foot right of way of Sycamore Ridge Road N 69-06-23 W 107.03 feet to an existing #5 rebar, said rebar being on the eastern edge of the 60 foot right of way of Sycamore Ridge Road and the line between Sycamore Development property (DB. 2581 PG. 9) and Lot 8 Coldwater Commercial Subdivision Phase III (MB. 41 PG. 74) THE TRUE POINT OF BEGINNING; thence from THE TRUE POINT OF BEGINNING N 69-06-23 W 43.77 feet to an existing #5 rebar; thence in a northerly and clockwise direction with the eastern edge of Sycamore Ridge Road on arc having a radius of 200.0 feet for a distance of 141.94 feet (chord bearing N 48-46-32 W chord length 138.98 feet) to an existing #5 rebar; thence continuing with the eastern edge of the 60 foot right of way of Sycamore Ridge Road, N 28-26-41 W 48.90 feet to an existing #5 rebar; thence in a clockwise and northeasterly direction an arc having a radius of 20.0 feet for a distance of 30.63 feet (chord bearing N 15-25-53 E, chord length 27.72 feet) to an existing #5 rebar in the southern edge of the 60 foot right of way of Vinehaven Drive; thence with the southeastern edge of the 60 foot right of way of Vinehaven Drive, N 59-18-28 E 201.12 feet to a set #5 rebar; thence in a generally northeastern direction with the southeastern edge of the 60 foot right of way of Vinehaven Drive an arc having a radius of 260.0 feet for a distance of 17.91 feet (chord bearing N 57-20-04 E, chord length 17.90 feet) to an existing #5 rebar, the front corner of Lot Nos. 7 and 8 of Coldwater Commercial Subdivision, Phase III; thence with the dividing line of Lot Nos. 7 and 8, S 30-45-46 E 235.10 feet to a set #5 rebar in the northwest edge of Lot No. 1 of Sycamore Ridge, Phase I; thence with the line of Lot No. 1 of Sycamore Ridge, Phase I, S 59-18-28 W 170.87 feet to the TRUE POINT OF BEGINNING.

CABARRUS COUNTY
FILED
10/30/2003 3:57 PM
LINDA E. MCADEE
Register of Deeds
By: *[Signature]* Deputy/Asst.
EXCISE TAX \$2400.00

\$ 2,400.00
Excise Tax

Recording Time, Book and Page

Tax Lot No. Parcel Identifier No. 04087A 0008.00
Verified by County on the day of, 20.....
by

Mail after recording to. Grantees:

This instrument was prepared by John Surles, Colonial Title

Brief description for the Index

[Empty rectangular box for brief description]

NORTH CAROLINA GENERAL WARRANTY DEED

THIS DEED made this 24 day of October, 2003 by and between:

GRANTOR	GRANTEE
Hill/Gray Seven, LLC 4580 NW 23 rd Court Boca Raton, FL	Net Lease Holdings, LLC 955 Executive Parkway Suite 220 St. Louis, MO 63141 Property Address: 1030 Vinehaven Drive Concord, NC

Enter in appropriate block for each party: name, address, and, if appropriate, character of entity, e.g. corporation or partnership.

The designation Grantor and Grantee as used herein shall include said parties, their heirs, successors, and assigns, and shall include singular, plural, masculine, feminine or neuter as required by context.

WITNESSETH, that the Grantor, for a valuable consideration paid by the Grantee, the receipt of which is hereby acknowledged, has and by these presents does grant, bargain, sell and convey unto the Grantee in fee simple all that certain lot or parcel of land situated in the City of Concord, No. 4 Township, Cabarrus County, North Carolina and more particularly described as follows:

See Exhibit "A" attached

db

The property hereinabove described was acquired by Grantors by instrument recorded in... Book..... Page.....
Cabarrus County Public Registry.....

A map showing the above described property is recorded inMap Book 37, Page 13

TO HAVE AND TO HOLD the aforesaid lot or parcel of land and all privileges and appurtenances thereto belonging to the Grantee in fee simple.

And the Grantors covenants with the Grantees, that Grantors are seized of the premises in fee simple, have the right to convey the same in fee simple, that title is marketable and free and clear of all encumbrances, and that Grantor will warrant and defend

the title against the lawful claims of all persons whomsoever except for the exceptions hereinafter stated.

Title to the property hereinabove described is subject to the following exceptions:

All easements, restrictions, conditions, and matters of public record; and the lien of Cabarrus County ad valorem taxes for 2003 and subsequent years which Grantees hereby assume and agree to pay.

IN WITNESS WHEREOF, the Grantor has hereunto set his hand and seal, or if corporate, has caused this instrument to be signed in its corporate name by its duly authorized officers and its seal to be hereunto affixed by authority of its Board of Directors, the day and year first above written.

Hill/Gray Seven, LLC

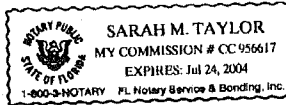
By: Gregg Hill [SEAL]
Print Name: Gregg Hill, Manager

ATTEST:

Print Name: _____
Secretary [Corporate Seal]

SEAL-STAMP STATE OF FLORIDA, WEST PALM BEACH COUNTY.

I, a Notary Public of the County and State aforesaid, certify that Gregg Hill



personally came before me this day and acknowledged that he is Manager of Hill/Gray Seven, LLC, a Florida limited liability company, and that as the Manager, being authorized to do so, executed the foregoing on behalf of the corporation.

Witness my hand and official stamp or seal, this 22nd day of October, 2003.

[Signature] Notary Public

My Commission expires: July 24, 2004

cc - Cabarrus
The foregoing Certificate(s) of Sarah M. Taylor, a notary public,

is/are certified to be correct. This instrument and this certificate are duly registered at the date and time and in the Book and Page shown on the first page hereof.

LINDA F. MCABEE
REGISTER-OF-DEEDS Register of Deeds for Cabarrus County

By: [Signature] Deputy/Assistant - Register of Deeds
10-30-2003

EXHIBIT A

Legal Description

Being in the City of Concord, Number 4 Township, Cabarrus County, North Carolina, at the southeast corner of the intersection of Vinehaven Drive, NE and Sycamore Ridge Road, NE and being more particularly described as follows:

Commencing at the northwest corner of Lot No. 1 of Sycamore Ridge, Phase I, (MB. 37 PG. 13) on the eastern side of Sycamore Ridge Road and runs thence with the eastern edge of the 60 foot right of way of Sycamore Ridge Road, in a northwesterly and counterclockwise direction an arc having a radius of 230.00 feet for a distance of 19.94 feet (chord bearing N 66-37-24 W, chord length 19.93 feet) to a existing #5 rebar; thence continuing with the eastern edge of the 60 foot right of way of Sycamore Ridge Road N 69-06-23 W 107.03 feet to a existing #5 rebar, said rebar being on the eastern edge of the 60 foot right of way of Sycamore Ridge Road and the line between Sycamore Development property (DB. 2581 PG. 9) and Lot 8 Coldwater Commercial Subdivision Phase III (MB. 41 PG. 74) THE TRUE POINT OF BEGINNING; thence from THE TRUE POINT OF BEGINNING N 69-06-23 W 43.77 feet to a existing #5 rebar; thence in a northerly and clockwise direction with the eastern edge of Sycamore Ridge Road an arc having a radius of 200.0 feet for a distance of 141.94 feet (chord bearing N 48-46-32 W chord length 138.98 feet) to a existing #5 rebar; thence continuing with the eastern edge of the 60 foot right of way of Sycamore Ridge Road, N 28-26-41 W 48.90 feet to a existing #5 rebar; thence in a clockwise and northeasterly direction an arc having a radius of 20.0 feet for a distance of 30.63 feet (chord bearing N 15-25-53 E, chord length 27.72 feet) to a existing #5 rebar in the southern edge of the 60 foot right of way of Vinehaven Drive; thence with the southeastern edge of the 60 foot right of way of Vinehaven Drive, N 59-18-28 E 201.12 feet to a set #5 rebar; thence in a generally northeastern direction with the southeastern edge of the 60 foot right of way of Vinehaven Drive an arc having a radius of 260.0 feet for a distance of 17.91 feet (chord bearing N 57-20-04 E, chord length 17.90 feet) to a existing #5 rebar, the front corner of Lot Nos. 7 and 8 of Coldwater Commercial Subdivision, Phase III; thence with the dividing line of Lot Nos. 7 and 8, S 30-45-46 E 235.10 feet to a set #5 rebar in the northwest edge of Lot No. 1 of Sycamore Ridge, Phase I; thence with the line of Lot No. 1 of Sycamore Ridge, Phase I, S 59-18-28 W 170.87 feet to the TRUE POINT OF BEGINNING, containing 1.210 acres.

CABARRUS COUNTY
FILED
02/12/2003 2:36 PM
LINDA F. MCABEE
Register of Deeds
By. Deputy/Asst.
EXCISE TAX \$765.00

NORTH CAROLINA GENERAL WARRANTY DEED

Excise Tax \$765.00

Tax Lot No. _____ Parcel Identifier No. Part of 5622-97-007
Verified by _____ County on the _____ day of _____, 2003.
by _____

Mail after recording to **P.O. Box 2**
Kannapolis, NC 28082

This instrument was prepared by **Tom M. Grady, Attorney at Law**

Brief Description for the index



THIS DEED made this 7th day of **February, 2003**, by and between

GRANTOR	GRANTEE
SYCAMORE DEVELOPMENT, LLC a North Carolina Limited Liability Company	HILL/GRAY SEVEN, LLC a Florida Limited Liability Company 4580 NW 23rd Court Boca Raton, Florida 33431

Enter in appropriate block for each party: name, address, and, if appropriate, character of entity, e.g., corporation or partnership.

The designation Grantor and Grantee as used herein shall include said parties, their heirs, successors, and assigns, and shall include singular, plural, masculine, feminine or neuter as required by context.

WITNESSETH, that the Grantor, for a valuable consideration paid by the Grantee, the receipt of which is hereby acknowledged, has and by these presents does grant, bargain, sell and convey unto the Grantee in fee simple, all that certain lot or parcel of land situated in the City of Concord, Number Four Township, Cabarrus County, North Carolina and more particularly described as follows:

Lying and being in No. 4 Township, Cabarrus County, North Carolina at the southeast corner of the intersection of Vinehaven Drive, NE and Sycamore Ridge Road, NE and being Lot No. 8 as shown upon a final major plat of Coldwater Commercial Subdivision – Phase III as surveyed by Concord Engineering & Surveying, Inc., dated November 12, 2002, said map being recorded in Map Book 41, Page 74 in the office of the Register of Deeds of Cabarrus County, North Carolina and being more particularly described as follows:

Beginning at a set iron pin, the northwest corner of Lot No. 1 of Sycamore Ridge, Phase I, (Map Book 37, Page 13) on the eastern side of Sycamore Ridge Road and runs thence with the eastern edge of the 60 foot right of way of Sycamore Ridge Road, N. 69-06-23 W. 43.77 feet to a set iron pin; thence in a northerly and clockwise direction with the eastern edge of Sycamore Ridge Road an arc having a radius of 200.0 feet for a distance of 141.94 feet to a set iron pin; thence continuing with the eastern edge of the 60 foot right of way of Sycamore Road, N. 28-26-41 W. 48.90 feet to a set iron pin; thence in a clockwise and northeasterly direction an arc having a radius of 20.0 feet for a distance of 30.63 feet to a set iron pin in the southern edge of the 60 foot right of way of Vinehaven Drive; thence with the southeastern edge of the 60 foot right of way of Vinehaven Drive, N. 59-18-28 E. 201.12 feet to a set iron pin; thence in a generally northeastern direction with the eastern edge of the southeastern edge of the 60 foot right of way of Vinehaven Drive an arc having a radius of 260.0 feet for a distance of 17.91 feet to a set iron pin, the front corner of Lot Nos. 7 and 8 of Coldwater Commercial Subdivision, Phase III; thence with the dividing line of Lot Nos. 7 and 8, S. 30-45-46 E. 235.10 feet to a set iron pin in the northwest edge of Lot No. 1 of Sycamore Ridge, Phase I; thence with the line of Lot No. 1 of Sycamore Ridge, Phase I, N. 59-18-28 E. 170.87 feet to the point of beginning.

A map showing the above-described property is recorded in Plat Book , page .

TO HAVE AND TO HOLD the aforesaid lot or parcel of land and all privileges and appurtenances thereto belonging to the Grantee in fee simple.

And the Grantor covenants with the Grantee, that Grantor is seized of the premises in fee simple, has the right to convey the same in fee simple, that title is marketable and free and clear of all encumbrances, and that Grantor will warrant and defend the title against the lawful claims of all persons whomsoever except for the exceptions hereinafter stated.

Title to the property hereinabove described is subject to the following exceptions:

IN WITNESS WHEREOF, the Grantor has hereunto set his hand and seal, or if corporate, has caused this instrument to be signed in its corporate name by its duly authorized officers and its seal to be hereunto affixed by authority of its Board of Directors, the day and year first above written.

Sycamore Development, LLC

By: Frank B. Sellers
Frank B. Sellers, Manager

_____ (SEAL)

_____ (SEAL)

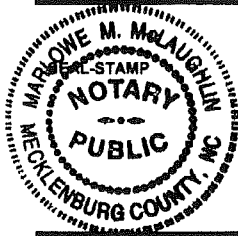
_____ (SEAL)

SEAL-STAMP

NORTH CAROLINA, Cabarrus County.
I, the undersigned, a Notary Public of the County and State aforesaid, certify that Grantor, personally appeared before me this day and acknowledged the execution of the foregoing instrument. Witness my hand and official stamp or seal, this _____ day of _____, 2003.

My commission expires: _____

Notary Public



NORTH CAROLINA, Cabarrus County, Mecklenburg
I, the undersigned, a Notary Public of the County and State aforesaid, certify that Frank B. Sellers, personally came before me this day and acknowledged that he is Manager of Sycamore Development, LLC, a North Carolina limited liability company and that he as Manager being authorized to do so, executed the foregoing on behalf of the company. Witness my hand and official stamp or seal, this 7th day of February, 2003.

My commission expires: 9-28-05
Marlowe M. McLaughlin
Notary Public

nc- Cabarrus
The foregoing Certificate(s) of Marlowe M. McLaughlin, a notary public,
is/are certified to be correct. This instrument and this certificate are duly registered at the date and time and in the Book and Page shown on the first page hereof.

REGISTER OF DEEDS FOR Cabarrus COUNTY
By [Signature] Deputy/Assistant Register of Deeds.
2-12-2003

County Appraisal Card Lookup

Owner Name

To search by name, enter last name first separated by spaces (Example: SMITH JOHN B)

House # Unit # Dir Street Name Type Suffix Muni
Address

To search by address, fill in any or all fields (Example: MAIN ST, 400 E 4TH ST)

Parcel

[Additional Information](#)

Click on a parcel number to view the property record card

Parcel	Card	Address	Owner Name
56228656410000	001		HILL/GRAY SEVEN LLC

Click on a parcel number to view the property record card

County Appraisal Card Lookup

Owner Name

To search by name, enter last name first separated by spaces (Example: SMITH JOHN B)

Address

To search by address, fill in any or all fields (Example: MAIN ST, 400 E 4TH ST)

Parcel

[Additional Information](#)

Click on a parcel number to view the property record card

Parcel	Card	Address	Owner Name
56228656410000	001	001030 NE VINEHAVEN DR	NET LEASE HOLDINGS LLC

Click on a parcel number to view the property record card

County Appraisal Card Lookup

Owner Name:

To search by name, enter last name first separated by spaces (Example: SMITH JOHN B)

House #	Unit #	Dir	Street Name	Type	Suffix	Muni
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>

To search by address, fill in any or all fields (Example: MAIN ST, 400 E 4TH ST)

Parcel

[Additional Information](#)

Click on a parcel number to view the property record card

Parcel	Card	Address	Owner Name
56228656410000	001	001030 NE VINEHAVEN DR	KLR INVESTMENTS LLC A SC LLC &

Click on a parcel number to view the property record card

**ARTICLES OF ORGANIZATION OF
HILL/GRAY SEVEN, L.L.C.**

The undersigned certify that we have associated ourselves together for the purpose of becoming a limited liability company under the laws of the State of Florida, providing for the formation, rights, privileges, and immunities of limited liability companies for profit. We further declare that the following Articles shall serve as the Charter and authority for the conduct of business of the limited liability company.

ARTICLE I.

NAME AND PRINCIPAL PLACE OF BUSINESS

The name of the limited liability company shall be HILL/GRAY SEVEN, L.L.C., and the street address of its principal office is 4580 NW 23rd Court, County of Palm Beach, Boca Raton, FL 33431, and its mailing address shall be located at 4580 NW 23rd Court, Boca Raton, FL, 33431, but it shall have the power and authority to establish branch offices at any other place or places as the members may designate.

ARTICLE II.

PURPOSES AND POWERS

In addition to the powers authorized by the laws of the State of Florida for limited liability companies, the general nature of the business or businesses to be transacted, and which the limited liability company is authorized to transact, shall be as follows:

1. To engage in any activity or business authorized under the Florida Statutes.
2. In general, to carry on any and all incidental business; to have and exercise all the powers conferred by the laws of the State of Florida, and to do any and all things set forth in these Articles to the same extent as a natural person might or could do.
3. To purchase or otherwise acquire, undertake, carry on, improve, or develop, all or any of the business, good will, rights, assets, and liabilities of any person, firm, association, or corporation carrying on any kind of business of a similar nature to that which this limited liability company is authorized to carry on, pursuant to the provisions of these Articles; and to hold, utilize, and in any manner dispose of the rights and property so acquired.
4. To enter into and make all necessary contracts for its business with any person, entity, partnership, association, corporation, domestic or foreign, or of any domestic or foreign state, government, or governmental authority, or of any political or administrative subdivision, or department, and to perform and carry out, assign, cancel, or rescind any of such contracts.

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TALLAHASSEE, FLORIDA

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5. To exercise all or any of the limited liability company powers, and to carry out all or any of the purposes, enumerated in these Articles and otherwise granted or permitted by law, while acting as agent, nominee, or attorney-in-fact for any persons or corporations, and perform any service under contract or otherwise for any corporation, joint stock company, association, partnership, firm, syndicate, individual, or other entity, and in this capacity or under this arrangement develop, improve, stabilize, strengthen, or extend the property and commercial interest of the property and to aid, assist, or participate in any lawful enterprise in connection with or incidental to the agency, representation, or service, and to render any other service or assistance it may lawfully do under the laws of the State of Florida, providing for the formation, rights, privileges, and immunities of limited liability companies for profit.

6. To do everything necessary, proper, advisable, or convenient for the accomplishment of any of the purposes, or the attainment of any of the objects, or the furtherance of any of the powers set forth in these Articles, either alone or in association with others incidental or pertaining to, or going out of, or connected with its business or powers, provided the same shall not be inconsistent with the laws of the State of Florida.

The several clauses contained in this statement of the general nature of the business or businesses to be transacted shall be construed as both purposes and powers of this limited liability company, and statements contained in each clause shall, except as otherwise expressed, be in no way limited or restricted by reference to or inference from the terms of any other clause. They shall be regarded as independent purposes and powers.

Nothing contained in these Articles shall be deemed or construed as authorizing or permitting, or purporting to authorize or permit the limited liability company to carry on any business, exercise any power, or do any act which a limited liability company may not, under Florida laws, lawfully carry on, exercise, or do.

ARTICLE III.

EXERCISE OF POWERS

All limited liability company powers shall be exercised by or under the authority of, and the business and affairs of this limited liability company shall be managed under the direction of, the members of this limited liability company. This Article may be amended from time to time in the regulations of the limited liability company by a unanimous vote of the members of the limited liability company.

ARTICLE IV.

MANAGEMENT

This limited liability company shall be managed by two managers. The name and address of the

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people who shall serve until the first annual meeting of members or until that member's successor is elected and qualified is as follows: Raymond Gregg Hill, 4580 NW 23rd Court, Boca Raton, FL 33431, and Marsha Gray Hill, 4580 NW 23rd Court, Boca Raton, FL 33431. The number of managers, the terms for the managers' replacement, the increase or decrease in the number of managers and the members or others directed to manage this limited liability company shall be provided for in the provisions of the members agreement.

ARTICLE V.

MEMBERSHIP RESTRICTIONS

Members shall have the right to admit new members by unanimous consent. Contributions required of new members shall be determined as of the time of admission to the limited liability company.

A member's interest in the limited liability company may not be sold or otherwise transferred except with unanimous written consent of all members.

On the death, retirement, resignation, expulsion, bankruptcy, or dissolution of a member, or the occurrence of any other event that terminates the continued membership of a member in the limited liability company, the remaining members shall have the right to continue the business on unanimous consent of the remaining members.

ARTICLE VI.

CAPITAL CONTRIBUTIONS

Capital contributions in the amount of \$115,000.00 cash shall be paid to the limited liability company by the members in accordance with the members agreement. Additional contributions will be made as required for investment purposes, as determined by unanimous consent of the members.

ARTICLE VII.

PROFITS AND LOSSES

(a). *Profit Sharing.* The members shall be entitled to the net profits arising from the operation of the limited liability company business that remain after the payment of the expenses of conducting the business of the limited liability company. Each member shall be entitled to that share of profits as determined in the members agreement.

(b). *Losses.* All losses that occur in the operation of the limited liability company business shall be paid out of the capital of the limited liability company and the profits of the business, or, if these sources are insufficient to cover such losses, by the members as provided in the members agreement.

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TALLAHASSEE, FLORIDA

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ARTICLE VIII.

DURATION

This limited liability company shall exist until December 1, 2051, or until dissolved in a manner provided by law, or as provided in the regulations adopted by the members.

ARTICLE IX.

INITIAL REGISTERED OFFICE AND REGISTERED AGENT

The street address and mailing address of the initial registered office of the limited liability company is 50 S.E. 4th Avenue, City of Delray Beach, County of Palm Beach, State of Florida, 33483, and the name of the company's initial registered agent at that address is Mark Perry.

The undersigned, being the original members of the limited liability company, certify that this instrument constitutes the proposed Articles of Organization of Hill/Gary Seven, L.L.C.

Executed by the undersigned at Delray Beach, FL on 2/22, 2001


RAYMOND GREGG HILL.

P:\KHF\CORP\Hill\Gray\articles.llc.wpd

APPROVED
AND
FILED
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SECRETARY OF STATE
TALLAHASSEE, FLORIDA

2HILLGRAY7X

LIMITED LIABILITY COMPANY ANNUAL REPORT

SOSID: 0687028
Date Filed: 4/27/2009 11:12:00 AM
Elaine F. Marshall
North Carolina Secretary of State
C200911700715

NAME OF LIMITED LIABILITY COMPANY: **HILL/GRAY 7, LLC**

STATE OF INCORPORATION: **FL**

SECRETARY OF STATE L.L.C. ID NUMBER: **0687028**

FEDERAL EMPLOYER ID NUMBER: Privacy Redaction

NATURE OF BUSINESS: **INVESTMENTS**

REGISTERED AGENT: **ROBERT E. LANGDON, II**

REGISTERED OFFICE MAILING ADDRESS: **223 HWY 70 EAST, STE 100
GARNER NC 27529**

REGISTERED OFFICE STREET ADDRESS: **223 HWY 70 EAST, STE 100
GARNER NC 27529
WAKE**

SIGNATURE OF THE NEW REGISTERED AGENT: _____
SIGNATURE CONSTITUTES CONSENT TO THE APPOINTMENT

PRINCIPAL OFFICE TELEPHONE NUMBER: **561-734-4046**

PRINCIPAL OFFICE MAILING ADDRESS: **6275 NORTH OCEAN BLVD
OCEAN RIDGE FL 33435**

PRINCIPAL OFFICE STREET ADDRESS: **6275 NORTH OCEAN BLVD
OCEAN RIDGE FL 33435**

MANAGERS/MEMBERS/ORGANIZERS:

Name: **R. GREGG HILL**

Title: **MANAGER**

Address: **6275 NORTH OCEAN BLVD
City: OCEAN RIDGE**

State: **FL** Zip: **33435**

Name:

Title:

Address:
City:

State: Zip:

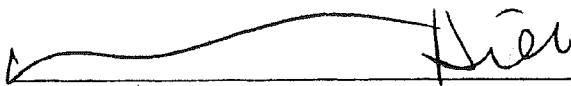
Name:

Title:

Address:
City:

State: Zip

CERTIFICATION OF ANNUAL REPORT MUST BE COMPLETED BY ALL LIMITED LIABILITY COMPANIES



FORM MUST BE SIGNED BY A MANAGER/MEMBER

4-14-09

DATE

R. GREGG HILL

TYPE OR PRINT NAME

MANAGER

TYPE OR PRINT TITLE

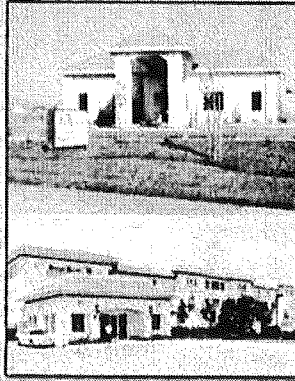
ANNUAL REPORT FEE: \$200 MAIL TO: Secretary of State • Corporations Division • Post Office Box 29525 • Raleigh, NC 27626-0525

7 HILL GRAY SEVEN
Commercial Development Firm

[About Us](#) [Our Developers](#) [Current Developments](#) [Portfolio](#)

Hill Gray Seven
Commercial Development Firm

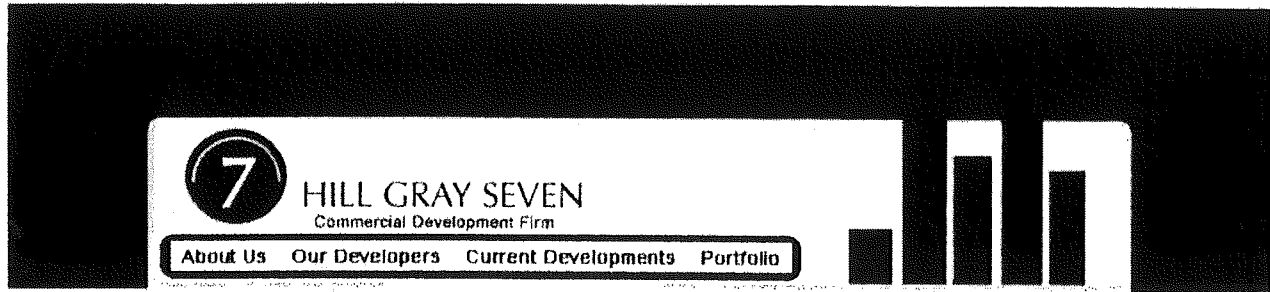
Hill Gray Seven is a commercial development firm that was founded in 2001. Over the years Hill Gray Seven has built high quality medical, warehouse, and retail developments in Florida, California, Louisiana, Oklahoma, Georgia, New Jersey, North Carolina, South Carolina, and Kentucky. Hill Gray Seven's portfolio ranges from 3,500 SF to 200,000 SF. DaVita, the largest independent provider of dialysis services in the United States is just one of Hill Gray Seven's regular clients.



