Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
380 Knollwood Street / Suite 530 / Winston-Salem, NC 27103
Tel: 336.774.3300 Fax: 336.774.3378
www.nelsonmullins.com

Received by the CON Section
29 OCT 2010 4:35

Franklin Scott Templeton
Tel: 336.774.3329
Fax: 336.774.3378
Scott.Templeton@nelsonmullins.com

October 29, 2010

By Hand Delivery

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

Re: Project ID No. F-8581-10
Total Renal Care of North Carolina, LLC
d/b/a Cabarrus County Dialysis
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

ec Jon M. Sundock, Esq.

~#4819-6163-7127 v.3 - 27620/09002~

COMMENTS FILED BY RENAL ADVANTAGE, INC.
IN OPPOSITION TO PROJECT I.D. NO. F-8581-10
TOTAL RENAL CARE OF NORTH CAROLINA, LLC
d/b/a CABARRUS COUNTY DIALYSIS

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 Cabarrus County Dialysis ("TRC") to develop a 12-station dialysis facility in Cabarrus County, 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, and a dominating provider of dialysis services in North Carolina. 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 the Close, Substantial Relationship Between the Applicant and the Proposed Landowner/Developer/Landlord, Fails to Name the Landowner/Developer/Landlord as a Necessary Co-Applicant, and Fails to Report and Include the Land and Base Building Cost in its Calculations

I. Identification

While TRC's Application contains a number of nonconformities, the most glaring failure of the Application is this: **TRC both mis-identifies and fails to disclose its close and substantial relationship with the landowner/developer/ landlord from whom it proposes to lease the space in which the dialysis**

facility will be operated, fails to include that landowner/developer/landlord as a co-applicant, 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] The owners of limited liability companies are called "members." TRC has two owners: *"The members of Total Renal Care of North Carolina, LLC are Total Renal Care, Inc. at 85% and Neil Realty, Co. at 15%." App. p. 4.* Total Renal Care, Inc. is identified as a wholly owned subsidiary of DaVita, Inc. *App. p. 2.* The other parent company, **Neil Realty Co.**, is not otherwise mentioned in the Application, but is discussed below.

RHGC Investments, LLC

TRC states that it proposes to lease the building in which the dialysis facility will be operated from **RHGC Investments, LLC**, which TRC identifies as both the landowner and the building owner. *App. pp. 3, 10.* TRC states on page 10 that *"RHGC Investments, LLC owns the primary site,"* and then refers the reader to Section XI, Question 1. In Section XI (*App. p. 61*), the reader is directed to Application Exhibit 24 for a *"copy of the letter from R. Gregg Hill of RHGC Investments, LLC indicating his intent to negotiate the purchase of property and construct the shell building."* TRC also states *"the developer owns the property,"* which is identified as parcel No. 5539950390 in Concord, North Carolina. *App. p. 61.* While this generates some confusion whether RHGC Investments, LLC actually owns the property or not, Exhibit 24 generates additional confusion. Application Exhibit 24 contains two letters from **R. Gregg Hill**, but in each instance he is identified as Vice President of **Hillco, Ltd.**, and not RHGC Investments, LLC. The second letter from Mr. Hill states that it is intended to serve *"as evidence that Hillco, Ltd. owns the primary site referenced below for the development of Cabarrus County Dialysis,"* and then references the same parcel number as given in the Application. *Ex. 24.* It is not at all clear from the Application why TRC states that RHGC Investments, LLC owns the land and will develop the building, but then provides evidence that Hillco, Ltd., owns the land and intends to develop the building.

[1] For the reader's convenience, citations to the Application are identified as *App. p.* __; Exhibits to the Application are *Ex.* __; and Exhibits to these Comments are *CE* __.