[Click Here to View Our New Developments](#)

1350 City View Center Oviedo, FL 32765 Tel: (407) 365-3775 Fax: (407) 365-3776

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About Hill Gray Seven

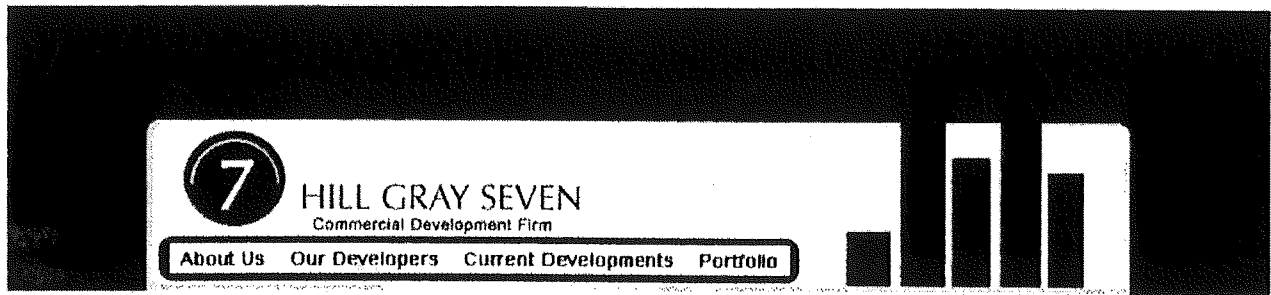
Hill/Gray Seven is a private commercial development firm founded by Gregg Hill Sr. Throughout the United States, Hill/Gray Seven specializes in the development of retail, medical, and warehouse (premium self storage.) Family values, ethics, and a positive energetic attitude are a few of the qualities that Hill/ Gray Seven brings to every project. Hill/Gray Seven has earned the confidence and respect of a strong portfolio of nationally recognized clients, including Davita, RBC Centura as well as many others.

Hill/Gray Seven has succeeded in the development of high quality medical, warehouse, and retail properties by providing a high level of accountability and understanding to their clients' needs and market requirements. Their commercial development team has proven their ability to seize, create and maximize opportunities. Hill/Gray Seven succeeds with its development projects because they are fully engaged in every aspect of the ongoing development and operations of each project ... from land acquisition and entitlement to design, space planning, construction and project management.

Hill/Gray Seven has an outstanding team of highly trained and skilled professionals who have earned the trust of a broad network of clients, brokers, architects, contractors and public-sector officials. Their commercial development team is so talented and trusted that many clients call Hill/Gray Seven their "go to developer." Hill/Gray Seven's development team can and will out perform their competition.

Clients' needs, project location, infrastructure, and market conditions are just some of the major issues that must be fully identified and successfully addressed before any project can go forward. Fully engaged in every project from start to finish, Hill/Gray Seven takes the time to do it well, which is why Hill/Gray Seven has gained trust in the commercial development industry. Throughout changing business cycles and real estate market shifts, Hill/Gray Seven endures — succeeding for commercial property users by building relationships, keeping promises and delivering quality developments.

Hill/Gray Seven is also the parent company of 7 Bo of Central Florida. 7 Bo of Central Florida is the Central Florida Bojangles' Franchisee Group. 7 Bo's first location will be located at 11291 East Colonial Drive in Orlando FL. The first location is scheduled to open Feb 2009. 7 Bo signed a development agreement that includes opening multiple locations in the greater Orlando area. 7 Bo will be the owner/operator and along with Hill/Gray Seven's development experience, 7 Bo will be able to expand quickly and effectively.



Hill Gray Seven Development Team

Gregg Hill

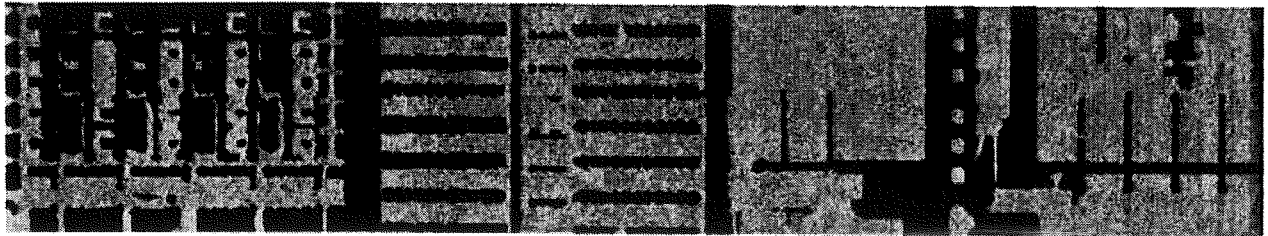
Gregg Hill Jr.

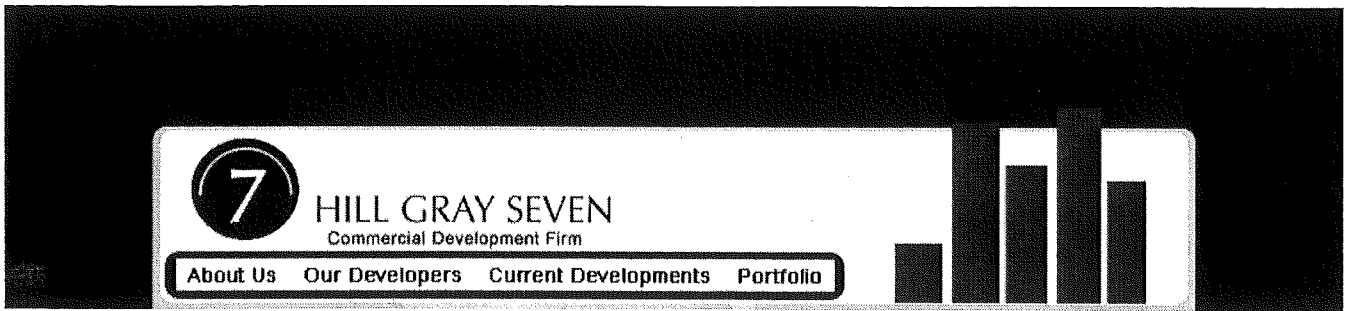
Gray Hill

Drew Hill

PG Pace
Director of Construction

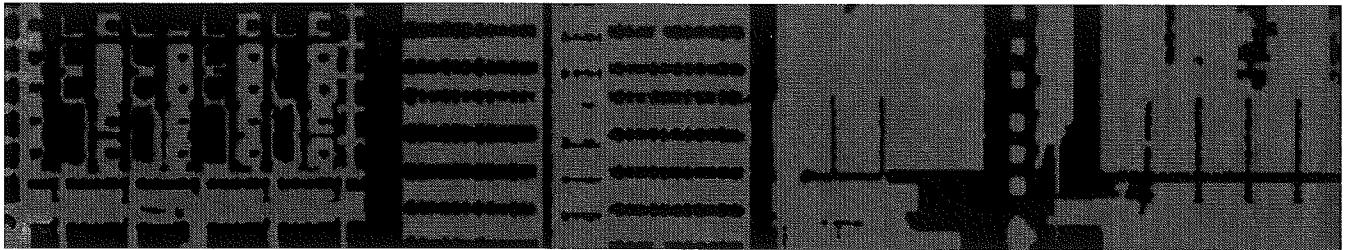
Caroni Contini
Office Manager

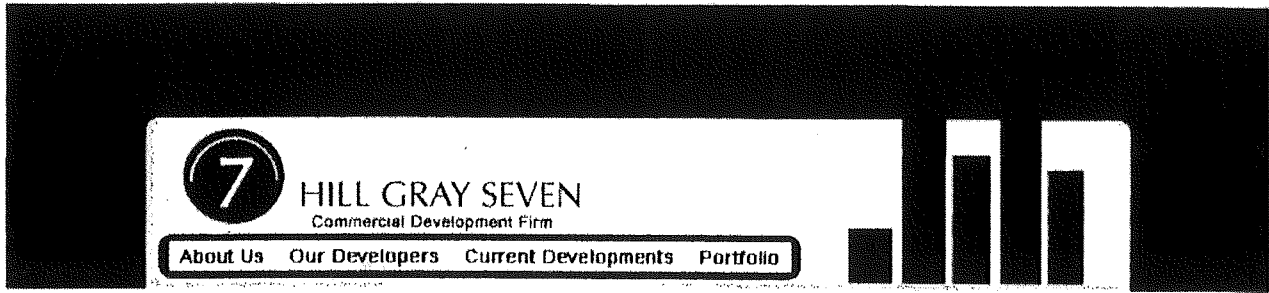




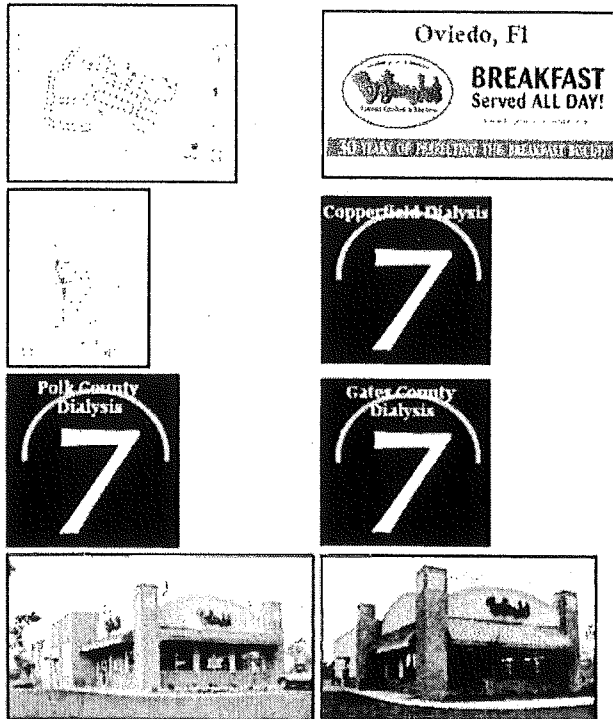
Copperfield Dialysis
1030 Vinehaven Drive
Concord NC 28025-2438

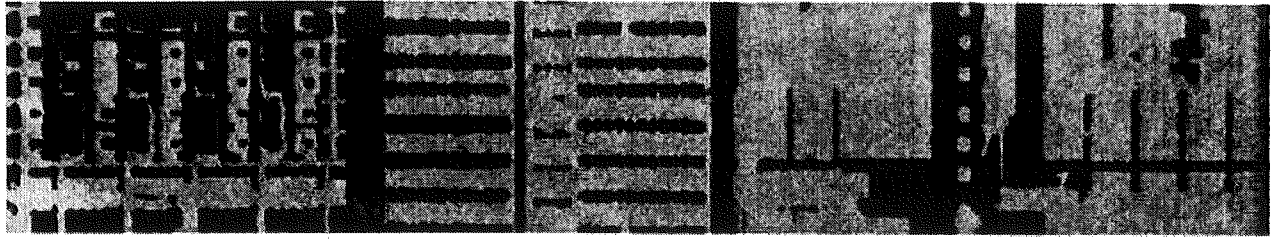
Picture Coming Soon



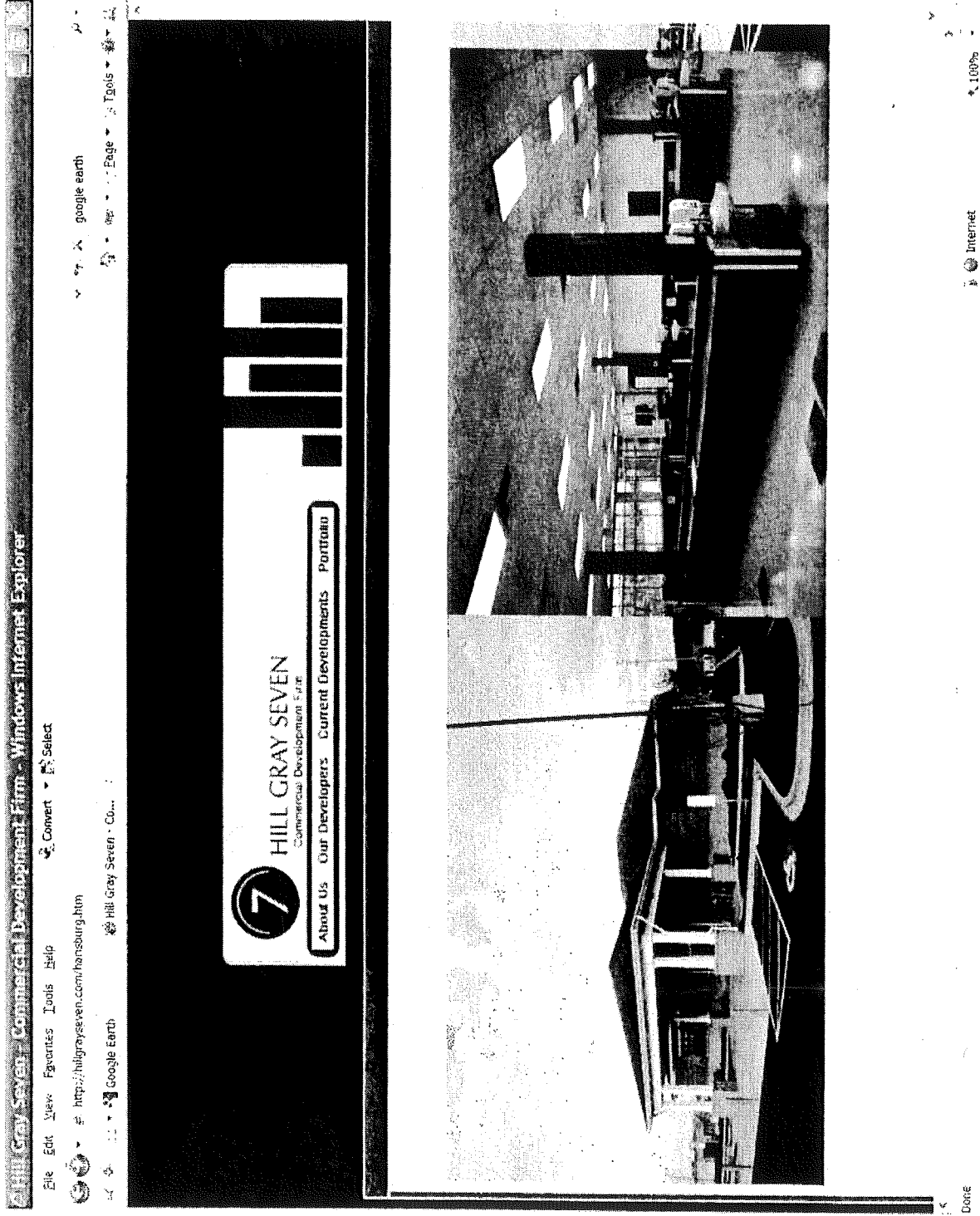


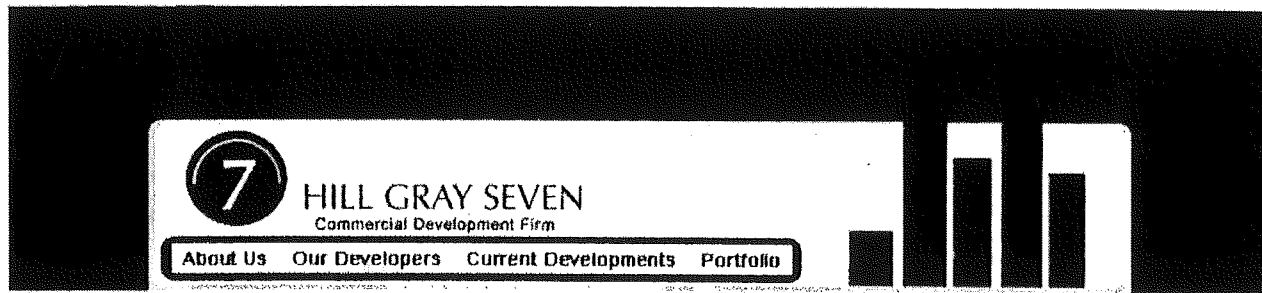
Current Developments





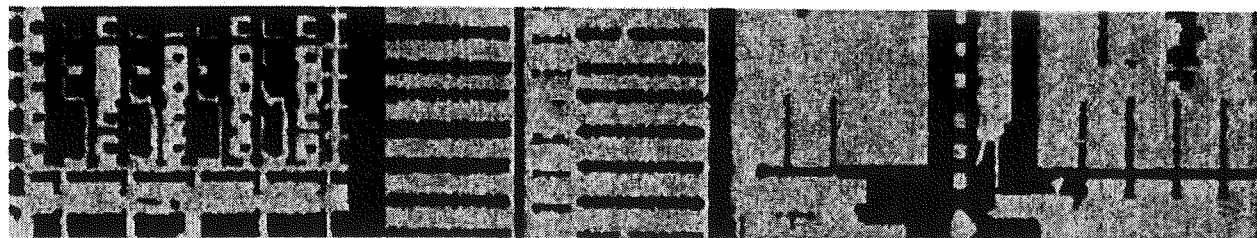
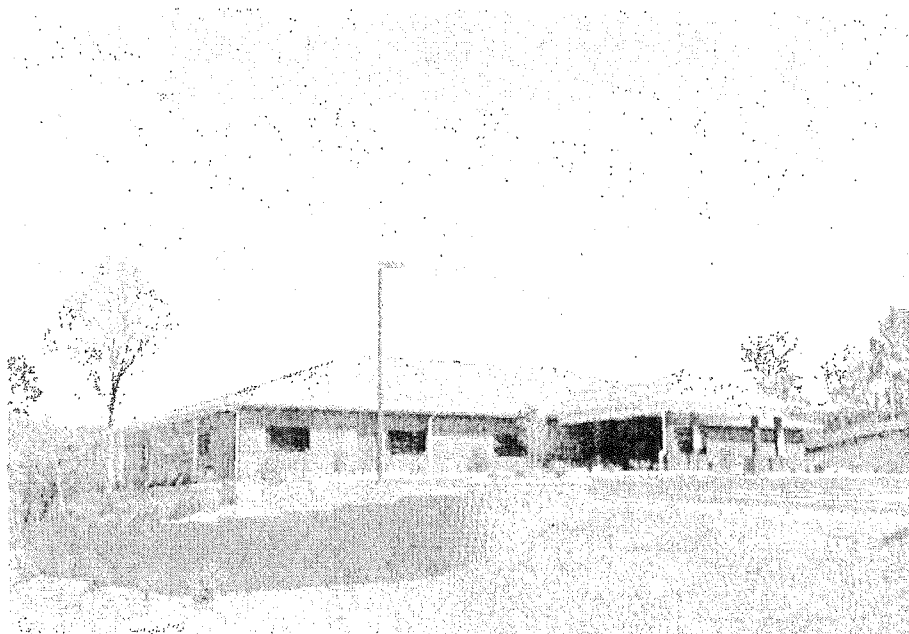
From the Hill Gray Seven, LLC Website - this is the Harrisburg Dialysis Center.

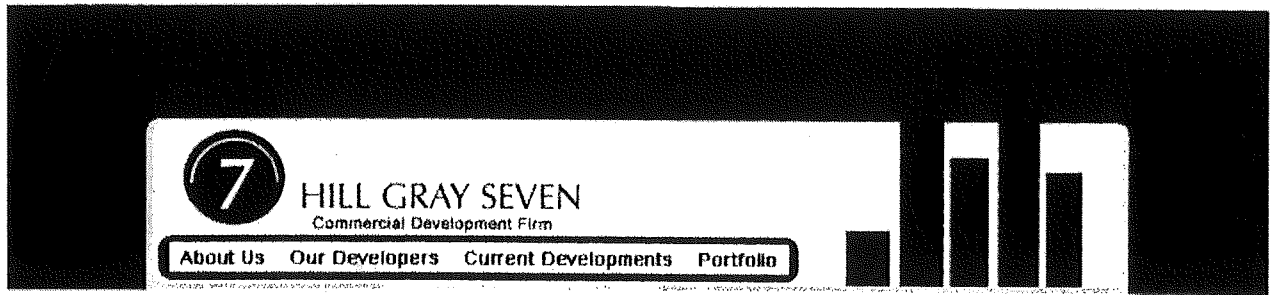




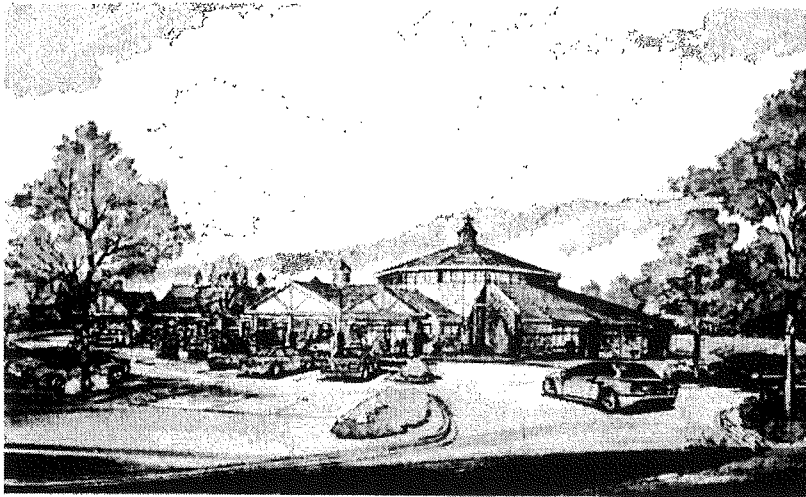
**Waynesville Dialysis Center
11 Park Terrace Dr
Clyde NC 28721-7445**

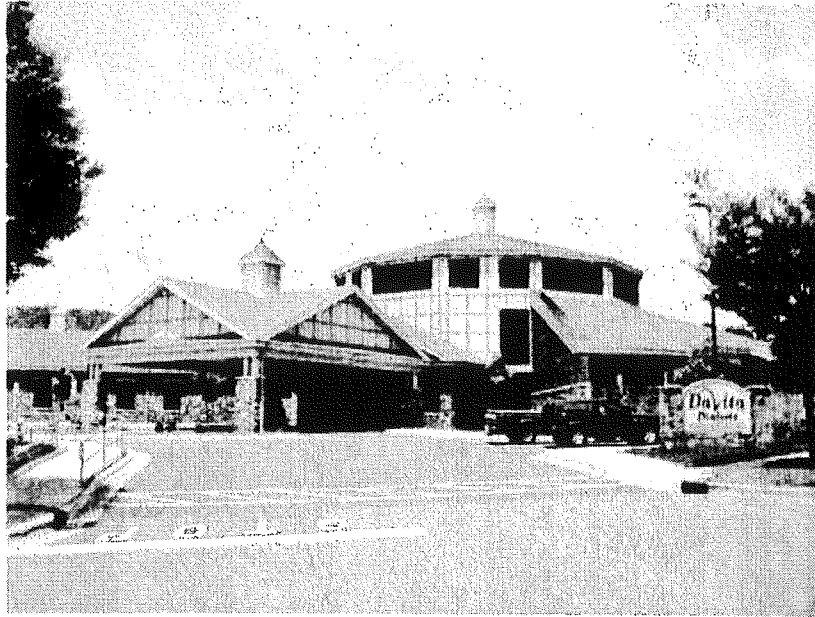
The Haywood County Dialysis center of Waynesville, NC is 7,222 square feet of occupied space and is 8,460 total square feet. The building is constructed of accent brick with an arched roof. It is located on the same road as the regional hospital and other medical buildings. This center is located in an excellent visible area. It sits high above the interstate and overlooks the surrounding area.

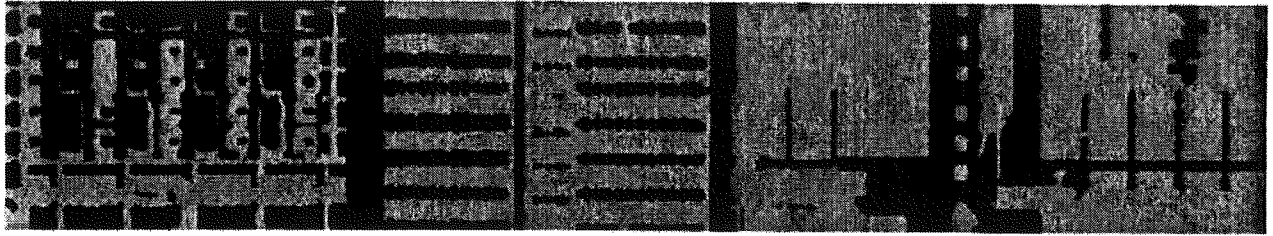
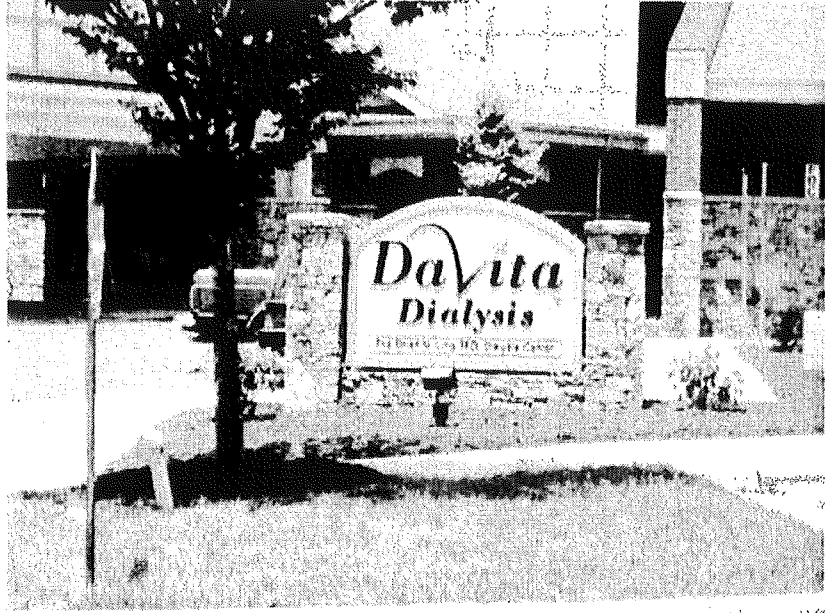


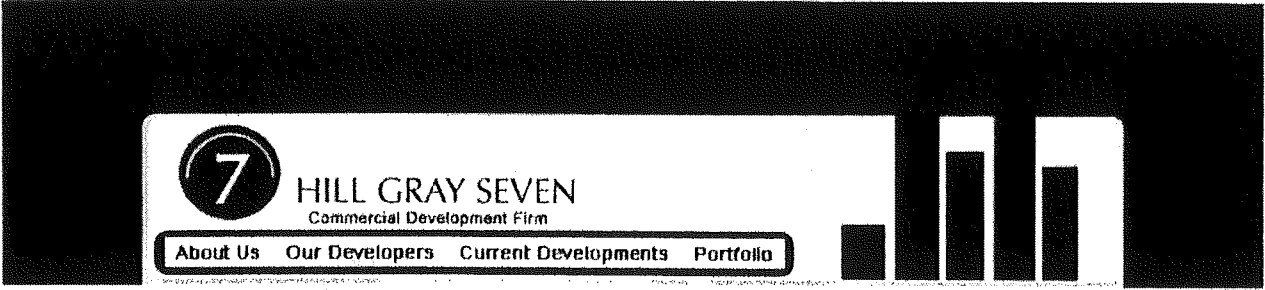


Asheville 22,000 SQ FT Dialysis Center
1600 Centerpark Dr
Asheville, NC 28805-6206





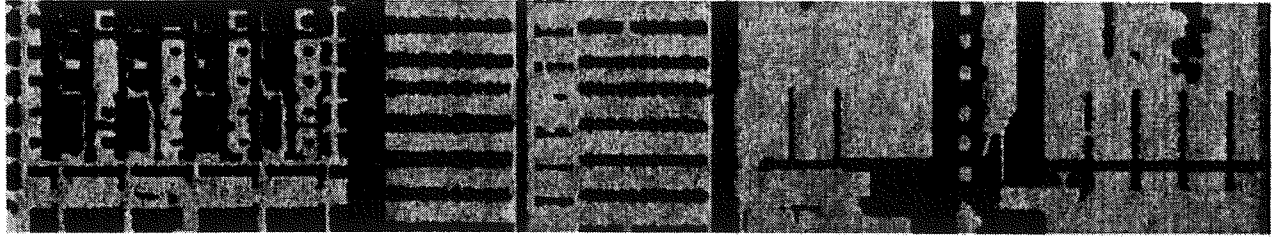


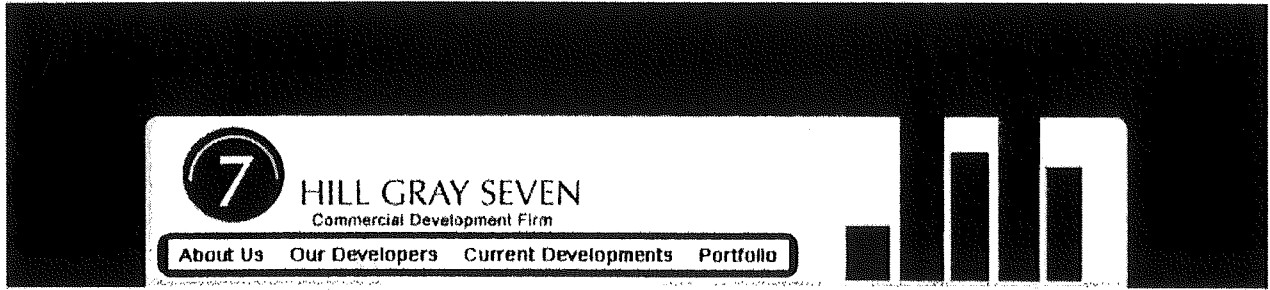


Biscoe Dialysis Center
323 W Main St Biscoe, NC 27209

The Biscoe Dialysis Center is located in Biscoe, North Carolina and is 7,800 square feet.

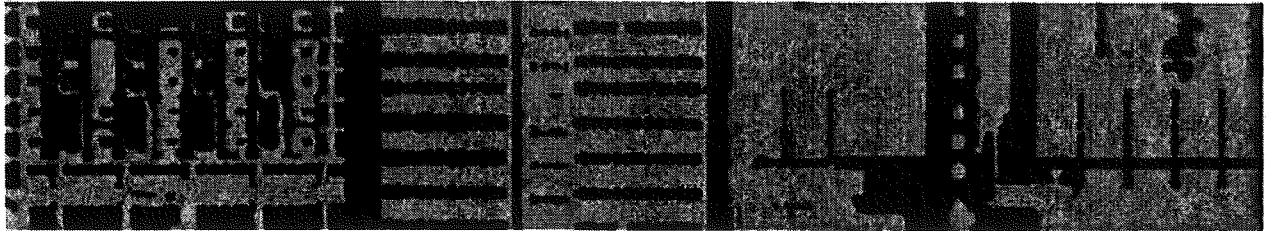


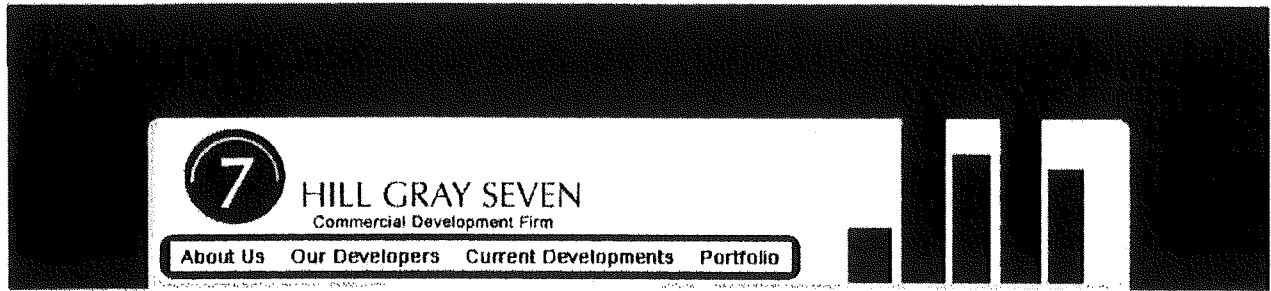




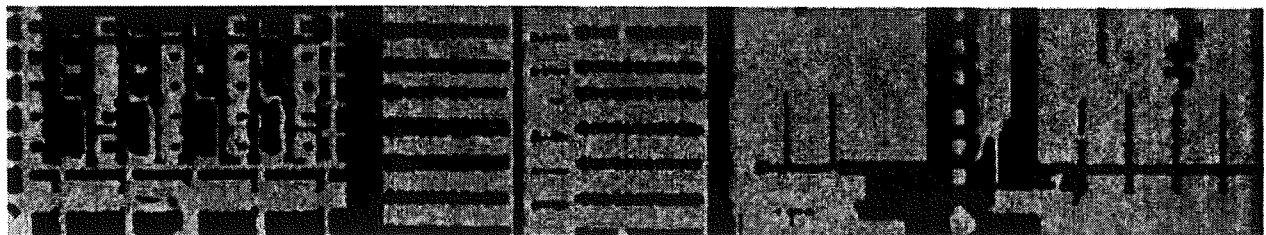
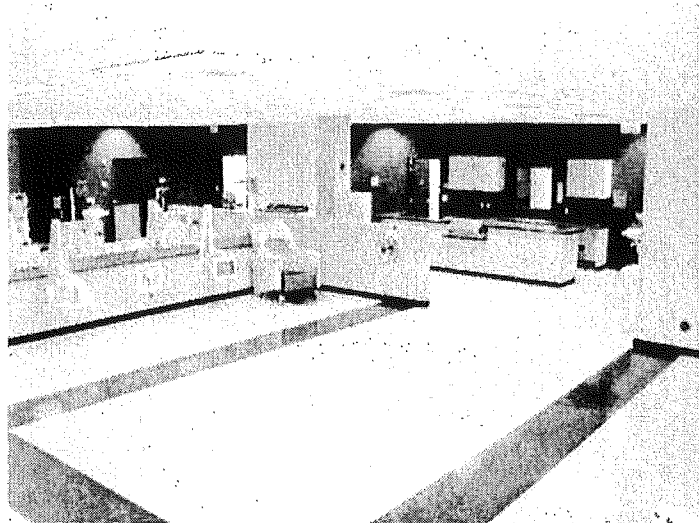
Reidsville Dialysis Center
1307 Freeway Dr Reidsville, NC 27320

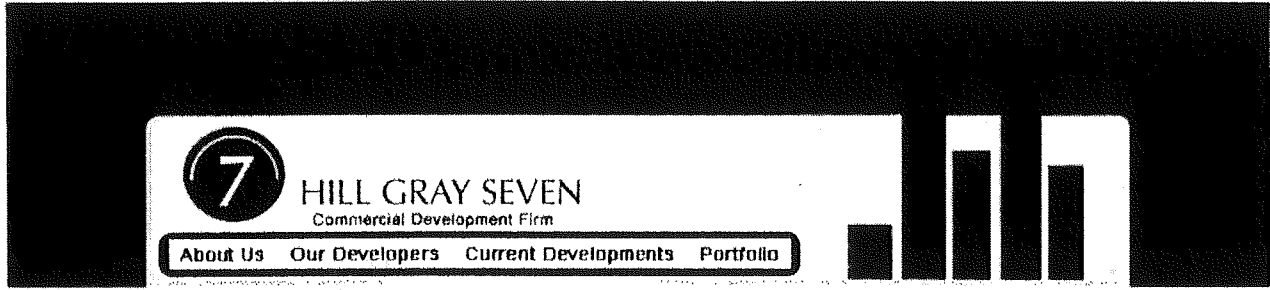
The Reidsville Dialysis Center is located in Reidsville, North Carolina and is 7,800 square feet.





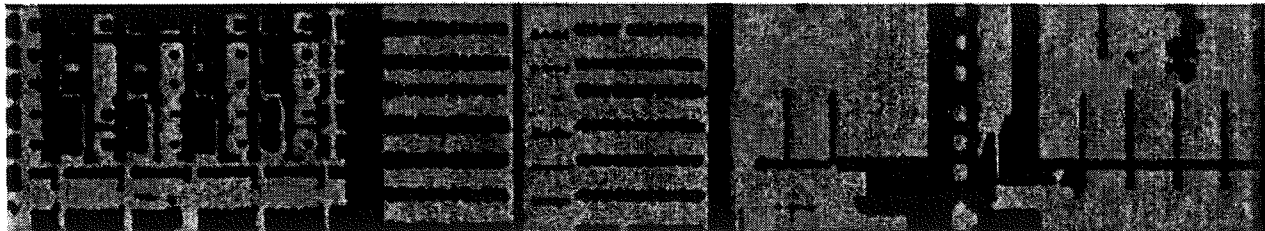
Dialysis Care Of Rowan County
111 Dorsett Dr
Salisbury NC 28144-2278

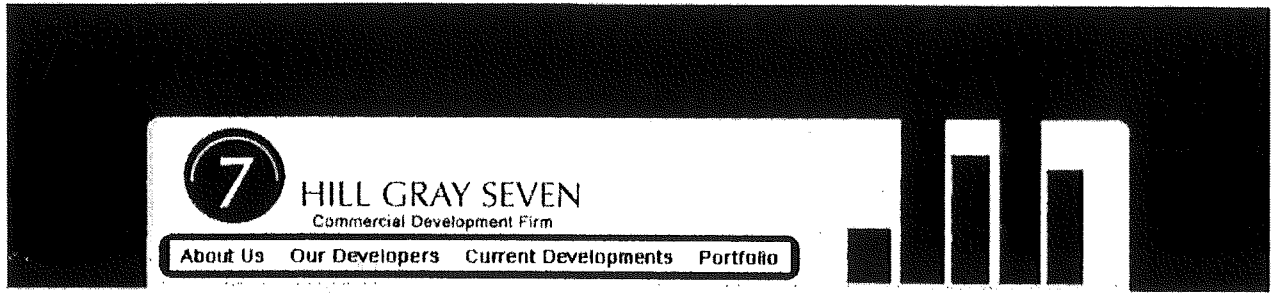




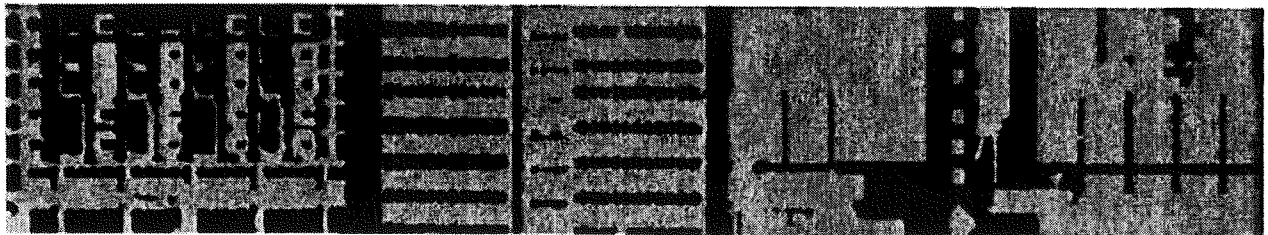
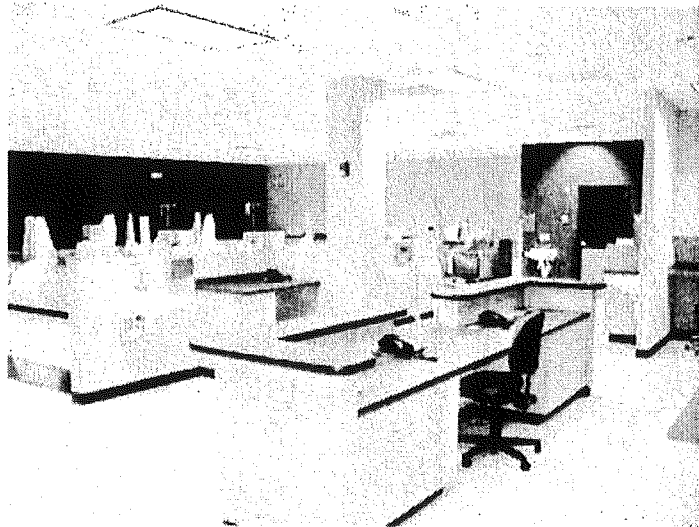
Southern Pines Dialysis Center
209 Windstar Place Southern Pines, NC 28387-7086

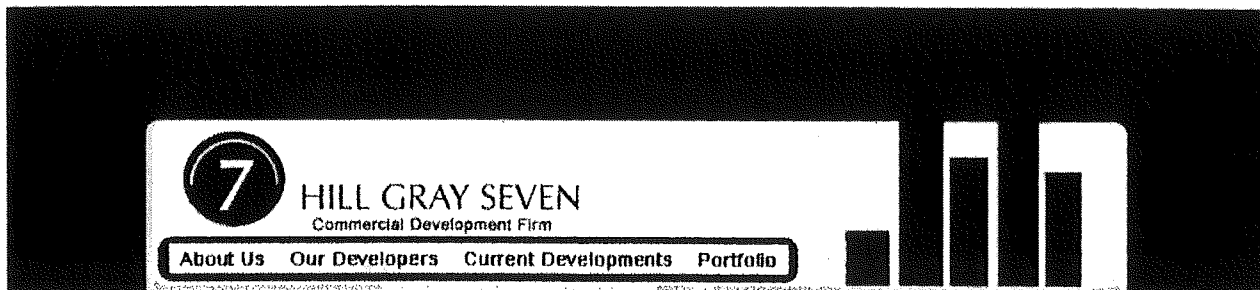
The Southern Pines Dialysis Center is located in Southern Pines North Carolina. The building is 8,000 square feet and is constructed with a brick exterior and arched roof.



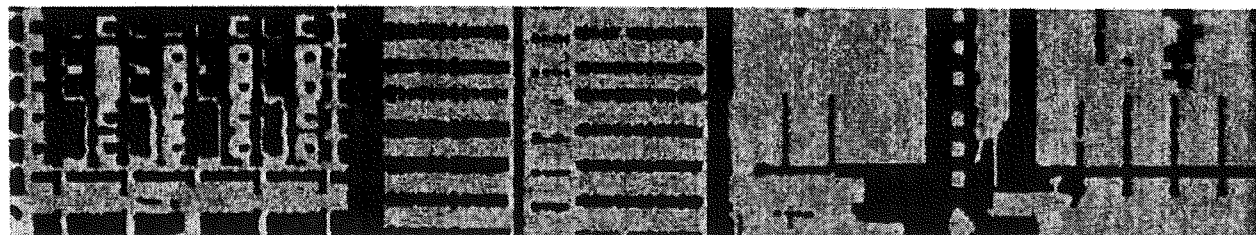


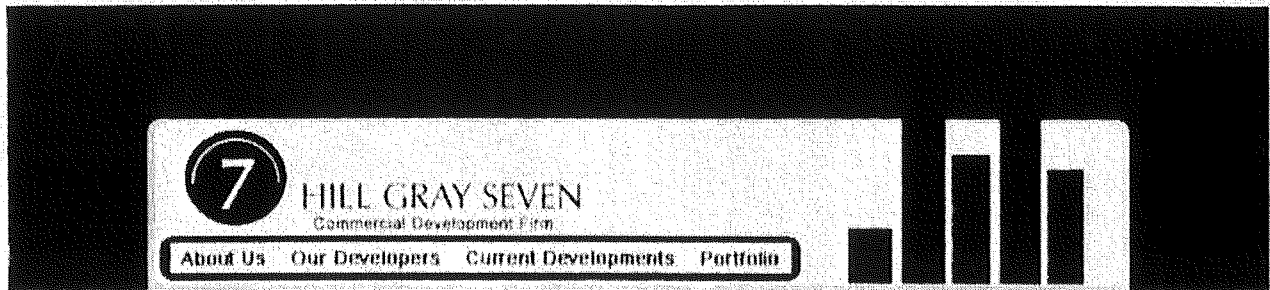
Wallace
5650 S Nc 41 Hwy
Wallace NC 28466-6094



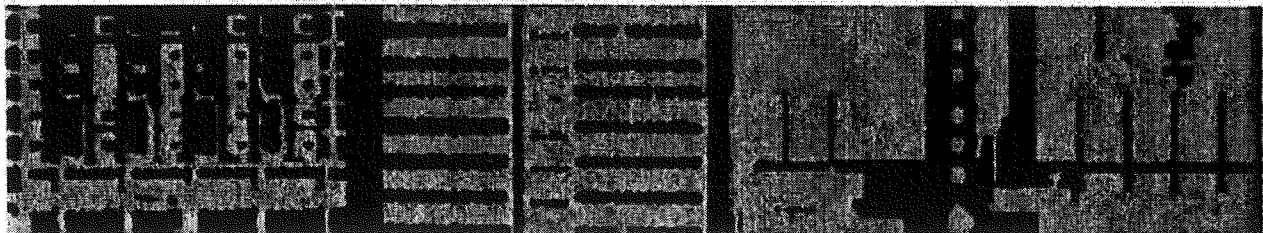
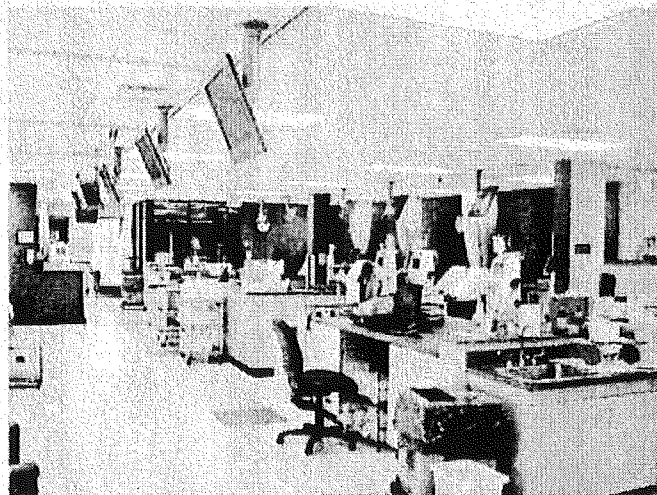


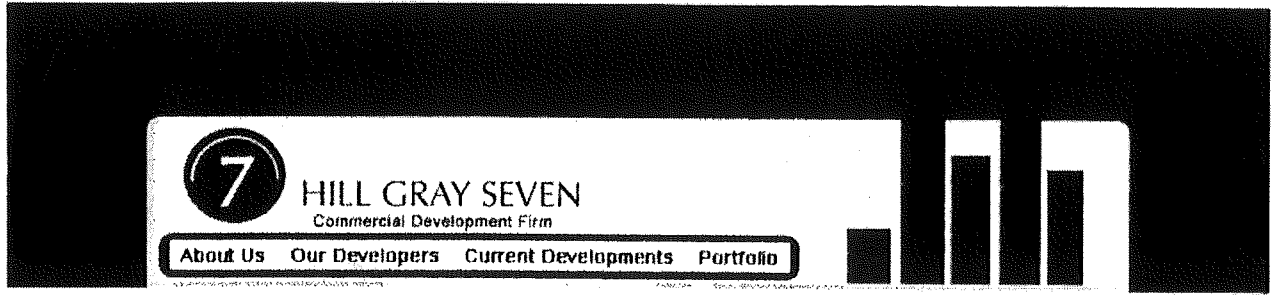
Smoky Mountain Dialysis
1611 Andrews Rd
Murphy NC 28906-5100