The Secretary of State's public records reveal that **RHGC Investments, LLC** is a North Carolina limited liability company, formed in 2007. *CE 1.* While the most recently reported managers of RHGC Investments, LLC are **Robert Hill, Jr., Stephen B. Hill**, and **Robert E. Langdon, II**, *CE 2,* **R. Gregg Hill** also recently served as a manager of RHGC Investments, LLC. *CE 3.* A search of the Cabarrus County land and tax records, however, fails to identify any land in Cabarrus County that is or has been owned by RHGC Investments, LLC.[2] RHGC Investments, LLC, the company explicitly identified by TRC as both the landowner and the developer for its dialysis facility, owns no land in Cabarrus County. R. Gregg Hill, however, is or recently was an executive of both RHGC Investments, LLC and Hillco, Ltd.

<u>Hillco, Ltd.</u>

Hillco, Ltd., the company that actually owns the land and proposes to construct the building for the dialysis center, *Ex. 24,* is a North Carolina corporation that identifies **Robert Hill, Jr.**, **Stephen B. Hill,** and **Gregg Hill** as its officers. *CE 4.* The three Hills are also present or recent managers of RHGC Investments, LLC. Note also that Hillco shows a principal office address in Kinston, and a registered office address in Garner which appears to be the same as the principal office of RHGC Investments. *Cf. CE 4, 1.* The Cabarrus County land and tax records confirm that Hillco, Ltd. owns the land on which TRC proposes to operate its dialysis facility. *CE 5.*

Hillco, Ltd., however, is not that company's original name. Hillco, Ltd., was incorporated as **Neil Realty Co.**, the same name as the company that owns 15% of the applicant TRC. *CE 6.* In 1994, when *then*-Neil Realty Co. changed its name to Hillco, Ltd., that corporate filing was signed by **Gregg Hill**, as Vice President of Neil Realty Co. *CE 6.*

<u>Neil Realty Co.</u>

These entity and name similarities require the Agency to look more closely at the present-day **Neil Realty Co.**, the 15% co-owner of the applicant TRC. Neil Realty Co. was originally incorporated as "Dialysis Care of North Carolina, Inc.," but changed its name to Neil Realty Co. in a corporate filing, again signed

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[2] http://www.co.cabarrus.nc.us/ClairsPC/search.aspx, searched on October 15, 2010.

by **R. Gregg Hill** as Vice President. *CE 7.* The registered agent for Neil Realty Co. is **Robert Langdon**, who is also a manager of RHGC Investments, LLC. *CE 8.* Neil Realty Co.'s most recently identified officers are Lucy **Hill** and Vicki Moore, who give the same Kinston post office and street addresses as those of Hillco, Ltd., the landowner/developer. *CE 8.* Even more illuminating, however, is the attached article excerpted from *Business North Carolina* magazine. *CE 9.* The article, titled "How to Keep It in the Family," is available on one of the Hill family's related company websites, and discusses Neil Realty Co. as a family business, run by **Robert O'Neil Hill, Sr. and his three sons Robert Hill Jr., Stephen Hill, and Gregg Hill**.

This chart summarizes the documented relationships between the applicant's co-owner and the two entities identified as the Project's developer:

Company	TRC Co-Owner **Neil Realty Co.**	Actual Landowner **Hillco, Ltd.**	TRC-Reported Landowner **RHGC Investments, LLC**
Original Company Name	Dialysis Care of North Carolina, Inc.	Neil Realty Co.	RHGC Investments, LLC
Executives Include	R. Gregg Hill	R. Gregg Hill 1435 Hwy 258 North Kinston, NC	R. Gregg Hill
	Stephen Hill	Stephen B. Hill 1435 Hwy 258 North Kinston, NC	Stephen B. Hill
	Robert O'Neil Hill, Jr.	Robert Hill, Jr. 1435 Hwy 258 North Kinston, NC	Robert Hill, Jr.
	Robert O'Neil Hill, Sr.		Robert E. Langdon, II
	Lucy Hill 1435 Hwy 258 North Kinston, NC		
	Vickie Moore PO Box 6159 Kinston, NC		
Office Address	223 Hwy 70 East, Suite 100 Garner, NC and 1435 US Hwy 258 N, Kinston, NC	PO Box 6159 1435 Hwy 258 North Kinston, NC	223 Hwy 70 East, Suite 100 Garner, NC
Registered Agent	Robert E. Langdon, II 223 Hwy 70 East, Suite 100 Garner, NC	Erik P. Lindberg 223 Highway 70 East Garner, NC	Robert E. Langdon, II 223 Hwy 70 East, Suite 100 Garner, NC
Supporting Exhibits	*CE 7, 8, 9*	*CE 4, 5, 6*	*CE 1, 2, 3*