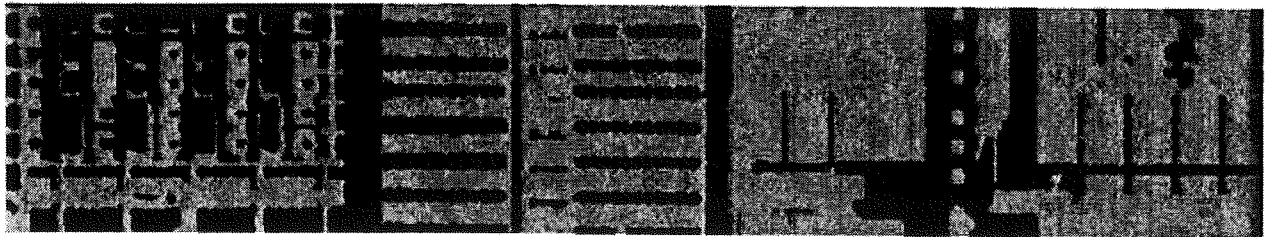
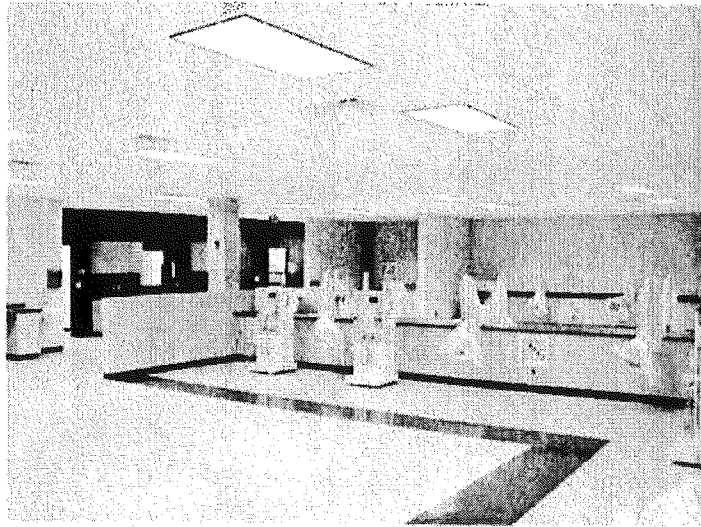


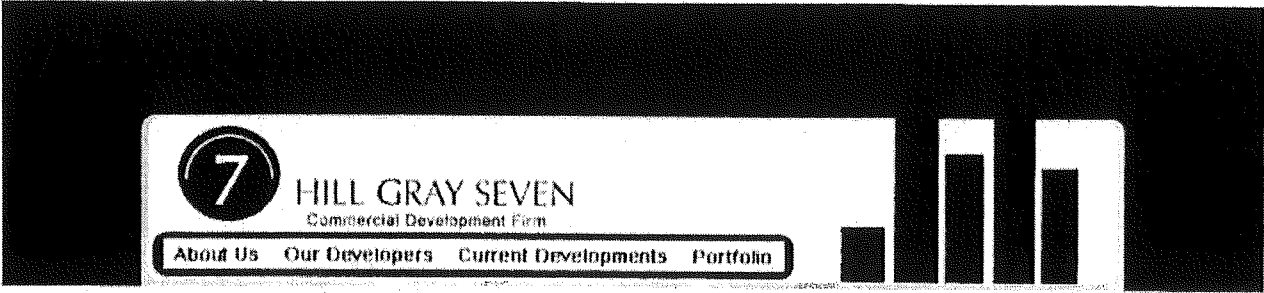
Elizabeth City
1840 W City Dr
Elizabeth City NC 27909



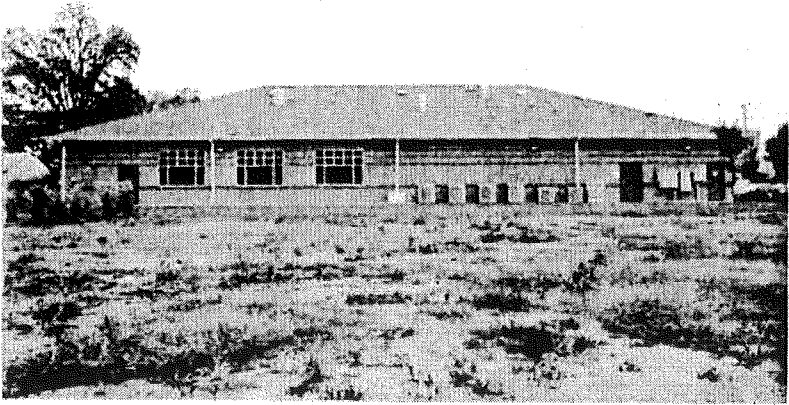


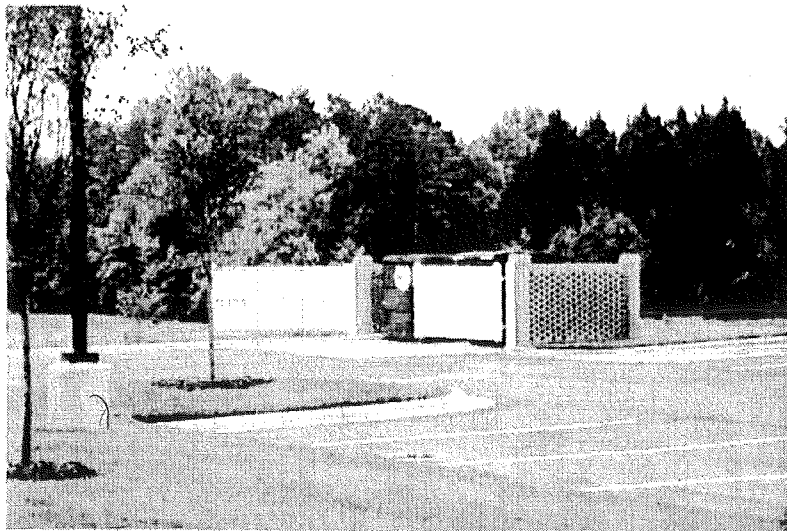
Mayland
575 Altapass Hwy
Spruce Pine NC 28777-3012

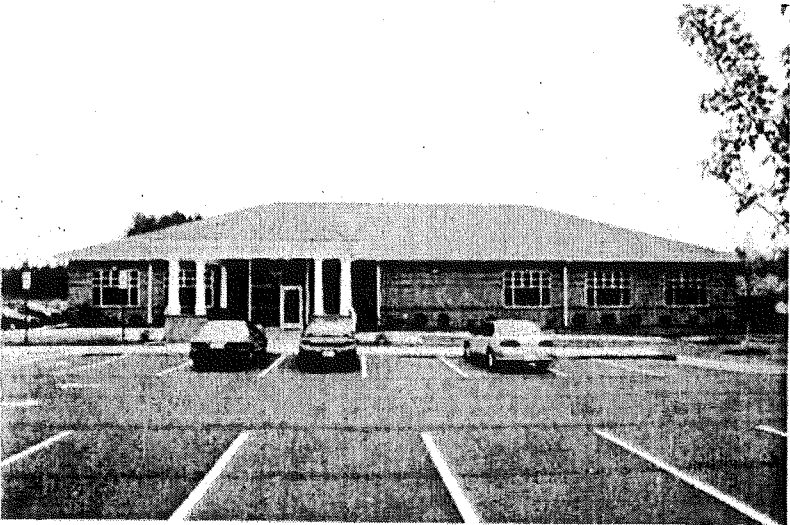
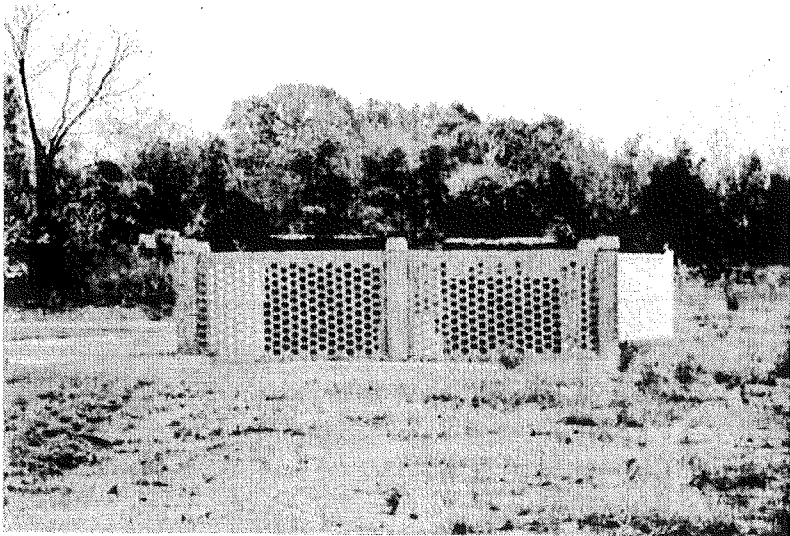


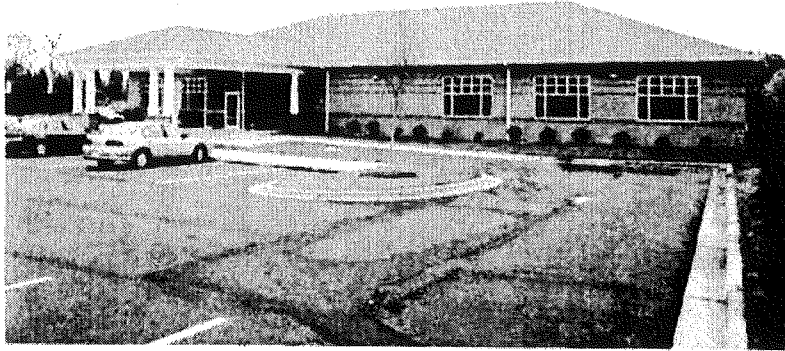


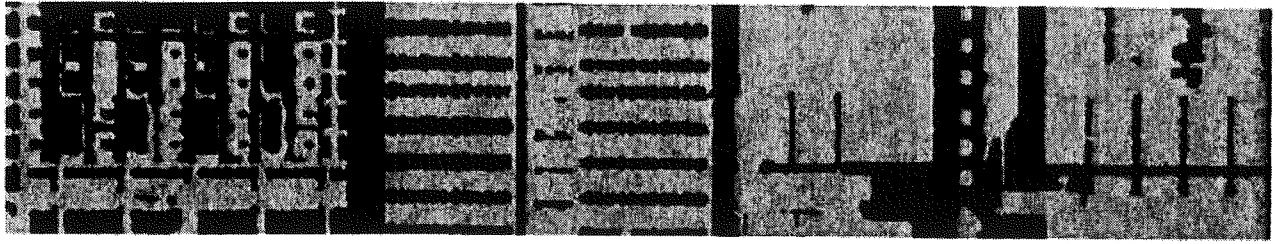
North Charlotte Dialysis Center
6620 Old Statesville Road
Charlotte, North Carolina

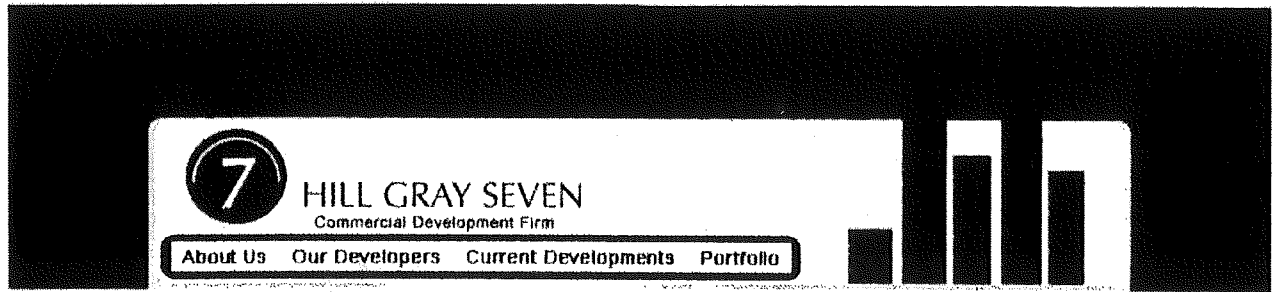




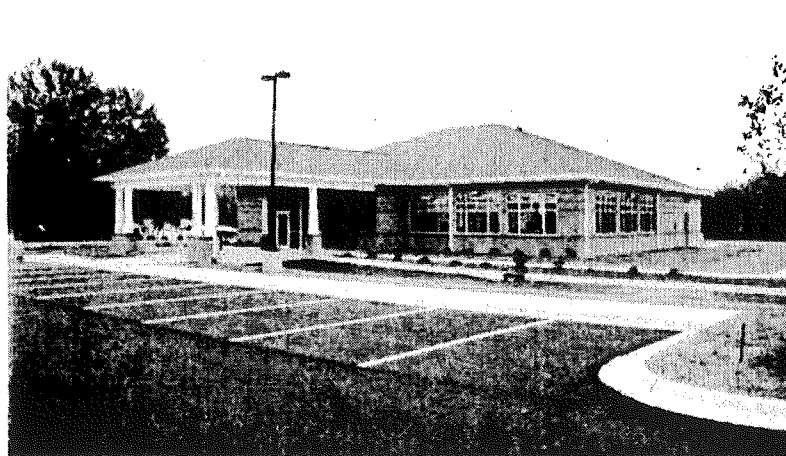


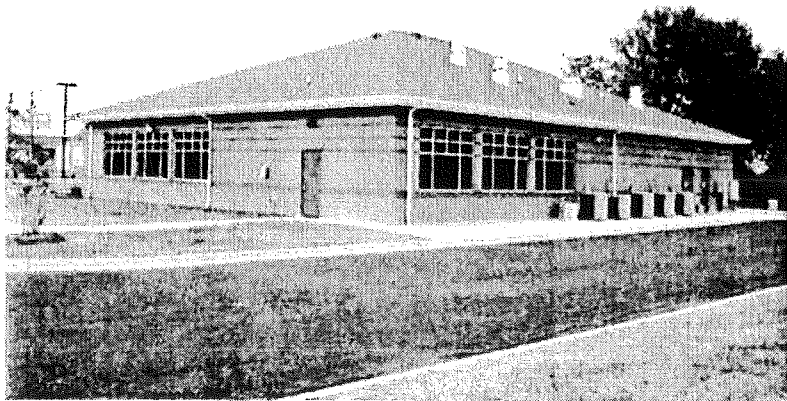
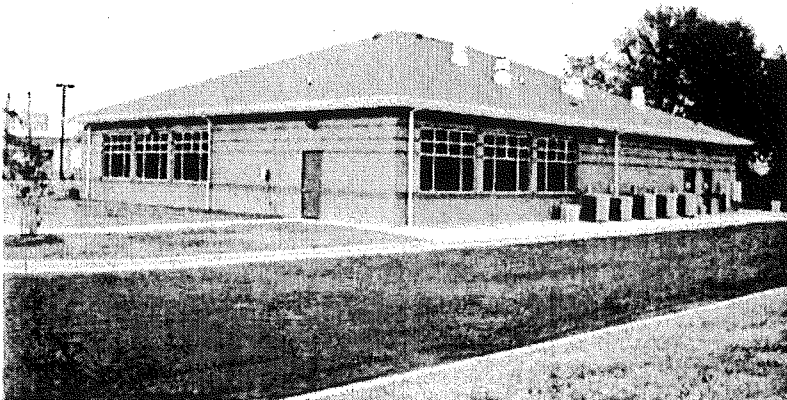


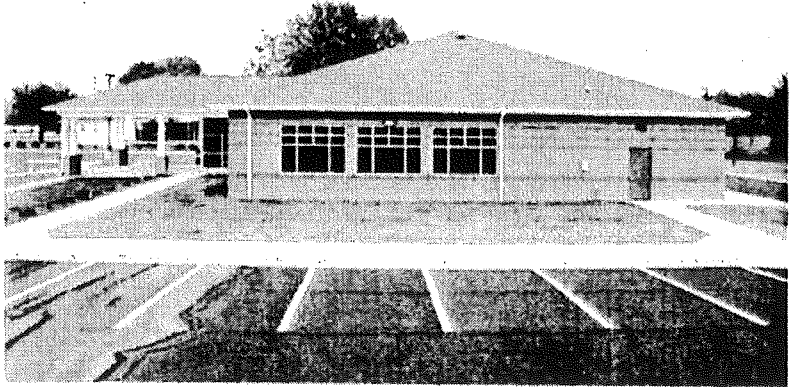
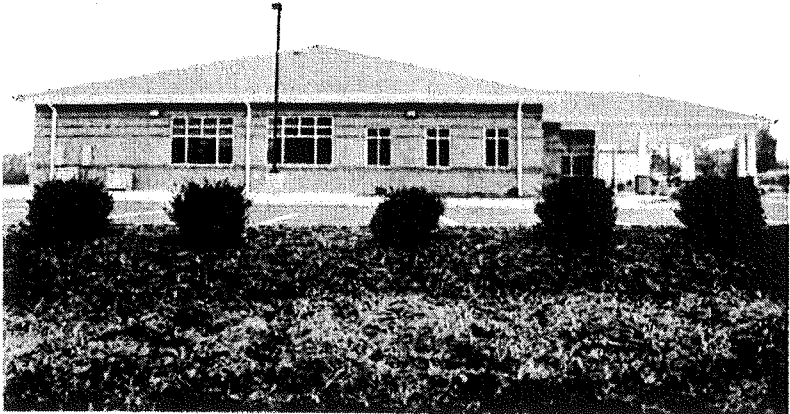
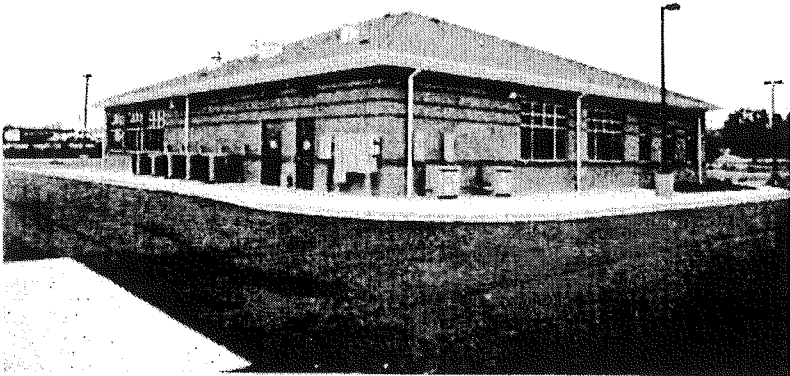


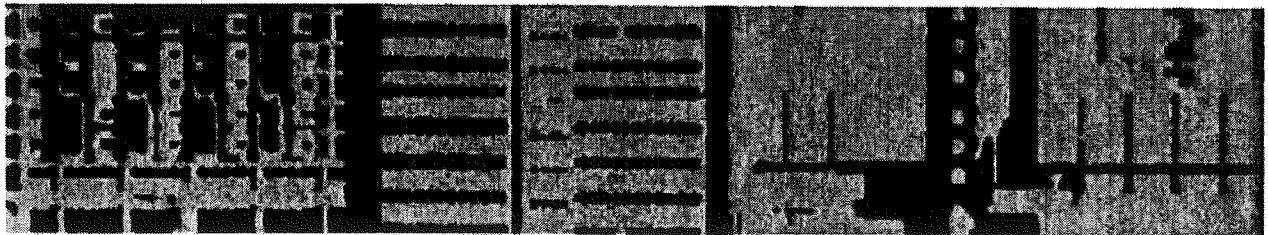
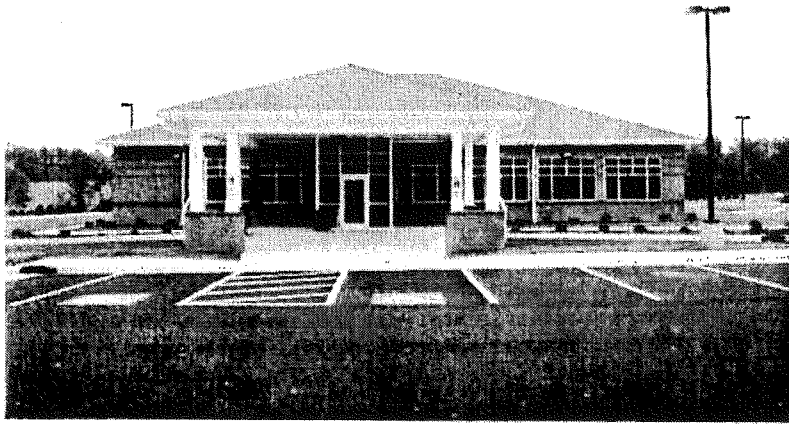
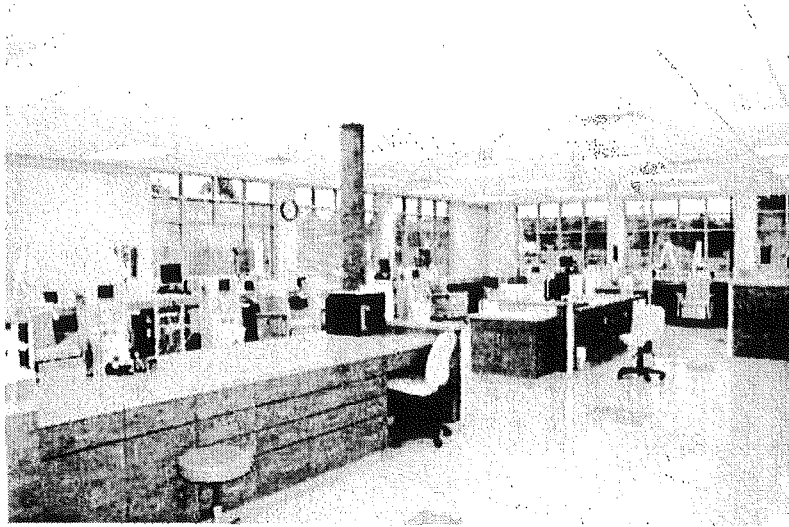


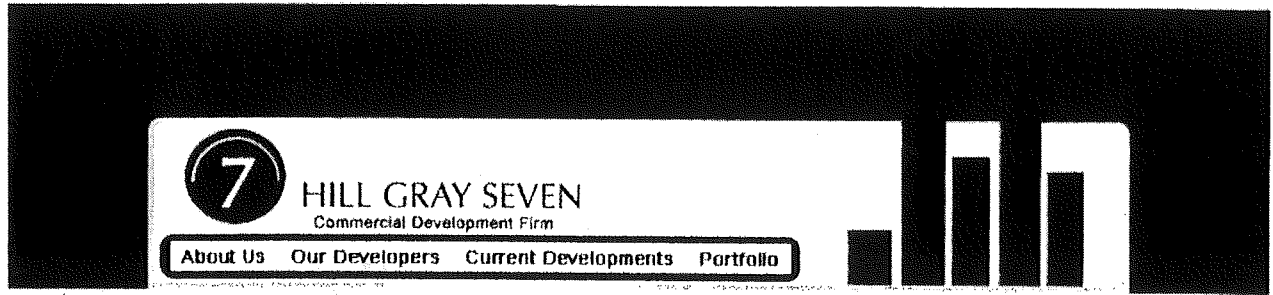
MARSHVILLE Dialysis Center
US 74 and SR 1736
Marshville, Union County, North Carolina