In addition to the foregoing, the applicant TRC itself (Total Renal Care of North Carolina, LLC), was originally named Dialysis Care of North Carolina, LLC, essentially identical to the original name of Neil Realty Co., and previously identified its principal office address as 223 Highway 70 East in Garner. *CE 10.* **In summary, there is a clear, close relationship among the applicant TRC, its co-owner Neil Realty Co., Hillco, Ltd., the actual landowner and self-reported developer/landlord, and RHGC Investments, LLC, the TRC-reported landowner/developer/landlord.**[3]

Hillco, Ltd. is identified as operating *"about 50"* Britthaven nursing homes in North Carolina, Kentucky and Virginia, and advertises itself as a *"family owned North Carolina enterprise." CE 11.* TRC identifies 87 dialysis facilities that it and DaVita, Inc. currently operate or are developing in North Carolina. *Ex. 3, 5.* DaVita and Neil/Hillco/RHGC should have recognized that the close relationship between Neil Realty Co., as the co-owner of TRC, and Hillco, Ltd. (or RHGC Investments, LLC) as the landowner, developer, and landlord for the Project, was required to have been disclosed in the Application, and the base costs relating to the land acquisition and building shell 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 costs of the land and building that TRC's related developer is contributing to the Project. The public record reveals that the land was most recently appraised at $740,150, *CE 5,* but the land preparation and base building costs are unknown. While TRC openly associates itself with DaVita throughout the Application (DaVita being the owner of Total Renal Care, Inc., a co-owner of TRC), Neil Realty Co., Hillco, Ltd., and RHGC Investments, LLC's contributions are not disclosed to the Agency. As a substantial contributor to the Project, Hillco and/or RHGC should have been a co-applicant on the Application. As a related party to TRC, the costs that Hillco and/or

[3] In addition, and as discussed in RAI's separate Comments opposing TRC's two other Cabarrus County CON Applications currently under review, there is an additional Hill family entity, named Hill/Gray Seven, LLC, that appears to have developed twenty or more dialysis facilities for DaVita in North Carolina.

RHGC has incurred to acquire the land and would incur to develop the building shell should have been reported and accounted for in the Application. Mission Hospitals, ___ N.C. App. at ___, 696 S.E.2d at 175 (*CE 12*). 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 clarify whether Hillco or RHGC is the landlowner/ developer/landlord; TRC's failure to disclose its close relationship with the landlowner/developer/landlord, TRC's failure to name the landlowner/developer/ landlord as a necessary co-applicant on the Application, and TRC's failure to report and account for the related land and building base costs in the Application 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

A. Section II, Question 6 requires the applicant to identify *"The projected patient origin for the services. All assumptions, including the methodology by which patient origin is projected, must be stated."* On Page 11 of the Application, TRC states the assumption that the percentage of patients dialyzing on home therapies will remain constant. TRC provides no support, however, for this assumption. Because the projection is made without reasonable foundation, it is therefore misleading, and the revenue projections based upon those projections are also inaccurate and misleading, and TRC's financial and operational projections are therefore not based upon reasonable projections, and are therefore nonconforming with 10A NCAC 14C.2202(b)(6) and Criteria 3 and 5.

B. On Application page 22, under Rule 10A NCAC 14C.2204(3), TRC is required to demonstrate that accessible self-care training will be available. TRC refers to Section II, Question 2 and Section V, Question 1. On page 37, at Section V, Question 1, TRC fails to provide *any* response regarding how self-care training for intermittent peritoneal dialysis will be provided. While this may not be a predominant type of dialysis, it is nonetheless a type of dialysis for which self-care training is to be available, and TRC's failure to demonstrate that self-care will be available renders its Application nonconforming with this Rule and Criterion 8.