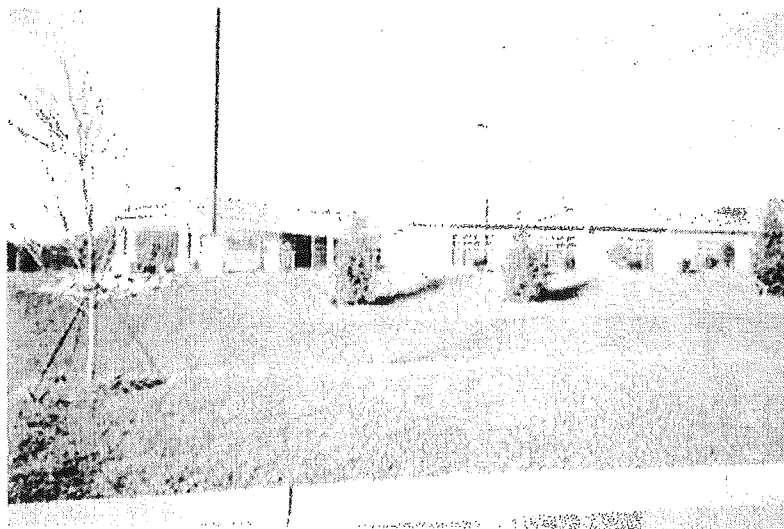
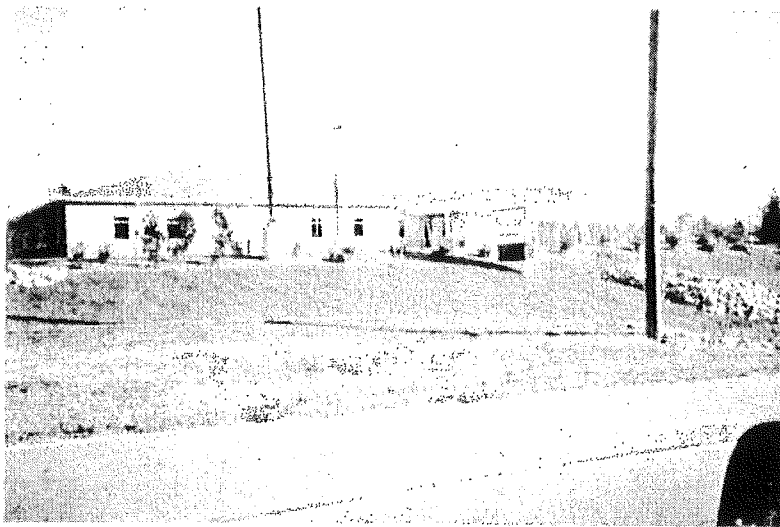


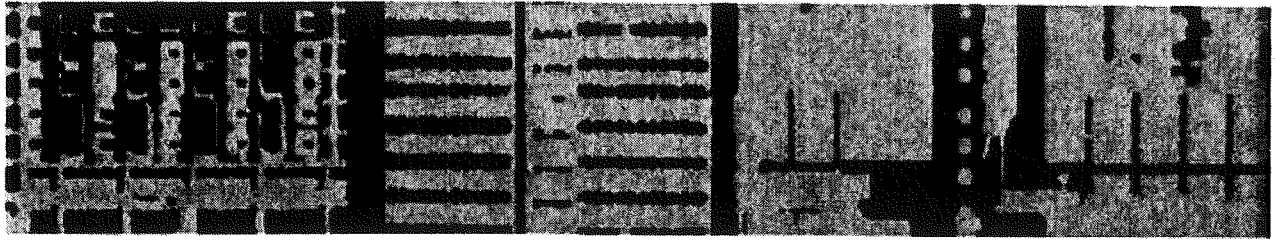


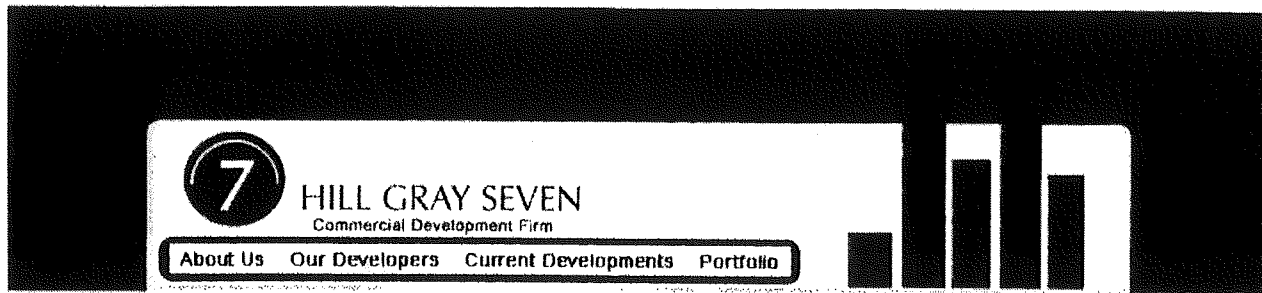




**Henderson Dialysis Center
854 Beckford Drive
Henderson, NC 27536**





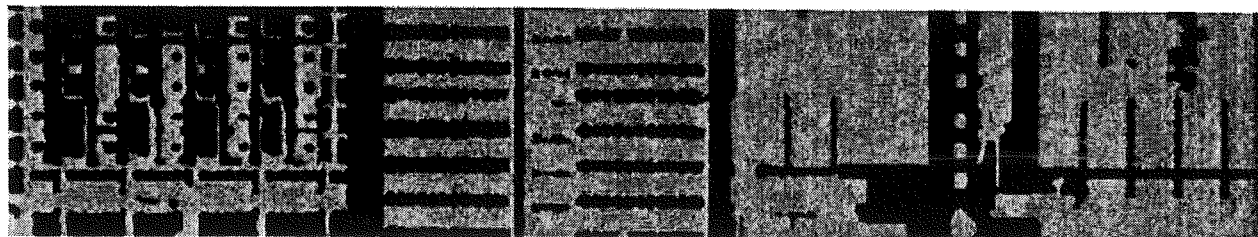
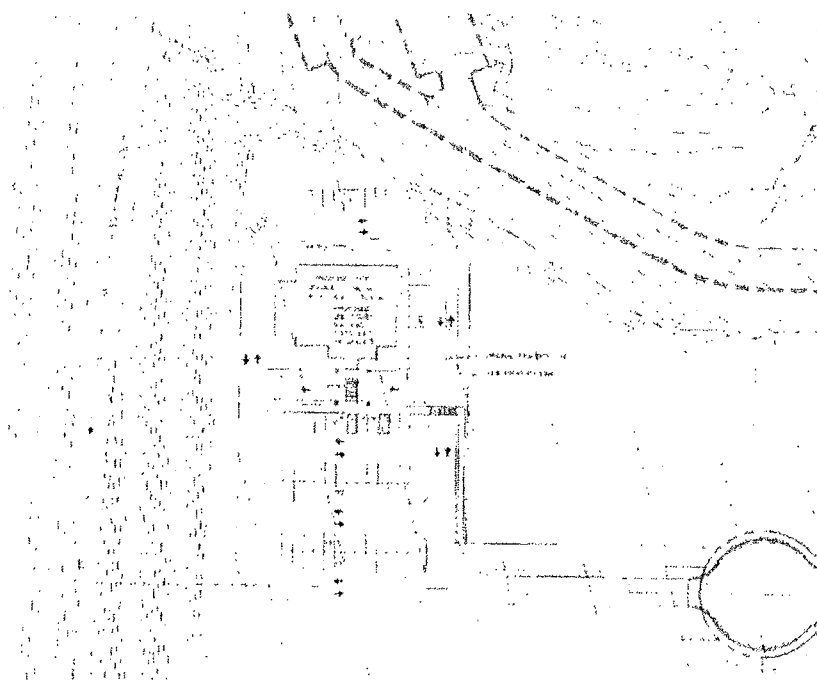


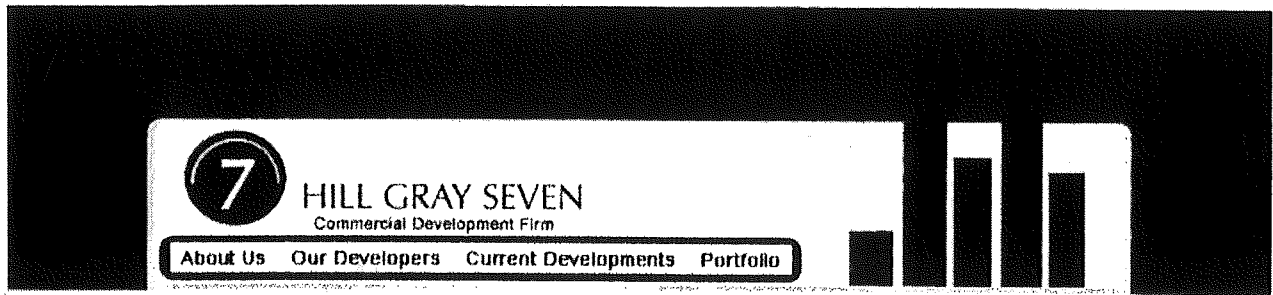
Wake Forest Dialysis Center

Opening June 2009

Wakefield Park

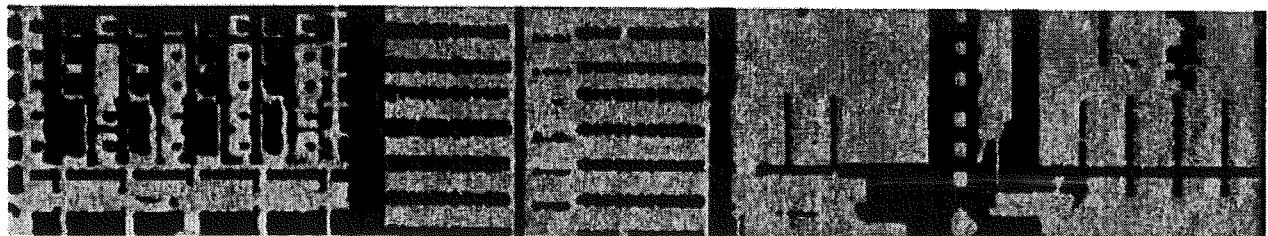
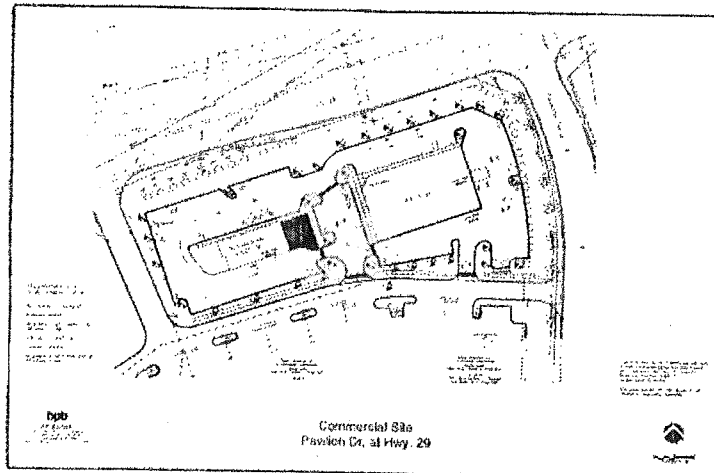
Raleigh, Wake County, North Carolina





North Tryon

11320 and 11300 North Tryon St.
Charlotte, NC 28262
3.43 Acres



HOW TO KEEP IT IN THE FAMILY

*The winners of our first North Carolina Family Business
of the Year Award find all success is relative.*

By Margot Lester Curley



(Excerpt of full article, Business North Carolina, pages 40-46)

Most family-business founders can't shake the image of their heirs as the 16-year-old kid who put the care in a tree, explains John Powell, head of the North Carolina Family Business Forum, based in Burlington. "So getting the entrepreneur in charge to let go of the reins—to transfer operational control to the next generation—is the most common stumbling block to keeping a family enterprise alive."

The numbers bear that out. More than 90% of North Carolina businesses are family-owned, yet few stay that way beyond the first generation. Big egos. Sibling rivalry and Oedipal conflict frequently spell disaster. "Often the first generation doesn't have faith that the next generation can run the business as well," says Powell, whose family's Carolina Biological Supply Co. has seen its share of feuding.

Still, some do manage to survive into the second generation and a few even into the third. Three such businesses are winners of the first North Carolina Family Business of the Year Award, presented by the forum and *Business North Carolina*.

Raleigh consulting engineers, Booth & Associates, won in the category for small companies (fewer than 100 employees). Gregory Poole Equipment Co. in Raleigh, winner for midsized (100-499 employees), is the Caterpillar dealer for Easter North Carolina. Neil Realty Co. (a.k.a. Contentnea Creek Development Company), a diversified real-estate company and operator of nursing homes, won for large (more than 500 employees) companies.

Neil Realty Company (Contentnea Creek Development Company)

Founded by a self-proclaimed country boy from Greene County, Neil Realty Co. has grown from a one-man construction company to a 6,200-employee diversified empire with \$201 million in sales this year. Robert O. Hill Sr., 63 built the company around his interests and has allowed his sons to develop their own lines of business based

on theirs.

It all began in 1953 when Hill, then in his early 20s, completed an apprenticeship in carpentry and founded Robert Hill Construction, a home-builder and real-estate developer. He continued to tend the family farm as his building business grew. But when his grandmother became seriously ill, his focus changed. "We had no options but to place her in a long-term-care facility where she could receive the care she needed," he says. He began looking for a skilled-nursing facility, which provides a higher level of care than does a standard nursing home. But there were few such centers in the state.

He turned this family need into a business opportunity—by entering the nursing-home business in 1965. "We were looking at possible ways to diversify so that the growth of our business would continue," he explains. The company built a skilled-nursing facility in Snow Hill. Others followed in LaGrange, Jacksonville, Kinston, Goldsboro and Wilkesboro.

Neil Realty (the name originally derived from Hill's middle name, O'Neil), owns and operates 45 Britthaven long-term-care homes with 5,500 patients in North Carolina, Kentucky and Virginia. It also owns clinics that specialize in treating patients with Alzheimer's disease and end-stage renal diseases and runs subsidiaries such as Neil Medical Group, a vendor of medical and pharmaceutical supplies.

Eldest son Robert Jr., 42 oversees these operations. A graduate of UNC Wilmington with a degree in business, he came to work at the family company excited about opportunities in health care. "I saw the demographics of a growing elderly population in North Carolina and the lack of adequate facilities in rural areas to care for these North Carolinians," he says. "An opportunity was there for further growth."

Youngest son Stephen, 33, who graduated with a B.S. in economics from Appalachian State University, spent three years in Washington as a staff member of the House Merchant Marine and Fisheries Committee before joining NRC in 1985 and leading its expansion into insurance. "My background with government regulatory procedures led to the company's becoming self-insured and the eventual growth of our insurance business," he says.



Robert Hill Sr. has allowed his sons, Stephen, Robert Jr. and Gregg, to develop their own lines of business.

The company owns two insurance operations; Kinston-based Discovery Insurance Co., a workers' compensation underwriter for health-care providers, and Markham, Gray & Dennis, a third-party administrator for self-funded health insurance, retirement and workers' compensation programs. Stephen also heads Neil Realty's internal operations.

Health care and insurance aside, Neil Realty continues to operate Robert Hill Construction and run the family farm (where it breeds thoroughbreds and produces timber). The company also operates Wayne Wholesale, which sells groceries to convenience stores and institutions, and SNOFAC, a plumbing and heating contractor. Son Gregg, 39, handles these activities and the company's finances. "Development and construction of new business has always been my primary interest," he says. Responsible for securing financing for continued growth, he juggles construction projects while keeping the financing in order.

Although the sons have pursued different interests in the company, they were introduced to the business the same way — from the ground up. "Our job was to clean up bricks, wood and mortar around houses after construction was completed," Stephen says.

The sons' diverse operations have given rise to a kind of divide-and-conquer approach to succession. There is no designated successor, and though no one at Neil Realty will admit it, it appears that the founder is waiting to see which of his sons rises to the top before appointing one. "I am certainly not ready to step down at this time," he says. "I still have many good years left."

He has pulled back a bit, however, serving in a more advisory role these days, meeting with his sons regularly to make major corporate decisions. "Basically, day-to-day responsibility has already been passed on to us," Stephen says.

The Hills don't seem worried about the lack of a concrete succession strategy. "A family business is no different than a sports team," Robert Jr. says. "Each person has his responsibility, and we all come together for a winning effort. While it is true there is always a captain or coach, it's the team — working together — that forces the win.

Margot Lester Gurley is a Carrboro free-lance writer.

CAR5

STATE OF NORTH CAROLINA
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SECRETARY OF STATE
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P.O. BOX 29525
RALEIGH, NC 27626-0525
(919) 733-4201

92 225 0109

92 ANNUAL REPORT DUE DATE- 10-06-1991

CORP ID- 0 1 9 1 3 1 0

FILING NO- A 0 0 1

STATE OF INC- NC

FILED: RUFUS L. EDMISTEN
SECRETARY OF STATE
NOTICE DATE- 06-30-1991
DATE OF INC- 06-30-1986

1. REGISTERED AGENT & REGISTERED OFFICE MAILING ADDRESS ENTER AGENT NAME & MAILING ADDRESS CHANGE HERE -

DIALYSIS CARE OF NORTH CAROLINA, INC.
C/O ROBERT V BODE
2626 GLENWOOD AVENUE, SUITE 265
RALEIGH NC 27608

DIALYSIS CARE OF NORTH CAROLINA, INC.
c/o Robert Hill, Sr.
P. O. Box 6159
Kinston NC 28501-1059

2. STREET ADDRESS OF REGISTERED OFFICE ENTER STREET ADDRESS CHANGE HERE -

PO BOX 6338
RALEIGH NC 276286338
COUNTY - MAKE

1211 Highway 258 North
Kinston NC 28502

3. IF REGISTERED AGENT CHANGED, SIGNATURE OF NEW AGENT
SIGNATURE CONSTITUTES CONSENT TO APPOINTMENT

4. ENTER PRINCIPAL OFFICE ADDRESS HERE - DIALYSIS CARE OF NORTH CAROLINA, INC.
ADDR- P O Box 6159

5. ENTER FEDERAL EMPLOYER ID NUMBER HERE - CITY- Kinston ST-NC ZIP- 28501-0159
NUMB [REDACTED]

6. ENTER NAME, TITLE AND BUSINESS ADDRESS OF PRINCIPAL OFFICERS HERE -
NAME- Robert Hill, Sr. ADDR- P O Box 6159
TITLE- President CITY- Kinston ST- NC ZIP- 28501-0159

NAME- R. Gregg Hill ADDR- P O Box 6159
TITLE- Vice President CITY- Kinston ST- NC ZIP- 28501-0159

NAME- Robert Hill, Jr. ADDR- P O Box 6159
TITLE- Vice President CITY- Kinston ST- NC ZIP- 28501-0159

NAME- Stephen Hill ADDR- P O Box 6159
TITLE- Vice President CITY- Kinston ST- NC ZIP- 28501-0159

7. ENTER NAME AND BUSINESS ADDRESS OF DIRECTORS HERE - ATTACH 2ND PAGE IS NECESSARY

NAME- SAME AS OFFICERS ADDR- CITY- ST- ZIP-
NAME- ADDR- CITY- ST- ZIP-
NAME- ADDR- CITY- ST- ZIP-

8. BRIEFLY DESCRIBE THE NATURE OF THE BUSINESS- Endstage Renal Dialysis

DIALYSIS CARE OF NORTH CAROLINA, INC.

9. DATE- August 5, 1992 SIGNED- [Signature]
(FORM MUST BE SIGNED BY OFFICER OF CORPORATION)

NAME- R. Gregg Hill TITLE- Vice President

TYPE OR PRINT NAME AND TITLE

This form should be returned by the DUE DATE shown above with a check for \$10.00 to:
SECRETARY OF STATE, ANNUAL REPORT SECTION, POST OFFICE 29525, RALEIGH NC 27626-0525.

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State of North Carolina
Department of the Secretary of State

EFFECTIVE
ELAINE F. MARSHALL
SECRETARY OF STATE
NORTH CAROLINA

ARTICLES OF AMENDMENT

Pursuant to §55-10-06 of the General Statutes of North Carolina, the undersigned corporation hereby submits the following Articles of Amendment for the purpose of amending its Articles of Incorporation:

1. The name of the corporation is: *Dialysis Care of North Carolina, Inc.*
2. The text of each amendment adopted is as follows: *(State below or attach)*


Paragraph 1 of the corporation's Articles of Incorporation is amended in its entirety to read as follows:

1. The name of the corporation is: *Neil Realty Co.*
3. If an amendment provides for an exchange, reclassification or cancellation of issued shares, provisions for implementing the amendment, if not contained in the amendment itself, are as follows: *N/A*
4. The date of adoption of each amendment was as follows: *November 12, 1997*
5. *(Check either a, b, c, or d, whichever is applicable)*
 - a. _____ The amendment(s) was (were) duly adopted by the incorporators prior to the issuance of shares.
 - b. _____ The amendment(s) was (were) duly adopted by the board of directors prior to the issuance of shares.
 - c. _____ The amendment was duly adopted by the board of directors without shareholder approval as shareholder approval was not required.
 - d. X The amendment was approved by shareholder action. Shareholder approval for the Articles of Amendment were obtained as required by Chapter 55 of the North Carolina General Statutes.
6. These articles will be effective upon filing.

C:\0179437.02

This the 14th day of November, 1997.

DIALYSIS CARE OF NORTH CAROLINA, INC.

By: 
R. Gregg Hill
Vice President

NOTES:

1. Filing fee is \$50. One executed original and one exact or conformed copy of these articles must be filed with the Secretary of State.

CORPORATIONS DIVISION 300 N. SALISBURY STREET RALEIGH, NC 27603-5909

C#0179437.02



Elaine F. Marshall
Secretary

North Carolina

DEPARTMENT OF THE SECRETARY OF STATE

PO Box 29622 Raleigh, NC 27626-0622 (919)807-2000

Date: 10/15/2010

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Corporation Names

Name	Name Type
NC NEIL REALTY CO.	LEGAL
NC DIALYSIS CARE OF NORTH CAROLINA, INC.	PREV LEGAL

Business Corporation Information

SOSID:	0191310
Status:	Current-Active
Effective Date:	6/30/1986
Dissolution Date:	
Annual Report Due Date:	
Citizenship:	DOMESTIC
State of Inc.:	NC
Duration:	PERPETUAL

Registered Agent

Agent Name:	LANGDON, ROBERT E., II.
Office Address:	223 HWY 70 EAST GARNER NC 27529
Mailing Address:	223 HWY 70 EAST, SUITE 100 GARNER NC 27529

Principal Office

Office Address:	223 HIGHWAY 70 EAST GARNER NC 27529
Mailing Address:	223 HWY 70 EAST, SUITE 100 GARNER NC 27529

Officers

Title:	PRESIDENT
Name:	VICKIE MOORE
Business Address:	PO BOX 6159 KINSTON NC 28501-0159
Title:	SECRETARY
Name:	LUCY HILL
Business Address:	1435 HWY 258 NORTH KINSTON NC 28504

Stock

Class	Shares	No Par Value	Par Value
COMMON	100000		1

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NORTH CAROLINA

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PROCESSED BY _____
REPORT DUE DATE- 11-29-1997

NOTICE DATE- 09-30-1997

DATE OF ORG- 09-26-1997

LLC ID- 0438652

FILING NO- A001

STATE OF ORG- DE

1. REGISTERED AGENT & REGISTERED OFFICE MAILING ADDRESS ENTER AGENT NAME & MAILING ADDRESS CHANGE HERE -

DIALYSIS CARE OF NORTH CAROLINA, LLC
C/O C T CORPORATION SYSTEM
225 HILLSBOROUGH ST
RALEIGH NC 27603

2. STREET ADDRESS OF REGISTERED OFFICE ENTER STREET ADDRESS CHANGE HERE -

225 HILLSBOROUGH ST
RALEIGH NC 27603
COUNTY - WAKE

3. IF REGISTERED AGENT CHANGED, SIGNATURE OF NEW AGENT
SIGNATURE CONSTITUTES CONSENT TO APPOINTMENT

N/A

4. ENTER PRINCIPAL OFFICE ADDRESS HERE - DIALYSIS CARE OF NORTH CAROLINA, LLC

ADDR- 223 HIGHWAY 70 EAST
CITY- GARNER ST-NC ZIP- 27529

5. ENTER FEDERAL EMPLOYER ID NUMBER HERE -

NUMB- [REDACTED]

6. ENTER NAME AND BUSINESS ADDRESS OF MANAGERS HERE -

NAME- TOTAL RENAL CARE, INC. ADDR- 21250 MAWTHORNE BLVD. # 800
CITY- TORRANCE ST- CA ZIP- 90503-

NAME- ADDR- CITY- ST- ZIP-

NAME- ADDR- CITY- ST- ZIP-

NAME- ADDR- CITY- ST- ZIP-

7. BRIEFLY DESCRIBE THE NATURE OF ITS BUSINESS - OUTPATIENT DIALYSIS CARE

DIALYSIS CARE OF NORTH CAROLINA, LLC

8. SIGNED _____ DATE- 11/25/97

(FORM MUST BE SIGNED BY MANAGER OF LLC)

NAME- BARRY COSGROVE VP/GENERAL COUNSEL

TYPE OR PRINT NAME

This form should be returned by the DUE DATE shown above with a check for \$200.00 to:
SECRETARY OF STATE, ANNUAL REPORT SECTION, POST OFFICE 29525, RALEIGH NC 27626-0525.

LLC5

.990419052

State of North Carolina
Department of the Secretary of State
APPLICATION FOR AMENDED CERTIFICATE OF AUTHORITY
FOR LIMITED LIABILITY COMPANY

J. J. 380652
FILED
FEB 4 1999
EFFECTIVE
ELAINE F. MARSHALL
SECRETARY OF STATE
NORTH CAROLINA

Pursuant to §57C-7-05 of the General Statutes of North Carolina, the undersigned limited liability company hereby applies for an Amended Certificate of Authority to transact business in the State of North Carolina, and for that purpose submits the following statement.

1. The name of the limited liability company is: DIALYSIS CARE OF NORTH CAROLINA, LLC

2. The name the limited liability company is currently using in the State of North Carolina is:
DIALYSIS CARE OF NORTH CAROLINA, LLC dba: DCNG, LLC

3. The state or country of organization is: Delaware

4. The date the limited liability company was authorized to transact business in the State of North Carolina is:
September 26, 1997

5. The changes being made are as follows:

#1: The name of the liability company is:
TOTAL RENAL CARE OF NORTH CAROLINA, LLC

6. Attached is a certificate of existence (or document of similar import), duly authenticated by the secretary of state or other official having custody of limited liability company records in the state or country of organization.

7. This application will be effective upon filing, unless a date and/or time is specified: _____

This the 2th day of January, 19 99

TOTAL RENAL CARE OF NORTH CAROLINA, LLC
Name of Limited Liability Company
[Signature]
Signature
BARRY C. COSGROVE, Vice-Pres.
Type or Print Name and Title

NOTE:

1. Filing fee is \$50. This application and one exact or conformed copy of this application must be filed with the Secretary of State.
CORPORATIONS DIVISION 300 N. SALISBURY STREET RALEIGH, NC 27603-5809

696 S.E.2d 163
 (Cite as: 696 S.E.2d 163)

H

Court of Appeals of North Carolina.
 MISSION HOSPITALS, INC., Petitioner,
 and
 North Carolina Radiation Therapy Management Services, Inc., d/b/a 21st Century Oncology, Petitioner-Intervenor,
 v.
 NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION (Formerly Division of Facility Services[.]) Certificate of Need Section, Respondent,
 and
 Asheville Hematology and Oncology Associates, P.A.,
 Respondent-Intervenor.
 No. COA08-1478.

July 6, 2010.

Background: Oncology treatment center sought a no-review determination from the Certificate of Need (CON) Section of the Department of Health and Human Services, Division of Facility Services (Agency), for relocation of offices and acquisition of radiation treatment equipment. After no-review determinations were issued, hospital filed a petition for a contested case hearing. Competing treatment center intervened. The ALJ issued a recommended decision affirming the no-review determinations, and petitioners filed joint exceptions. After a hearing the Agency reversed, and treatment center appealed. The Court of Appeals, 189 N.C.App. 263, 658 S.E.2d 277, vacated and remanded. On remand, the Agency determined that acquisition and expansion did not require a CON, and petitioners appealed.

Holdings: The Court of Appeals, Stephens, J., held that:

- (1) lease created a vested right in applying prior CON law;
- (2) costs associated with the record and verify system were properly excluded from the total cost of linear accelerator (LINAC);
- (3) CT scanner was exempt from CON requirements;

- (4) Agency could use fair market value of used diagnostic contrast equipment rather than full cost when allocating portion to cost of CT scanner;
- (5) expanded and relocated physician office building was exempt from CON review;
- (6) lease of building to house center was an "operating lease"; and
- (7) center did not incur any additional staff costs pertinent to CON review.

Affirmed.

West Headnotes

[1] Administrative Law and Procedure 15A ↪791

15A Administrative Law and Procedure
 15AV Judicial Review of Administrative Decisions
 15AV(E) Particular Questions, Review of
 15Ak784 Fact Questions
 15Ak791 k. Substantial evidence. Most

Cited Cases

Under whole record review, an agency's decision should be reversed only if it is not supported by substantial evidence.

[2] Statutes 361 ↪219(1)

361 Statutes
 361VI Construction and Operation
 361VI(A) General Rules of Construction
 361k213 Extrinsic Aids to Construction
 361k219 Executive Construction
 361k219(1) k. In general. Most Cited

Cases

North Carolina law gives great weight to the agency's interpretation of a statute it administers.

[3] Health 198H ↪240

198H Health
 198HI Regulation in General
 198HI(C) Institutions and Facilities
 198Hk236 Licenses, Permits, and Certificates
 198Hk240 k. Need, public necessity. Most

696 S.E.2d 163

(Cite as: 696 S.E.2d 163)

Cited Cases

Oncology treatment center's lease created a vested right in applying prior certificate of need (CON) law, rather than amended law, to proposed relocation of oncology treatment center, even though parties modified lease after amended law took effect. West's N.C.G.S.A. § 131E-176(3).

[4] Constitutional Law 92 ↪2630

92 Constitutional Law

92XXI Vested Rights

92k2630 k. Constitutional guarantees in general.

Most Cited Cases

Constitutional Law 92 ↪2660

92 Constitutional Law

92XXII Obligation of Contract

92XXII(A) In General

92k2660 k. In general. Most Cited Cases

A "vested right" is a common law right that is based upon the constitutional right prohibiting Congress or the State from enacting laws which would impair a party's right to contract. U.S.C.A. Const.Amends. 5, 14; West's N.C.G.S.A. Const. Art. 1, § 19.

[5] Constitutional Law 92 ↪2641

92 Constitutional Law

92XXI Vested Rights

92k2641 k. Licenses, permits, franchises, and other privileges. Most Cited Cases

The proper question for consideration of the issue of vested rights within the context of amendments to statutory law impacting government-issued permit is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect.

[6] Constitutional Law 92 ↪2641

92 Constitutional Law

92XXI Vested Rights

92k2641 k. Licenses, permits, franchises, and other privileges. Most Cited Cases

The good faith reliance of the concerned parties upon

the then-existing state of the law is a consideration in determining whether rights have vested, within the context of amendments to statutory law impacting government-issued permits.

[7] Constitutional Law 92 ↪2632

92 Constitutional Law

92XXI Vested Rights

92k2631 Property in General

92k2632 k. In general. Most Cited Cases

A lease of real estate is the type of contract which creates a vested right.

[8] Landlord and Tenant 233 ↪37

233 Landlord and Tenant

233II Leases and Agreements in General

233II(B) Construction and Operation

233k37 k. Application of general rules of construction. Most Cited Cases

The terms of leases are interpreted according to general principles of contract law.

[9] Landlord and Tenant 233 ↪33

233 Landlord and Tenant

233II Leases and Agreements in General

233II(A) Requisites and Validity

233k33 k. Modification. Most Cited Cases

Under contract law, a modification to a lease does not necessarily create a new contract; rather, the intention of the parties governs.

[10] Health 198H ↪240

198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk236 Licenses, Permits, and Certificates

198Hk240 k. Need, public necessity. Most

Cited Cases

Oncology treatment center acquired linear accelerator (LINAC) and CT scanner by "comparable arrangement" when center's business manager acquired the equipment prior to amendment of certificate of need (CON) law, and thus center had vested rights in the equipment under

696 S.E.2d 163
 (Cite as: 696 S.E.2d 163)

prior CON law rather than amended law; in addition, Department of Health and Human Services (DHHS) rendered its no-review decision determining that center's project did not require a CON prior to the effective date of the amendment to the CON law. West's N.C.G.S.A. § 131E-176(3).

[11] Health 198H ↪240

198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk236 Licenses, Permits, and Certificates

198Hk240 k. Need, public necessity. Most

Cited Cases

Record and verify system was not "essential to acquiring and making operational" linear accelerator (LINAC) acquired by oncology treatment center, and thus costs associated with the record and verify system were properly excluded from the total cost of the LINAC for purposes of determining whether the cost of the LINAC exceeded the threshold under the certificate of need (CON) law; rather, record and verify system, which consisted of a computer and software that processed raw data, including numerical values generated from the views of a tumor and tissues taken by CT simulator and the data making up the different numerical parameters of the treatment plan, verifying dosage, rate and time of delivery, and created a record in the computer memory of what transpired during a patient's treatment, was a separate treatment planning system apart from the LINAC and was properly allocated to treatment planning equipment. G.S. § 131E-176(14f) (2004).

[12] Health 198H ↪240

198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk236 Licenses, Permits, and Certificates

198Hk240 k. Need, public necessity. Most

Cited Cases

The overriding legislative intent behind the certificate of need (CON) process is the regulation of major capital expenditures which may adversely impact the cost of health care services to the patient. West's N.C.G.S.A. §

131E-176.

[13] Health 198H ↪240

198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk236 Licenses, Permits, and Certificates

198Hk240 k. Need, public necessity. Most

Cited Cases

Construction costs, including costs associated with construction of space to house mechanical room or mold room and "general conditions" costs such as contractor employee salaries, construction trailer, office supplies, storage trailers, temporary utilities, waste receptacles, and clean-up, were not attributable to oncology treatment center's acquisition of linear accelerator (LINAC) and thus were not properly excluded when calculating total costs for the LINAC for purposes of certificate of need (CON); general conditions costs attributable to the LINAC vault did not increase the cost of general conditions related to the cost of construction for center's medical office building, and costs associated with constructing space for rooms were "developer's base costs" not included in the cost of health service. G.S. § 131E-176 (14f) (2004).

[14] Health 198H ↪240

198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk236 Licenses, Permits, and Certificates

198Hk240 k. Need, public necessity. Most

Cited Cases

Oncology treatment center's total cost to acquire and make CT scanner operational was \$488,547.62 and thus scanner was exempt from certificate of need (CON) requirements, which set \$500,000 threshold for medical diagnostic equipment. West's N.C.G.S.A. § 131E-176 (7a).

[15] Health 198H ↪240

198H Health

198HI Regulation in General

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198HI(C) Institutions and Facilities
 198Hk236 Licenses, Permits, and Certificates
 198Hk240 k. Need, public necessity. Most

Cited Cases

A certificate of need (CON) must be obtained before establishing a diagnostic center. West's N.C.G.S.A. § 131E-176(7a).

[16] Health 198H ↪240

198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk236 Licenses, Permits, and Certificates

198Hk240 k. Need, public necessity. Most

Cited Cases

Department of Health and Human Services (DHHS) could use fair market value of used diagnostic contrast equipment transferred from another facility to oncology treatment center's new facility, rather than full cost of the equipment when originally purchased, when allocating portion of that cost to CT scanner for purposes of determination as to whether CT scanner required certificate of need (CON); statute required DHHS to use greater of the cost or fair market value of the equipment, which was estimated to be three to four years old and had fully depreciated by the time it was acquired by center, equipment was estimated to be worth 40% of the cost of purchasing new equipment, and equipment had no market value because there was no secondary market in which it could be sold. West's N.C.G.S.A. § 131E-176(7a).

[17] Health 198H ↪240

198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk236 Licenses, Permits, and Certificates

198Hk240 k. Need, public necessity. Most

Cited Cases

Petitioners failed to identify any evidence, or argue, that diagnostic counter equipment was essential to acquiring and making operational CT scanner, and thus Court would decline to conclude that Department of Health and Human Services (DHHS) erred when excluding

cost of that equipment from cost of the CT scanner for purposes of determining whether CT scanner's cost exceeded threshold which triggered certificate of need (CON) requirement. West's N.C.G.S.A. § 131E-176(7a).

[18] Health 198H ↪240

198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk236 Licenses, Permits, and Certificates

198Hk240 k. Need, public necessity. Most

Cited Cases

Petitioners' claim on appeal that CT room and control room would not "be necessary except for the CT" scanner was insufficient to establish that rooms were essential to the installation and operation of the CT scanner, and thus appellate court would decline to conclude that Department of Health and Human Services (DHHS) erred when excluding cost of the rooms from cost of the CT scanner for purposes of determining whether CT scanner's cost exceeded threshold which triggered certificate of need requirement in light of DHHS findings that "estimates and allocations of total construction costs related to the CT scanner as presented at the hearing properly included the construction of all space essential to the installation and operation of the CT scanner." West's N.C.G.S.A. § 131E-176(7a).

[19] Health 198H ↪240

198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk236 Licenses, Permits, and Certificates

198Hk240 k. Need, public necessity. Most

Cited Cases

Oncology treatment center's building lease was an operating lease, not a capital lease, which was not subject to certificate of need (CON) review, and thus no part of lease was attributable to CT scanner for purposes of determination as to whether CT scanner exceeded threshold triggering CON review. West's N.C.G.S.A. § 131E-176(7a).

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[20] Health 198H ↻240

198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk236 Licenses, Permits, and Certificates

198Hk240 k. Need, public necessity. Most

Cited Cases

Existing oncology treatment center's expanded and relocated physician office building to accommodate linear accelerator, CT scanner, and treatment planning equipment did not require treatment as health service facility, but was exempt from of certificate of need (CON) review, as costs essential to acquiring the equipment and making it operational did not exceed \$2,000,000 threshold after excluding part of the project exempt as a physician office building. West's N.C.G.S.A. §§ 131E-176(9b), (16)(b), 131E-184; G.S. § 131E-176 (18a) (Repealed).

[21] Health 198H ↻240

198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk236 Licenses, Permits, and Certificates

198Hk240 k. Need, public necessity. Most

Cited Cases

A physician office building exempt from the certificate of need (CON) law may include certain non-exempt portions, such as an oncology treatment center. West's N.C.G.S.A. § 131E-184(a)(9).

[22] Health 198H ↻240

198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk236 Licenses, Permits, and Certificates

198Hk240 k. Need, public necessity. Most

Cited Cases

The certificate of need (CON) law exempts a capital expenditure to develop or expand a health service or a health service facility, or which relates to the provision of a health service if it is in the physician office building. West's N.C.G.S.A. §§ 131E-176(16), 131E-184

(a)(9), (b).

[23] Health 198H ↻240

198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk236 Licenses, Permits, and Certificates

198Hk240 k. Need, public necessity. Most

Cited Cases

Oncology treatment center's lease of building which was to house center was an "operating lease" which was not a capital expenditure for purposes of certificate of need (CON) law, as present value at the beginning of the lease term of the minimum lease payments was less than 90% of the fair market value of the leased property. West's N.C.G.S.A. § 131E-176(2d), (16)(b).

[24] Health 198H ↻240

198H Health

198HI Regulation in General

198HI(C) Institutions and Facilities

198Hk236 Licenses, Permits, and Certificates

198Hk240 k. Need, public necessity. Most

Cited Cases

Oncology treatment center did not incur any additional staff costs as a result of its expansion and relocation project, and thus there were no additional staff costs attributable to the relocation and expansion to add to expansion costs for purposes of determining whether expansion required certificate of need (CON). West's N.C.G.S.A. § 131E-176(7a), (16)(b); G.S. § 131E-176 (14d) (Repealed).

***166** Appeal by Petitioners from the final agency decision signed 30 May 2008 by Jeff Horton, Acting Director for the North Carolina Department of Health and Human Services, Division of Health Service Regulation. Heard in the Court of Appeals 8 June 2009. Smith Moore Leatherwood LLP, Greensboro, by Maureen Demarest Murray and Allyson Jones Labban, for Petitioner.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., Raleigh, by Susan H. Hargrove, Sean A. Tim-

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mons, and Courtney H. Mischen, for Petitioner-Intervenor.

Attorney General Roy Cooper, by Assistant Attorney General June S. Ferrell, for Respondent.

Bode, Call & Stroupe, L.L.P., Raleigh, by Robert V. Bode, S. Todd Hemphill, Diana Evans Ricketts, and Matthew A. Fisher, for Respondent-Intervenor.

STEPHENS, Judge.

The present matter was before this Court on a prior appeal from a Final Agency Decision (“the first FAD”) entered 7 August 2006 by the North Carolina Department of Health and Human Services (“DHHS” or “the Agency”). The pertinent factual background of this matter up to the time of that appeal is set out in our opinion in *Mission Hospitals, Inc. v. N.C. Dep’t of Health and Human Services*, 189 N.C.App. 263, 658 S.E.2d 277 (2008) (“*Mission I*”).^{FN1} However, to aid understanding of the current appeal, we find it useful to set forth the factual background and procedural history which brought this matter to our Court.

FN1. Since the entry of our Court’s decision in *Mission I*, the name of Respondent North Carolina Department of Health and Human Services, Division of Facility Services, Certificate of Need Section has been changed to “North Carolina Department of Health and Human Services, Division of Health Service Regulation, Certificate of Need Section.”

Factual Background and Procedural History

On 1 February 2005, Asheville Hematology (“AHO” or appellant), an oncology treatment center, sought a “no-review” determination from the Certificate of Need (“CON”) Section of the North Carolina Department of Health and Human Services, Division of Facility Services (“Agency”), for a proposed relocation of its offices and acquisition of medical equipment that would allow AHO to provide radiation therapy. AHO presented four proposals: acquisition of a linear accelerator (“LINAC”), acquisition of a CT scanner, acquisition of treatment planning equipment, and relocation of their oncology treatment center. AHO sought a ruling that its proposals “do not require certificate of need review and are not new institutional health services, within the meaning of the CON law.”

In determining the allocable costs for the CT scanner and LINAC projects, AHO applied upfitting costs to accommodate the CT scanner and LINAC and did not allocate general office construction costs, which were instead attributed to the base costs of the developer. AHO clearly specified in its letter which costs were attributed to each project and which costs were attributed to the developer’s base costs. *167 The submitted costs for the four projects, and associated thresholds against which AHO analyzed each of the proposals as a new institutional health service under the statute, were as follows:

<u>Project</u>	<u>AHO’s Cost</u>	<u>Statutory</u> <u>Threshold for</u> <u>“No Review”</u>
CT Scanner	\$ 488,547	\$ 500,000 ²
LINAC	\$ 746,416	\$ 750,000 ³
Treatment Planning	\$ 381,135	\$ 750,000 ⁴
Relocation	\$1,985,278	\$2,000,000 ⁵

FN2. See N.C. Gen.Stat. § 131E-176(7a) (2003) (governing diagnostic centers).

FN3. See N.C. Gen.Stat. § 131E-176(14f) (2003) (governing acquisition of major medical

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equipment).

FN4. *Id.*

FN5. See N.C. Gen.Stat. § 131E-176(16) (2003) (governing capital expenditures).

On 2 August 2005, the CON Section issued four "no-review" letters, reviewing each proposal separately and confirming that none required a Certificate of Need. Each letter stated that "this determination is binding only for the facts represented by you." Shortly thereafter, the General Assembly amended N.C. Gen.Stat. § 131E-176(16) to require a CON for the acquisition of linear accelerators, regardless of cost, as a new institutional health service. (2005 Sess. Laws ch. 325, § 1). The relevant portion of the amendment became effective on 26 August 2005.

On 1 September 2005, Mission Hospitals, Inc. ("Mission" or "petitioner"), a nonprofit hospital in Asheville, North Carolina, filed a petition for a contested case hearing in the Office of Administrative Hearings ("OAH"), challenging each of the No-Review Determinations. North Carolina Radiation Therapy Management Services, Inc. d/b/a 21st Century Oncology ("21st Century" and, with Mission, "petitioners"), an oncology treatment center in Asheville, North Carolina, intervened in the proceeding, also contesting the No-Review Determinations. AHO intervened in support of the CON Section's No-Review Determinations.

On 26 May 2006, the ALJ entered a 65-page Recommended Decision affirming the No-Review Determinations. The ALJ agreed with the CON Section that the relocation of the existing oncology treatment center and the acquisition of equipment as proposed by AHO and addressed in the August 2005 No-Review determinations did not require Certificates of Need. The ALJ recommended that no CON was necessary because neither the relocation nor the acquisition projects "constitute[d] a 'new institutional health service' as defined by N.C. Gen.Stat. § 131E-176 at the time that [AHO] acquired vested rights to develop these services."

Mission I, 189 N.C.App. at 265-67, 658 S.E.2d at 278-79.

On 7 August 2006, DHHS entered the first FAD reversing the ALJ's recommended decision. AHO appealed from the first FAD to the Court of Appeals. See *id.* This Court vacated the first FAD upon holding that the Division of Facility Services of DHHS erred by engaging in *ex parte* communications with one party without notice to the other parties or affording an opportunity to all parties to be heard, and that these *ex parte* communications were prejudicial. *Id.* at 276, 658 S.E.2d at 285.

On remand from this Court, Jeff Horton, Acting Director of the Division of Health Service Regulation of DHHS, entered a second FAD ("FAD") on 30 May 2008. In its FAD, DHHS adopted Administrative Law Judge ("ALJ") Beecher R. Gray's Recommended Decision that AHO's acquisition of a LINAC and a CT scanner and expansion of the oncology treatment center did not require a CON. From the FAD adopting the recommendations of the ALJ, Petitioners appeal.

Standard of Review

[1] Pursuant to N.C. Gen.Stat. § 150B-34(c),

in cases arising under Article 9 of Chapter 131E of the General Statutes, the administrative law judge shall make a recommended decision or order that contains findings of fact and conclusions of law. A final decision shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37(a) and shall *168 include findings of fact and conclusions of law. The final agency decision shall recite and address all of the facts set forth in the recommended decision. For each finding of fact in the recommended decision not adopted by the agency, the agency shall state the specific reason, based on the evidence, for not adopting the findings of fact and the agency's findings shall be supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31. The provisions of G.S. 150B-36 (b), (b1), (b2), (b3), and (d), and G.S. 150B-51 do not apply to cases decided under this subsection.

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N.C. Gen.Stat. § 150B-34(c) (2007).

It is well settled that in cases appealed from administrative tribunals, “[q]uestions of law receive *de novo* review,” whereas fact-intensive issues “such as sufficiency of the evidence to support [an agency’s] decision are reviewed under the whole-record test.” *In re Greens of Pine Glen Ltd. Part.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). Thus, where the gravamen of an assigned error is that the agency violated subsections 150B-51(b)(1), (2), (3), or (4) of the APA, a court engages in *de novo* review. Where the substance of the alleged error implicates subsection 150B-51(b)(5) or (6), on the other hand, the reviewing court applies the “whole record test.”

N.C. Dep’t of Env’t & Natural Res. v. Carroll, 358 N.C. 649, 659, 599 S.E.2d 888, 894-95 (2004) (internal citations omitted). Under whole record review, the Agency’s decision should be reversed only if it is not supported by substantial evidence. *Total Renal Care of N.C. v. N.C. Dep’t of Health & Human Servs.*, 171 N.C.App. 734, 739, 615 S.E.2d 81, 84 (2005).

[2] North Carolina law gives great weight to the Agency’s interpretation of a law it administers. *Frye Reg’l Med. Cir. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999); *see also Carpenter v. N.C. Dep’t of Human Res.*, 107 N.C.App. 278, 279, 419 S.E.2d 582, 584 (1992) (When a court reviews an agency’s interpretation of a statute it administers, so long as the agency’s interpretation is reasonable and based on a permissible construction of the statute, the court should defer to the agency’s interpretation of the statute.); *High Rock Lake Ass’n. v. N.C. Envtl. Mgmt. Comm’n*, 51 N.C.App. 275, 279, 276 S.E.2d 472, 475 (1981) (The interpretation of a statute given by the agency charged with carrying it out is entitled to great weight.).

Discussion

I. Amendment to the CON Law

A CON is “a written order which affords the person so designated as the legal proponent of the proposed

project the opportunity to proceed with the development of such project.” N.C. Gen.Stat. § 131E-176(3) (2007). The CON Law, *inter alia*, regulates the acquisition of certain types of equipment. *See Total Renal Care v. Dep’t of Health & Human Servs.*, 195 N.C.App. 378, 379-82, 673 S.E.2d 137, 139-40 (2009) (setting forth the history and purpose of the CON Law and the procedure involved in obtaining a CON in North Carolina).

AHO submitted a request for a CON determination to the Agency on 1 February 2005. This submission was made in good faith reliance on the CON Law then in existence, N.C. Gen.Stat. § 131E-175, *et. seq.* (2003) (the “prior CON Law”). The CON Law was amended effective 26 August 2005 (“the amended CON Law”), more than six months after AHO’s initial submission to the Agency. The amended CON Law changed certain definitions regarding oncology treatment centers and the acquisition and operation of new LINACs. As a result of the amendment, the statutory definition for oncology treatment center was stricken from the text of N.C. Gen.Stat. § 131E-176(18a), and a new definition was added to section 131E-176 defining LINACs.

Petitioners argue that the amended CON Law applies to AHO’s acquisition of medical equipment and expansion of its oncology center. Specifically, Petitioners argue that AHO did not have a vested right in the prior CON Law and that AHO acquired the LINAC and CT scanner for purposes of the CON Law after the amendment became effective.*169 We are not persuaded by Petitioners’ contentions, as addressed below.

A. Building Lease

[3] On 6 June 2005, AOR Management, as managing agent for AHO, entered into a lease with CC Asheville MOB for the building to which AHO would relocate. AOR Management and CC Asheville MOB modified this lease by amendment twice after the CON Law was amended on 26 August 2005. In its FAD, the Agency found that “the only reasonable reading of the Lease and its subsequent amendments is to view all three writings as one contract memorialized by multiple writings, as contemplated by the Statute of Frauds in North Caro-

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lina." Furthermore, the Agency found that "for the purposes of determining the vesting of rights in the Lease of the Building, as set forth above, [AHO] had vested rights in such Lease as of June 6, 200[5]."

[4][5][6] A vested right is a common law right that is based upon the constitutional right prohibiting Congress or the State from enacting laws which would impair a party's right to contract. U.S. Const. amends. V, XIV; N.C. Const. Art. 1, § 19; see *Lester Bros., Inc. v. Pope Realty & Ins. Co.*, 250 N.C. 565, 567-68, 109 S.E.2d 263, 265-66 (1959) (Plaintiff had a vested right in the individual liability of defendant, a stockholder of a corporation, stemming from purchases made from the corporation in 1955, when a 1957 amendment to the law would have relieved defendant of individual liability.). The common law of North Carolina has addressed the issue of vested rights within the context of amendments to statutory law impacting government-issued permits. See generally *Booker v. Duke Med. Ctr.*, 297 N.C. 458, 256 S.E.2d 189 (1979); *Lester Bros.*, 250 N.C. 565, 109 S.E.2d 263. "The proper question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect." *Booker*, 297 N.C. at 467, 256 S.E.2d at 195. Furthermore, the good faith reliance of the concerned parties upon the then-existing state of the law is a consideration in determining whether such rights have vested. See *Michael Weinman Assocs. Gen. P'ship v. Town of Huntersville*, 147 N.C.App. 231, 234, 555 S.E.2d 342, 345 (2001) ("[W]here property owners have reasonably made a substantial expenditure of money, time, labor or energy in a good faith reliance of a government approved land-use, they have a vested right.").

[7][8][9] A lease of real estate is the type of contract which creates a vested right. *Carolina Mineral Co. v. Young*, 220 N.C. 287, 290-91, 17 S.E.2d 119, 121-22 (1941) (right to partition land may be lost or suspended where contractual obligations between tenants are "manifestly inconsistent with partition, especially by sale of the land, and where such a sale would destroy a property right growing out of the lease and guaranteed by it"). Furthermore, the terms of leases "are interpreted

according to general principles of contract law." *Wal-Mart Stores, Inc. v. Ingles Markets, Inc.*, 158 N.C.App. 414, 418, 581 S.E.2d 111, 115 (2003). Under contract law, a modification to a lease does not necessarily create a new contract, and rather, the intention of the parties governs. *Id.* at 419, 581 S.E.2d at 115 ("[T]he heart of a contract is the intention of the parties as determined from its language, purposes, and subject matter and the situation of the parties at the time of execution." (internal citation and quotation marks omitted)).

In accordance with our case law, we agree with the Agency's interpretation of AOR Management's lease and conclude that the parties' lease created a vested right in applying the prior CON Law. Accordingly, we analyze the additional issues regarding AHO's building lease under the prior CON Law. The Agency also found that AHO had a vested right in the purchase contracts for the LINAC and CT scanner. We address the applicability of the appropriate CON Law to these purchase contracts below.

B. Acquisition of Equipment

An acquisition of equipment can occur "by donation, lease, transfer or comparable arrangement[.]" N.C. Gen.Stat. § 131E-178 (b) (2003). The prior CON Law tied its requirement of a CON for the acquisition of a LINAC or CT scanner to the total cost of the equipment. N.C. Gen.Stat. § 131E-176(7a) and (14f) (2003). The amended CON *170 Law, however, requires a CON prior to acquiring a LINAC or CT scanner, regardless of cost. N.C. Gen.Stat. § 131E-176(16)f1.5a. and f1.9. (2007). The amended CON Law requires a CON prior to making an acquisition of a "new institutional health service" by donation, lease or transfer, or comparable arrangement "if the acquisition would have been a new institutional health service if it had been made by purchase." N.C. Gen.Stat. § 131E-178(b) (2007). The definition of "[n]ew institutional health services" includes "[t]he acquisition by purchase, donation, lease, transfer, or comparable arrangement of ... [a] [l]inear accelerator[, or a] [s]imulator [by or on behalf of any person.]" N.C. Gen.Stat. § 131E-176(16)f1.5a and f1.9.

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In its FAD, the Agency made the following pertinent findings of fact:

241. Pursuant to the Management Agreement between AOR Management and Asheville Hematology, US Oncology, through its subsidiary AOR Management, will own the equipment located at Asheville Hematology's relocated oncology treatment center....

....

243. *Whether the equipment is owned by Asheville Hematology or its manager would not impact the CON Section's Determination. Whether a provider acquires medical equipment for purposes of the CON Law by purchase, lease, or other comparable arrangement, the CON Section's treatment of that acquisition is the same under the CON law. Such a comparable arrangement could be through a management agreement.... Through its Management Agreement with US Oncology, Asheville Hematology will acquire the equipment to be located in the facility.*

....

248. On June 3, 2005, US Oncology issued a purchase order to Varian for the linear accelerator described in Quotation No. EHD20050511-002....

249. Once US Oncology has issued a purchase order, that binds it to purchase the equipment described in the purchase order....

....

261. On June 8, 2005, US Oncology issued a purchase order to GE for the CT scanner....

(emphasis added).

Thus, DHHS concluded that AHO acquired the LINAC and CT scanner on 3 June and 8 June 2005, respectively, when the purchase agreements were issued. The Agency further concluded that AHO had vested rights in this equipment as of the date each piece of equipment was acquired.

Our Court's opinion in *Koltis v. N.C. Dep't of Human*

Res., 125 N.C.App. 268, 480 S.E.2d 702 (1997), defined the scope of inquiry with regard to a determination as to whether binding contracts predating a change in the laws of this State continue to be vested. In *Koltis*, the petitioners

proposed to develop and operate a new oncology treatment center in Pitt County, North Carolina. To that end, petitioners notified the North Carolina Department of Human Resources, Division of Facility Services, Certificate of Need Section (DHR) of their ongoing efforts to develop the center and requested DHR's confirmation that the project was exempt from obtaining the certificate of need required for a "new institutional health service" under N.C. Gen.Stat. § 131E-178. DHR responded that no certificate of need was required since the project did not meet the current statutory definition of a "new institutional health service" under N.C. Gen.Stat. § 131E-176(16) but warned that pending legislation would significantly change that definition and if enacted, the project would have to be reevaluated in light of the statutory amendment.

Id. at 269, 480 S.E.2d at 703. Section 131E-176 was amended effective 18 March 1993 "so that an oncology treatment center fell within the definition of a 'new institutional health service' requiring a certificate of need under N.C.G.S. § 131E-178." *Id.* at 270, 480 S.E.2d at 703. The General Assembly included a "grandfather" provision, however, "which excepted from application of the amended statute 'any person ... [or] corporation ... who has lawfully entered into a binding legal contract to develop and offer any service that was not a new institutional *171 health service requiring a certificate of need prior to the ratification of this act.'" *Id.* (quoting 1993 N.C. Sess. Laws ch. 7, sec. 12.). On appeal, our Court held that a mere binding contract for "consulting services related to development of the proposed oncology treatment center" which was entered into prior to the amendment to the CON Law was sufficient to create vested rights on the part of the petitioners. *Id.* at 272, 480 S.E.2d at 705.

[10] In the present case, the Agency found that AHO's purchase contracts for the LINAC and the CT scanner

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met the definition set forth in *Koltis* of valid, binding contracts, and thus, these contracts gave AHO vested rights in the equipment as of June 2005 under the prior CON Law. Petitioners argue, however, that AHO acquired the equipment after the amended CON Law went into effect, and thus, that AHO did not have any vested rights in the prior CON Law. Petitioners contend that the *purchase* of equipment by US Oncology and the *transfer* of that equipment to AHO were two separate events. Thus, Petitioners argue that although US Oncology acquired the LINAC and CT scanner in June 2005, AHO acquired the equipment when it was transferred to AHO for installation and use at AHO's oncology treatment center after 26 August 2005.

In support of their position, Petitioners argue further that the FAD in the present case contradicts the Agency's decision in 2006 in which DHHS concluded that an acquisition of a LINAC at Thomasville Medical Center ("Thomasville") occurred after the effective date of the CON Law amendment. In that case, although Forsyth Medical Center ("Forsyth") purchased a LINAC with the intended purpose of installing and using the LINAC at Thomasville, DHHS concluded that Thomasville did not acquire the LINAC until it was actually installed. Thus, although Forsyth purchased the LINAC before the amendment went into effect, DHHS concluded that the amended CON Law applied to Thomasville since the LINAC was installed at Thomasville after the new law went into effect.

In a letter titled "Review Determination & Notice to Cease and Desist" from DHHS to Thomasville, DHHS stated that

[t]he Certificate of Need Section received a December 19, 2005 letter from Forsyth Medical Center ... stating that Forsyth Medical Center had purchased a linear accelerator which it intends to install at Thomasville Medical Center. However, the proposal is a new institutional health service within the meaning of N.C. Gen.Stat. § [131E-176(16)f]1.5a because it results in the acquisition of a linear accelerator by Thomasville Medical Center by donation, lease, transfer or comparable arrangement.

The record before us does not reveal any relationship between Forsyth and Thomasville beyond Forsyth's intent to donate a LINAC to Thomasville, nor does the record include any written agreement between the two.

We conclude that Petitioners' reliance on the 2006 Agency decision is misplaced. Unlike Thomasville and Forsyth, AHO and US Oncology share a symbiotic relationship in which US Oncology serves as AHO's "Business Manager." Under the "Management Services Agreement" ("MSA"), US Oncology "provide[s] all Management Services as are necessary and appropriate for the day-to-day administration of the business aspects of AHO's operations[.]" US Oncology's responsibilities as AHO's business manager include: (1) ordering and purchasing medical supplies for AHO; (2) repairing and maintaining AHO's office; and (3) exercising special power of attorney for various purposes including billing AHO's patients. US Oncology purchased the LINAC and CT Scanner on behalf of AHO. Unlike Thomasville's relationship with Forsyth, AHO and US Oncology enjoyed a reciprocal relationship that extended far beyond the donation of a LINAC.

Thus, we conclude that AHO acquired the LINAC and CT scanner by a "comparable arrangement" (*i.e.*, its management agreement with US Oncology) when US Oncology acquired the LINAC and CT scanner, on 3 June and 8 June 2005, respectively. Accordingly, AHO had vested rights in the equipment as of June 2005 under the prior CON *172 Law. Furthermore, the Agency rendered its no-review decision on 2 August 2005 determining that AHO's project did not require a CON, prior to the 26 August 2005 effective date of the amendment to the CON Law. Accordingly, we hold that the prior CON Law applies to the determination of whether AHO's project requires a CON.

II. AHO's Acquisition of the LINAC

The Agency found the costs "essential to acquiring and making operational" the LINAC to total \$746,416.62. N.C. Gen.Stat. § 131E-176(14f) (2003). Because the total cost of the LINAC was found to be less than the \$750,000 statutory threshold, the Agency determined

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that AHO's acquisition of the LINAC did not require a CON. Petitioners argue that the Agency erroneously excluded the record and verify system and the construction costs from this total and that the inclusion of either of these omitted costs would have caused the cost of the LINAC to exceed the statutory threshold and require a CON. We are not persuaded by Petitioners' contention.

A. Record and Verify System

[11] The record and verify system's primary role is to assure that the patient is treated within the proper parameters as described in the treatment plan. The Agency describes the record and verify system as a single system consisting of a data processing computer and software that processes raw data, including numerical values generated from the views of a tumor and tissues taken by the CT simulator and the data making up the different numerical parameters of the treatment plan, verifying dosage, rate and time of delivery, and creating a record in the computer memory of what transpired during a patient's treatment.

N.C. Gen.Stat. § 131E-178 requires that a CON be obtained before any person acquires "a new institutional health service[.]" N.C. Gen.Stat. § 131E-178 (2003). An "acquisition by purchase, donation, lease, transfer, or comparable arrangement ... of major medical equipment" constitutes a "new institutional health service[.]" N.C. Gen.Stat. § 131E-176(16)p. (2003).

"Major medical equipment" means *a single unit or single system of components with related functions which is used to provide medical and other health services and which costs more than seven hundred fifty thousand dollars (\$750,000)*. In determining whether the major medical equipment costs more than seven hundred fifty thousand dollars (\$750,000), the costs of the equipment, studies, surveys, designs, plans, working drawings, specifications, construction, installation, and other activities *essential to acquiring and making operational the major medical equipment shall be included*. The capital expenditure for the equipment shall be deemed to be the fair market value of the equipment or the cost of the equipment,

whichever is greater.

N.C. Gen.Stat. § 131E-176(14f) (2003) (now subsection (14o), effective 26 August 2005) (emphasis added).

In its brief on appeal, the Agency contends that in applying the statutory phrase, "activities essential to acquiring and making operational the major medical equipment[.]" the Agency applied the customary meaning of "essential" which is "those items which are indispensable, the absence of which renders the equipment useless." N.C. Admin. Code tit. 10A, r. 14C.3102(1) (January 1994). This definition tracks the ordinary meaning of the word, "essential," which is customarily defined to mean "necessary," "indispensable," "inherent," and constituting the "intrinsic character" of a thing. *Webster's Third New International Dictionary* 777 (2002).

The Agency concluded that the record and verify system was not "essential to acquiring and making operational" the LINAC, and thus the costs associated with the record and verify system were excluded from the total cost of the LINAC. *See* N.C. Gen.Stat. § 131E-176 (14f). The Agency instead allocated the costs of the record and verify system to the treatment planning equipment.

Petitioners argue that the record and verify system is not separate from the LINAC, and that "[I]ike four-wheel drive in a vehicle, [the record and verify system] has no independent purpose or function, and record and verify services cannot be separated or occur *173 apart from the delivery of radiation by the LINAC." Petitioners contend that the following features of the record and verify system make it essential to the operation of the LINAC: (1) where the parameters of a patient's radiation plan differ from the parameters set on the LINAC, the record and verify system will not allow the LINAC to operate unless manually overridden or disengaged by the radiation therapist; (2) the record and verify system is physically connected or hard-wired to the LINAC; (3) the record and verify system communicates with the LINAC and not with the treatment planning system; and (4) and the only use for a record and verify system is for use with a LINAC in providing radiation therapy.

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[12] Petitioners' argument is inconsistent with this Court's interpretation of the CON Law, however. "[T]he overriding legislative intent behind the CON process [is the] regulation of major capital expenditures which may adversely impact the cost of health care services to the patient." *Cape Fear Mem. Hosp. v. N.C. Dep't of Human Res.*, 121 N.C.App. 492, 494, 466 S.E.2d 299, 301 (1996). In *Cape Fear*, our Court reversed the Agency's determination that Cape Fear Memorial Hospital ("Cape Fear") was required to obtain a CON prior to purchasing an image intensifier and cine camera in an effort to upgrade and expand the capabilities of its existing Angiostar cardiac catheterization equipment ("Angiostar"). *Id.* at 492-93, 466 S.E.2d at 300. This Court held that the Agency's decision would have the effect of allowing micro-management over relatively minor capital expenditures,^{FN6} and that "the legislature clearly did not intend to impose unreasonable limitations on maintaining ... or expanding ... presently offered health services." *Id.* at 494, 466 S.E.2d at 301 (citing N.C. Gen.Stat. § 131E-176(14f) (1994) (CON not required for purchase of unit or system to provide new health service which costs less than \$750,000)). Accordingly, we construed N.C. Gen.Stat. § 131E-175, *et. seq.*, as a whole to mean "that the legislature intended 'cardiac catheterization equipment' to include only the actual unit capable of performing cardiac catheterization procedures, not the component parts used to maintain, upgrade, or expand a unit." *Id.*

FN6. The cost of acquiring the image intensifier and cine camera was found to be \$232,510. *Id.* at 495, 466 S.E.2d at 301. In the present case, the fair market value of the record and verify system was found to be \$230,000.

Although the present case involves the purchase of a new LINAC and not an existing piece of equipment, our holding in *Cape Fear* is nevertheless instructive to our decision in the case *sub judice*. The Agency's determination that N.C. Gen.Stat. § 131E-176(14f) was intended to include only the LINAC and not the component parts used to maintain, upgrade, or expand the unit is consistent with our interpretation in *Cape Fear*. In determining that the record and verify system was a separate unit

and not an essential part of the LINAC, the Agency made the following pertinent findings of fact:

34. ... The Agency has interpreted [N.C. Gen.Stat. § 131E-176(14f)] to mean that if an equipment component is not required for the operation of the proposed item of major medical equipment and it is operated separately from such equipment, then the two items of equipment are not a single system of components, and the equipment component is not essential to making operational the major medical equipment....

41. In correspondence to the Agency prior to the Determination, Asheville Hematology described the record and verify system as follows:

When treating patients with radiation on a linear accelerator, the use of a record and verify system serves as an optional component of a quality control system for the radiation therapists. The record and verify system provides electronic validation of the daily treatment parameters but is not necessary in administration of radiation therapy. As such, it is an optional part of the treatment planning system, which is a separate piece of medical equipment....

*174 43. Asheville Hematology also notified the CON Section that it can operate the treatment planning system without this record and verify system....

44. Only 74 of the 94 radiation sites US Oncology manages have chosen to install a record and verify system....

45. The record and verify system is a separate piece of equipment from and is not attached to the linear accelerator. It is manufactured by a company other than Varian, the manufacturer of Asheville Hematology's proposed linear accelerator....

46. The record and verify system's primary role is to assure that the patient is treated with the proper para-

meters as described in the treatment plan....

47. The record and verify system does not turn the linear accelerator "on" for the purpose of delivering radiation. Rather, it sets up the linear accelerator so that it is ready to deliver radiation, by ensuring that treatment parameters contained in the treatment plan are accurate. In that regard, the record and verify system is an extension of the treatment planning system, because it manages the data contained in the treatment plan and provides it to the linear accelerator for delivery....

....

51. [Lee Hoffman, Chief of the CON Section,] saw the record and verify system as a communication link or a bridge between the treatment plan and the delivery of the treatment. As a result, she determined that it was part of the treatment planning [equipment] because it was to assure that the treatment delivered was consistent with the treatment plan....

The Agency's findings are supported by the testimony of AHO witnesses, Mission's expert witnesses, and by the testimony of Lee Hoffman ("Hoffman"), the Chief of the CON Section. Prior to making the no-review determination, Hoffman visited Duke Health Raleigh Hospital's radiation oncology program. Hoffman met with Duke Health Raleigh staff, viewed the LINAC, and reviewed the documentation for their record and verify system. Duke Health Raleigh treated the record and verify system consistently with the way that AHO had represented to the Agency: that is, as a separate treatment planning system apart from the LINAC.

Accordingly, the Agency's determination that the record and verify system was not "essential to acquiring and making operational" the LINAC is supported by substantial evidence in the record and is consistent with the CON Law. Petitioners' argument regarding the record and verify system is overruled.

B. Construction Costs

[13] Petitioners also argue that the Agency erroneously

excluded two categories of construction costs when calculating the total costs for the LINAC: (1) the "general conditions" costs, and (2) the costs associated with construction of the space to house the mechanical room or the mold room. Timothy Knapp, an architect and witness for 21st Century, testified that general conditions are the general contractor's costs related to the overall construction of a project which are not specifically related to any one particular aspect of the construction project. Bryan Royal ("Royal"), a project manager for one of the contractors involved with the AHO Project and a witness for AHO, testified that general conditions costs include costs such as contractor employee salaries, construction trailer, office supplies, porta-johns, storage trailers, temporary utilities, waste receptacles, and clean-up.

The Agency found that the projected cost for the LINAC was \$746,416.62. Royal testified that the general conditions costs attributable to the LINAC vault totaled \$23,418.00. Thus, had the Agency included these costs in calculating the cost of the LINAC, the total would have exceeded the \$750,000 statutory threshold and required a CON.

Petitioners' argument is flawed, however, as the general conditions costs attributable to the LINAC vault did not increase the cost of general conditions related to the cost of construction for the medical office building. In its FAD, the Agency found that "[h]ad the vault not been constructed, total general conditions would have been the same. Consequently, there [were] no additional general condition cost[s] incurred to build the [LINAC] vault." In addition, a new medical *175 office building is not "essential" to acquiring and making operational a LINAC. See N.C. Gen.Stat. § 131E-176(14f). Accordingly, the general conditions costs of the LINAC vault were properly excluded from the projected cost of the LINAC.

Petitioners also contend that the costs associated with constructing the space to house the mechanical room and mold room were erroneously excluded from the total cost of the LINAC. The Agency classified these costs as "developer's base costs" which Hoffman testified are not included in the cost of health service. The

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Agency made the following findings of fact with regard to the developer's base costs:

61. Ms. Hoffman explained her reasoning during the contested case hearing as to why developer's base costs are not included in the cost of the health service. She explained that the development of an office building, including a medical office building, is not a capital expenditure falling within the statutory definition of "new institutional health service" under the CON Law....

62. If the builder is unrelated to the entity which will be providing the health service, and is only leasing space to the health service, then the CON Section only will look at what costs are going to be incurred to make that office building a health service facility. That is consistent with the way exemptions are handled in G.S. § []131E-184(a), so the CON Section looks at no review requests the same way....

63. If the builder is a party which is related to the provider of the health service, the CON Section considers the builder to be developing the health service facility, and therefore, the entire cost of the facility would be considered....

....

70. Neither Asheville Hematology nor US Oncology owns the Building or the land on which it is being constructed. Both are owned by CC Asheville MOB....

Based on the record before us, the Agency's findings are supported by the evidence and support the Agency's conclusion that the developer's base costs were not attributable to the LINAC. Petitioners' argument is overruled.

III. AHO's Acquisition of the CT Scanner

[14] Next, Petitioners contend the Agency erroneously concluded that AHO's acquisition of the CT scanner was exempt from the CON requirements. We disagree.

[15] Under the CON Law, a CON must be obtained before establishing a diagnostic center, which is defined as

a freestanding facility, program, or provider, including but not limited to, physicians' offices, clinical laboratories, radiology centers, and mobile diagnostic programs, in which the total cost of all the medical diagnostic equipment utilized by the facility which cost ten thousand dollars (\$10,000) or more exceeds five hundred thousand dollars (\$500,000). In determining whether the medical diagnostic equipment in a diagnostic center costs more than five hundred thousand dollars (\$500,000), the costs of the equipment, studies, surveys, designs, plans, working drawings, specifications, construction, installation, and other activities essential to acquiring and making operational the equipment shall be included. The capital expenditure for the equipment shall be deemed to be the fair market value of the equipment or the cost of the equipment, whichever is greater.

N.C. Gen.Stat. § 131E-176(7a) (2003).

Because a CT scanner is considered medical diagnostic equipment, the Agency found that

the utilization of any medical diagnostic equipment, including a diagnostic CT scanner, which cost in excess of \$500,000, would cause Asheville Hematology to be a diagnostic center, which is a new institutional health service. Because Asheville Hematology is not currently a diagnostic center, it would not be able to acquire a diagnostic CT scanner without a CON, if the cost to acquire and make operational the CT scanner and the cost of any other medical diagnostic equipment currently utilized or proposed to be utilized at the facility would exceed \$500,000....

*176 The Agency determined the total cost to acquire and make operational the CT scanner to be \$488,547.62. Because the total cost was less than \$500,000, the Agency concluded that the acquisition of the CT scanner did not require a CON. The Agency made the following findings of fact with regard to the costs associated with the CT scanner:

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310. ... [T]he final purchase price for the diagnostic CT scanner of \$308,500 is reasonable and supported by the preponderance of the evidence.

311. Mr. Royal's and Mr. Kury's ^{FN7} estimates and allocations of total construction costs related to the CT scanner as presented at the hearing properly included the construction of all space essential to the installation and operation of the CT scanner. Petitioners were given a thorough opportunity to cross examine Mr. Royal and Mr. Kury on the bases for those estimates, and the witnesses were able to demonstrate that all of the essential construction costs were included and supported by back-up documentation.

FN7. "Mr. Kury" refers to Mark Kury, Vice President of Centex-Concord, the developer of the AHO project.

312. Further, ... equipment used for simulation which is not essential to the performance of diagnostic CT scans should not be included in the \$500,000 diagnostic center cost threshold, because such equipment is not medical diagnostic equipment within the meaning of the CON Law.

313. Asheville Hematology's estimate of equipment and other costs essential to the operation of the CT scanner as presented at the hearing properly identified all such essential equipment, and the cost attributed to that equipment was reasonable.

314. The preponderance of the evidence demonstrates that the actual cost to acquire and make operational the Asheville Hematology diagnostic CT scanner will not exceed \$500,000.

The above findings of fact support the Agency's conclusion that AHO's acquisition of the CT scanner did not require a CON. Petitioners, however, argue that several necessary costs were excluded from the Agency's determination, and that had any of these costs been included, the cost of the CT scanner would have exceeded the \$500,000 threshold. Among these excluded costs are: (1) the entire cost of CT diagnostic contrast equipment valued at \$21,000; (2) presently owned diagnostic

equipment totaling \$20,598; (3) the cost of constructing the CT room and control room totaling \$118,745 or alternatively \$104,716; and (4) the portion of the capital lease attributable to the CT scanner valued at \$165,156. We address each of these contested items below.

A. Total Cost of CT Diagnostic Contrast Equipment

[16] Included in the cost of the CT scanner was certain used diagnostic contrast equipment. This equipment was to be transferred from another US Oncology facility to AHO's new facility. The Agency found that

this equipment is fully depreciated and has no market value, because there is not a secondary market where it could be sold. Asheville Hematology's estimate of 40% [of the original cost of the equipment] was a conservative estimate of the equipment's value. In reality, if it could not be relocated to another US Oncology facility, it would be thrown away.

Thus, the Agency allocated \$8,400, or 40% of the original price of \$21,000, to the CT scanner for this diagnostic contrast equipment.

Petitioners argue that the entire \$21,000 should have been allocated to the CT scanner. This would add \$12,600 to the total cost of the CT scanner, bringing the total cost of the CT scanner to \$501,147.62, which is in excess of the \$500,000 CON threshold.

N.C. Gen.Stat. § 131E-176(7a) provides that "[t]he capital expenditure for the equipment shall be deemed to be the fair market value of the equipment or the cost of the equipment, whichever is greater." N.C. Gen.Stat. § 131E-176(7a). Petitioners contend that for purposes of the statute, "the cost" of the diagnostic contrast equipment was the cost of the equipment when it was originally purchased, \$21,000, which was greater than the fair market value of the equipment, *177 \$8,400. Thus, Petitioners argue that the Agency erroneously excluded \$12,600 from its calculation of the total cost of the CT scanner. We are not persuaded by Petitioners' argument.

The diagnostic contrast equipment to be used with the CT scanner was estimated to be three to four years old

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and had fully depreciated by the time it was acquired by AHO. The equipment was estimated to be worth 40% of the cost of purchasing new equipment, and the Agency found that the equipment had no market value because there was no secondary market in which it could be sold. Thus, "the greater" of the cost or fair market value of the used diagnostic contrast equipment was properly determined to be \$8,400, which was properly allocated to the cost of the CT scanner.

B. Presently Owned Diagnostic Equipment

[17] At AHO's existing facility, AHO housed a type of diagnostic equipment called a "Coulter counter," which AHO purchased in 2003 for \$20,598. Petitioners argue that the Agency erroneously excluded this amount from the total cost of the CT scanner. Petitioners, however, have identified no evidence, nor have they argued, that this piece of equipment was essential to acquiring and making operational the CT scanner. Thus, we cannot conclude that the Agency erred in excluding the presently owned diagnostic equipment from the cost of the CT scanner.

C. Construction Costs for the CT Room

[18] The Agency found that "Mr. Royal's and Mr. Kury's estimates and allocations of total construction costs related to the CT scanner as presented at the hearing properly included the construction of all space essential to the installation and operation of the CT scanner." The Agency further found that "Petitioners were given a thorough opportunity to cross examine Mr. Royal and Mr. Kury on the bases for those estimates, and the witnesses were able to demonstrate that all of the essential construction costs were included and supported by back-up documentation." Petitioners now contend that construction costs for the CT room and control room were erroneously omitted from the total cost of the CT scanner. Petitioners fail to demonstrate, however, that the Agency's findings were in error, and argue only that "[n]one of these spaces would be necessary except for the CT [scanner]." Petitioners have not shown that either the CT room or the control room was

essential to the installation and operation of the CT scanner. Accordingly, the construction costs for these spaces were properly omitted from the determination of the total cost of the CT scanner.

D. Portion of Building Lease Attributable to CT Scanner

[19] Petitioners also argue that a portion of AHO's lease of its new facility should be allocated to the CT scanner. Petitioners' argument is based on their incorrect assumption that AHO's lease was a capital lease. As we discuss *infra*, AHO's building lease is an *operating* lease, not a *capital* lease, which is not subject to CON review. Thus, no part of AHO's lease was attributable to the CT scanner and this was properly excluded.

Based on the foregoing, we conclude that the Agency correctly determined that AHO's acquisition of a CT scanner for its new facility did not require a CON. Petitioners' argument is overruled.

IV. Expansion of Oncology Treatment Center

Petitioners also argue that the Agency erroneously concluded that AHO's expansion of its existing oncology treatment center was exempt. We disagree.

A. Physician Office Building

[20] AHO was formed in 1982 to engage in the practice of medical oncology. Thus, AHO was in existence as a physician practice specializing in oncology 11 years prior to the 1993 enactment of the CON requirements for new oncology treatment centers, diagnostic centers, and acquisition of major medical equipment. In 1984, the physician owners of AHO formed a partnership^{FN8} in order to purchase*178 real estate in Asheville, North Carolina, construct a building for a medical oncology practice ("the Facility"), and lease the Facility to AHO. In its 1 February 2005 letter, AHO informed the Agency that AHO had entered into a tentative lease agreement with CC Asheville MOB^{FN9} to relocate the Facility to a new building which was constructed by CC Asheville

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MOB. CC Asheville MOB incurred all construction costs and would maintain ownership of the new building while AHO leased its space pursuant to an operating lease.

FN8. The partnership formed by the physician owners of AHO is Paschal, Jackson, Puckett and Davis General Partnership.

FN9. In AHO's 1 February 2005 letter to the Agency, the building developer and owner is referred to as "Centex Development Company." In the Agency's FAD, CC Asheville MOB is referred to as the owner of AHO's new facility. CC Asheville MOB is a subsidiary of Centex-Concord, and while it appears that Centex-Concord is affiliated with Centex Development Company, the record does not confirm this relation.

It is undisputed that AHO is an oncology treatment center within the meaning of N.C. Gen.Stat. § 131E-176 (18a). The Agency found that because of this, AHO is an existing health service facility. The Agency further found that

[u]nder the law applicable to the CON Section's Determination, an existing oncology treatment center may relocate its oncology treatment center and acquire certain items of medical equipment without obtaining a certificate of need, so long as the cost to acquire and make operational each unit of equipment does not exceed \$750,000, and so long as the combination of the costs to acquire and make operational all such equipment and all other costs related to relocating the oncology treatment center, do not exceed \$2,000,000.

Thus, the Agency treated AHO's expansion and relocation of its office building as a "physician office building" which does not require a CON so long as the total cost of expansion and relocation of said office building does not exceed \$2,000,000. See N.C. Gen.Stat. § 131E-176(16)b. and 184(a)(9) (2003).

[21] Petitioners, however, argue that because AHO was

an existing oncology treatment center, AHO's expanded and relocated office building must be treated as a "health service facility," defined by N.C. Gen.Stat. § 131E-176(9b), rather than an unregulated "physician office building." If AHO's new office building was deemed a "health service facility," the entire cost of the land and building for the relocated AHO office would be included as a "capital expenditure" which would count toward the expansion of an oncology treatment center. Thus, no part of AHO's project would be exempt under the "physician office building" exemption. Petitioners' argument is contrary to the CON Law, however. The CON Law provides that an exempt physician office building may include certain non-exempt portions, such as an oncology treatment center, which is the case here.

N.C. Gen.Stat. § 131E-184(a)(9) provides in pertinent part that

the Department shall exempt from certificate of need review a new institutional health service if it receives prior written notice from the entity proposing the new institutional health service, which notice includes an explanation of why the new institutional health service is required... [t]o develop or acquire a physician office building regardless of cost, unless a new institutional health service other than defined in G.S. 131E-176(16)b. is offered or developed in the building.

N.C. Gen.Stat. § 131E-184(a)(9) (2003). If another type of "new institutional health service" is developed in the building, N.C. Gen.Stat. § 131E-184(b) nonetheless preserves the exemption for the physician office building while allowing regulation of the nonexempt portions.

Those portions of a proposed project which are not proposed for one or more of the purposes under subsection (a) of this section are subject to certificate of need review, if these non-exempt portions of the project are new institutional health services under G.S. 131E-176(16).

N.C. Gen.Stat. § 131E-184(b) (2003).

The physician office building exemption applies to (1) developing or acquiring a physician office building re-

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ardless of cost, and (2) offering or developing "in the building" a new institutional health service as defined by *179 N.C. Gen.Stat. § 131E-176(16)b. Thus, the following projects in a physician office building are exempt:

[t]he obligation by any person of a capital expenditure exceeding two million dollars (\$2,000,000) to develop or expand a health service or a health service facility, or which relates to the provision of a health service. The cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities, including staff effort and consulting and other services, essential to the acquisition, improvement, expansion, or replacement of any plant or equipment with respect to which an expenditure is made shall be included in determining if the expenditure exceeds two million dollars (\$2,000,000).

N.C. Gen.Stat. § 131E-176(16)b. (2003).

[22] Reading N.C. Gen.Stat. §§ 131E-176(16)b.,	
	\$ 381,135.62 Costs of the treatment planning equipment
	\$ 488,547.62 Costs of the CT simulator equipment
	\$ 746,416.62 Costs of the linear accelerator equipment
	\$ 364,301.00 Costs of the construction/relocation (in letter dated 2/01/05)
	\$ 1,500.00 Costs of the view boxes (in letter dated 6/16/05)
	\$ 4,277.62 Costs for 1/4 of staff effort (in letter dated 7/11/05)
	(\$ 900.00) Less 1/4 of legal fees for no review prep (in letter dated 7/26/05)
	<hr/>
	\$1,985,278.49 Total costs

Thus, the Agency properly focused on whether the costs *essential* to acquiring this equipment and making it operational exceeded the \$2,000,000 threshold, and excluded the part of the project that was exempt as a physician office building. The Agency defines "essential" to mean "those items which are indispensable, the absence of which renders the equipment useless." N.C. Admin. Code tit. 10A, r. 14C.3102(1) (January 1994). The Agency's definition of "essential" as applied to major medical equipment has been in effect since 1993 and has not been modified by the General Assembly which suggests agreement with the Agency's interpretation. Further, the Agency's interpretation is consistent with

184(a)(9), and 184(b) together, the CON Law therefore exempts "a capital expenditure ... to develop or expand a health service or a health service facility, or which relates to the provision of a health service[.]" N.C. Gen.Stat. § 131E-176(16)b., if it is "in the [physician office] building." N.C. Gen.Stat. § 131E-184(a)(9). Accordingly, the Agency here considered the equipment which would expand the services of the oncology treatment center—the LINAC, the CT scanner, and the treatment planning equipment. The Agency found that

[t]he CON Section's "no review" determination for relocation of the existing oncology treatment center, including the acquisition of the radiation oncology treatment equipment, attributed the following activities for purpose of determining the applicability of CON review:

the General Assembly's intention because Agency

micro-management over relatively minor capital expenditures ... does not effectuate the overriding legislative intent behind the CON process, *i.e.*, regulation of major capital expenditures which may adversely impact the cost of health care services to the patient... Nevertheless, the legislature clearly did not intend to impose unreasonable limitations on maintaining ... *or* expanding ... presently offered health services.

Cape Fear Mem. Hosp., 121 N.C.App. at 494, 466 S.E.2d at 301. Accordingly, Petitioners' argument is

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overruled.

B. Building Lease

[23] Petitioners also argue that AHO's lease of the building which was to house AHO's relocated oncology treatment center was a capital lease, and thus it was a capital expenditure which should be counted toward the \$2,000,000 threshold pursuant to N.C. Gen.Stat. § 131E-176(16)b. We disagree.

In its FAD, the Agency explained that under generally accepted accounting principles ("GAAP"), a building lease may be classified as an operating lease or a capital lease, depending upon certain circumstances. A capital lease is treated differently on a company's books than an operating lease. A capital lease is considered a financing arrangement under GAAP, such that it is an asset in the balance sheet of the lessee, with an off-setting debt in the balance sheet liabilities.*180 An operating lease, however, would not be shown in the balance sheet. Rather, the expense of an operating lease would be shown in the company's income statement.

On 6 June 2005, AOR Management, a subsidiary of US Oncology and managing agent for AHO, entered into a lease with CC Asheville MOB, for a building and the land on which it was located to be used for its oncology treatment center. On 2 September 2005, AOR Management and CC Asheville MOB entered into a "First Amendment to Lease Agreement[.]" In its FAD, the Agency found that at the time the lease and the first amendment were executed, US Oncology believed the lease to be an operating lease. However, Kevin Krenzke ("Krenzke"), a certified public accountant and Vice President and Controller of US Oncology, later concluded that under GAAP, the lease and first amendment constituted a capital lease.

On 31 March 2006, AOR Management and CC Asheville MOB entered into a "Second Amendment to Lease Agreement[.]" in which the parties renegotiated the lease in a manner that changed the minimum lease payments. Krenzke applied GAAP, and concluded that the second amendment was an operating lease.

The Agency's findings in the FAD establish that AHO's lease is an operating lease and not a capital lease. Specifically, the Agency made the following pertinent findings:

281. Under FASB 13, a lease would be a capital lease if (a) the lease transfers ownership of the property at the end of the term; (b) the lease contains a bargain purchase option; (c) the lease term is equal to 75% or more of the estimated life of the leased property; or (d) the present value at the beginning of the lease term of the minimum lease payments equals or exceeds 90% of the fair market value of the leased property....

....

283. Centex-Concord, the parent company of CC Asheville MOB, is a development company engaged in the primary business of constructing, owning, leasing, and selling real estate development properties. As such, it meets the definition of a manufacturer for determining the fair market value of the property. For the same reason, the value defined in an appraisal would be the proper basis for determining whether a lease for property developed by Centex-Concord is a capital lease or an operating lease under the 90% test....

284. An appraisal of the property owned by CC Asheville MOB was conducted by Fred H. Beck and Associates ("Beck") in August 2005. Beck appraised the fair market value of the leased property as \$8,500,000....

....

288. At the time the Lease and the First Amendment were executed, it was US Oncology's understanding that the Lease was an operating lease. After the First Amendment was executed, it and the Lease were submitted by US Oncology's capital planning group to Mr. Krenzke in his financial reporting capacity, to confirm whether or not that conclusion was correct. By the time his analysis was completed, he concluded that the Lease and the First Amendment as structured

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constituted a capital lease....

....

290. [Because US Oncology prefers all leases to be operating leases,] US Oncology and Centex-Concord renegotiated the Lease so that the minimum lease payments were changed under the Second Amendment. Instead of a 2.5% annual increase in the minimum rental payment, the annual increase would be tied to the Consumer Price Index ("CPI"), with a minimum annual increase of 1% and a maximum annual increase of 4%....

....

296. For purposes of determining whether the Second Amendment is a capital lease, it is appropriate to value the property at \$8,500,000, as per the Beck appraisal. The preponderance of the evidence shows that the terms of the Second Amendment would not cause the appraised value in the Beck appraisal to decrease.

297. Further, under the Second Amendment, the present value at the beginning of the lease term of the minimum lease payments*181 would be calculated under GAAP based upon a 1% annual increase. Using those assumptions, the present value at the beginning of the lease term of the minimum lease payments would be less than 90% of the fair market value of the leased property.... *Therefore, the Second Amendment is an operating lease.*

(Emphasis added).

Petitioners argue that for purposes of the CON Law, AHO incurred the expense of the lease when it first entered into the lease on 6 June 2005. Thus, Petitioners contend that when deciding whether AHO's lease constituted a capital expenditure, the Agency should have looked at the initial lease—a *capital lease*—which, by its nature, constituted a capital expenditure. We disagree.

N.C. Gen.Stat. § 131E-176(16)b. requires a CON for a capital expenditure exceeding \$2,000,000. The CON Law defines a "capital expenditure" as

an expenditure for a project, including but not limited to the cost of construction, engineering, and equipment which under generally accepted accounting principles is not properly chargeable as an expense of operation and maintenance. *Capital expenditure includes, in addition, the fair market value of an acquisition made by donation, lease, or comparable arrangement by which a person obtains equipment, the expenditure for which would have been considered a capital expenditure under this Article if the person had acquired it by purchase.*

N.C. Gen.Stat. § 131E-176(2d) (2003) (emphasis added). Furthermore, the Agency found that a capital lease would not be "an acquisition made by donation, lease, or comparable arrangement by which a person obtains equipment," N.C. Gen.Stat. § 131E-176(2d), and therefore would not be a capital expenditure under N.C. Gen.Stat. § 131E-176(2d), because it is not a lease of equipment. Thus, even assuming *arguendo* that AHO's lease constituted a capital lease, it would not have been a capital expenditure for purposes of the CON Law. Accordingly, Petitioners' argument is overruled.

C. Staff Costs

[24] Petitioners argue that staff costs which were attributable to the relocation and expansion of AHO's oncology treatment center were erroneously excluded in the CON determination. We disagree.

The Agency considered AHO's staff costs irrespective of the relocation and expansion of its oncology treatment center and determined that AHO did not incur any additional staff costs as a result of its project. The Agency made the following findings of fact:

216. In its July 11, 2005 letter, Asheville Hematology provided documentation of \$17,110.49 in internal staff costs as of that date....

....

221. Ultimately, the evidence offered indicated that all actual internal staff costs incurred by Asheville Hematology/US Oncology to date, along with the pro-

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spective staff costs reasonably anticipated to be incurred prior to the treatment of the first patient at the new Asheville Hematology facility, total \$30,402.41....

....

227. All the foregoing staff members were salaried employees of Asheville Hematology/US Oncology and that no additional cost was incurred as a result of their efforts in furtherance of the project. Their salaries would have been paid irrespective of the Asheville Hematology Project....

228. Neither G.S. § 131E-176(7a) ("diagnostic centers") nor G.S. § 131E-176(14d) ("major medical equipment") specifically includes staff costs among the costs which are deemed essential to the operation of that equipment. Only G.S. § 131E-176(16)b ("New Institutional Health Service" / \$2 million total capital expenditure) specifically mentions staff costs in the cost threshold determination.

229. [Lee] Hoffman stated, however, that in her opinion these staff costs were nonetheless attributable to the linear accelerator, the CT scanner, the treatment planning equipment, and total capital costs for the Asheville Hematology Project, despite the fact that no additional cost was incurred*182 by Asheville Hematology/US Oncology as a result of their efforts in furtherance of the project....

230. Furthermore, Ms. Hoffman admitted that, in numerous prior no-review determinations, the Agency had not included the cost of internal staff time in furtherance of a project in the total capital costs essential to making a health service operational....

231. In light of the foregoing, there were no staff costs, above and beyond staff costs which would have otherwise been incurred by Asheville Hematology or US Oncology irrespective of the Asheville Hematology Project, and therefore, there were no additional capital costs attributable to the Asheville Hematology Project, for the efforts of salaried staff in furtherance of the Asheville Hematology Project.

232. Notwithstanding this fact, even if costs related to the efforts of salaried staff in the employ of Asheville Hematology or US Oncology in furtherance of the Asheville Hematology Project are attributable, the allocations of the staff costs associated with the development of the Asheville Hematology Project are reasonable in light of the evidence adduced.

Petitioners contend that the Agency erroneously excluded the \$30,402.41 AHO reported in internal staff costs as of 11 July 2005 from its CON determination. Petitioners do not, however, demonstrate that the Agency's findings were unsupported by substantial evidence or otherwise erroneous, and thus, this argument is overruled.

V. Certified Cost Estimate

Under the CON Law, if a licensed architect or engineer provides a valid cost estimate and certifies that the costs contained in the estimate are "equal to or less than the expenditure minimum for capital expenditure for new institutional health services, such expenditure shall be deemed not to exceed the amount for new institutional health services regardless of the actual amount expended," provided that the following requirements are met: (1) the licensed architect or engineer must certify the costs; (2) the certified cost estimate must be issued in writing at least 60 days before the obligation for the capital expenditure is incurred; and (3) the proponent must notify the Agency in writing within 30 days of any expenditure that exceeds the expenditure minimum. N.C. Gen.Stat. § 131E-178(d) (2003).

As part of its 1 February 2005 submission to the Agency, AHO provided an architect's estimate of the expected costs and a series of cost breakdowns for the proposed cancer center. AHO provided a letter and supporting materials from the licensed architect responsible for the design and management of the project as a certified estimate of the construction costs with the attached cost breakdowns. AHO's architect estimated the costs for the project to be less than the applicable thresholds in the CON Law.

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Petitioners argue that AHO's estimate did not qualify as a certified estimate under section 131E-178(d). The Agency did not ultimately decide whether the estimate provided by AHO's architect qualified as a certified cost estimate under this section, because the Agency found that the evidence established that the actual construction costs for the project would not exceed the relevant cost thresholds in the CON Law. Thus, the Agency found that section 131E-178(d) was not applicable in this instance. In light of the Agency's finding and based on our holding that the Agency properly determined the AHO project did not require a CON, we need not decide whether AHO's cost estimate constituted a certified cost estimate under section 131E-178(d).^{FN10}

FN10. Nonetheless, it is obvious from the Agency's findings set out above, which are supported by substantial evidence in the record, that Petitioners' argument lacks merit.

Conclusion

For the foregoing reasons, we affirm the Final Agency Decision adopting the recommended decision of the Administrative Law Judge.

AFFIRMED.

Chief Judge MARTIN and Judge HUNTER, JR. concur.
N.C.App., 2010.
Mission Hospitals, Inc. v. North Carolina Dept. of
Health and Human Services, Div. of Health Service
Regulation
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END OF DOCUMENT

§ 405.2136

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(a) *Standard: licensure.* Where State or applicable local law provides for the licensing of ESRD facilities, the facility is:

- (1) Licensed pursuant to such law; or
- (2) Approved by the agency of such State or locality responsible for such licensing as meeting the standards established for such licensing.

(b) *Standard: licensure or registration of personnel.* Each staff member is currently licensed or registered in accordance with applicable law.

(c) *Standard: conformity with other laws.* The facility is in conformity with applicable laws and regulations pertaining to fire safety, equipment, and other relevant health and safety requirements.

§ 405.2136 Condition: Governing body and management.

The ESRD facility is under the control of an identifiable governing body, or designated person(s) so functioning, with full legal authority and responsibility for the governance and operation of the facility. The governing body adopts and enforces rules and regulations relative to its own governance and to the health care and safety of patients, to the protection of the patients' personal and property rights, and to the general operation of the facility. The governing body receives and acts upon recommendations from the network organization. The governing body appoints a chief executive officer who is responsible for the overall management of the facility.

(a) *Standard: disclosure of ownership.* The ESRD facility supplies full and complete information to the State survey agency (§ 405.1902(a)) as to the identity of:

(1) Each person who has any direct or indirect ownership interest of 10 per centum or more in the facility, or who is the owner (in whole or in part) of any mortgage, deed of trust, note, or other obligation secured (in whole or in part) by the facility or any of the property or assets of the facility;

(2) Each officer and director of the corporation, if the facility is organized as a corporation; and

(3) Each partner, if the facility is organized as a partnership; and promptly reports to the State survey agency any

changes which would affect the current accuracy of the information so required to be supplied.

(b) *Standard: Operational objectives.* The operational objectives of the ESRD facility, including the services that it provides, are established by the governing body and delineated in writing. The governing body adopts effective administrative rules and regulations that are designed to safeguard the health and safety of patients and to govern the general operations of the facility, in accordance with legal requirements. Such rules and regulations are in writing and dated. The governing body ensures that they are operational, and that they are reviewed at least annually and revised as necessary. If the ESRD facility is engaged in the practice of hemodialyzer reuse, the governing body ensures that there are written policies and procedures with respect to reuse, to assure that recommended standards and conditions are being followed, and requires that patients be informed of the policies and procedures.

(1) The objectives of the facility are formulated in writing and clearly stated in documents appropriate for distribution to patients, facility personnel, and the public.

(2) A description of the services provided by the facility, together with a categorical listing of the types of diagnostic and therapeutic procedures that may be performed, is readily available upon request to all concerned.

(3) Admission criteria that insure equitable access to services are adopted by the facility and are readily available to the public. Access to the self-dialysis unit is available only to patients for whom the facility maintains patient care plans (see § 405.2137).

(4) The operational objectives and administrative rules and regulations of the facility are reviewed at least annually and revised as necessary by the administrative staff, medical director, and other appropriate personnel of the facility, and are adopted when approved by the governing body.

(c) *Standard: chief executive officer.* The governing body appoints a qualified chief executive officer who, as the ESRD facility's administrator, is responsible for the overall management