C. On page 24, the Rule at 10A NCAC 14C.2205(b) requires the applicant to demonstrate it will provide an ongoing program of training for nurses and technicians in dialysis techniques. TRC response refers to Section VII, Question 5, which (on page 47) refers to Exhibit 20. Exhibit 20, however, is a two-page document summarizing *initial* training for certain personnel, but the Exhibit in no way demonstrates an ongoing program of training. TRC's response therefore fails to meet the rule, and is noncompliant with Criterion 7.

D. Also on page 24 of the Application, TRC is required to describe all services that will be provided, and to explain how the facility will be organized to accommodate the provision of services. TRC's response, which does not refer to any other Sections or Exhibits of the Application, is summary and conclusory, and does not address how the facility will be organized to accommodate the provision of services (except perhaps for an isolation area). The Application is therefore nonconforming with 10A NCAC 14C.2205 and Criterion 8.

III. <u>Need/Demand</u>

At Section III, Question 9 of the Application (page 33), 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's proposed landowner/developer/landlord is closely and substantially related to TRC, although that is not disclosed in the Application, and TRC further fails to address facility costs incurred by the related party(ies). 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.

V. Coordination With Existing Healthcare Providers

A. Section V, Question 1 of the Application requires TRC to identify how certain services will be provided, and for those which are not provided on-site, to explain the manner in which patients will have access to the service. *App. p. 37.* Under Item (k), Pediatric Nephrology, TRC only indicates that "Carolinas Medical Center" will provide that service. None of the documents in the Application, including the transplant document from CMC at Exhibit 7, provides any evidence that Carolinas Medical Center will provide pediatric nephrology services to TRC. The Application is therefore nonconforming with Criteria 7 and 8 and 10A NCAC 14C.2204.

B. Section V, Question 2(c) requires TRC to *"provide a <u>written agreement</u> with a transplantation center describing the relationship with the dialysis facility and the specific services that the transplantation center will provide to patients of the dialysis facility,"* including identifying four specific criteria. *App. p. 38 (emphasis added).* TRC's response at Exhibit 7 is *not* an agreement with a transplantation center; it is instead only a very short letter from Carolinas Medical Center to the CON Section, stating that the hospital will enter into a transplant agreement with TRC when it is awarded a CON. The Application, however, requires a written agreement, not a letter of intent. There is no evidence that the letter provided at Exhibit 7 is binding, and it is otherwise nonconforming with the requirements of the Application. TRC therefore fails to demonstrate that necessary services will be provided, and the Application is nonconforming with Criterion 8 and 10A NCAC 14C.2204.

C. On page 40, in response to Section V, Question 5(b), TRC fails to provide any *"documented evidence of specific support for your proposal from other groups/individuals <u>who could affect the project's success</u> . . . ."* TRC states that it has an ongoing working relationship with local providers, but gives no evidence of specific support for the Project in response to this question. Question 6(a) then requires TRC to describe its efforts *"to involve the community in the planning and development of the facility's services." App. p. 40.* TRC refers to Exhibit 16, which contains only several form letters from the nephrology practice that will support the proposed facility, along with form letters from existing DaVita patients. TRC's conclusory and essentially nonresponsive answers make it appear that these questions, which address specific statutory requirements, are of little concern to TRC. The Application should be found nonconforming with Criterion 8.

D. 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. 40.* 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. p. 40.*

What TRC does not discuss, however, is how TRC and the other DaVita affiliates in North Carolina are a huge healthcare organization, and a dominating provider of dialysis services in North Carolina. 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 Application is therefore nonconforming with Criterion 18a.

VII. <u>Staffing and Operation</u>

A. TRC's staffing table at Section VII, Question 1 (page 45) proposes unusual, fractional staffing ratios, without explaining how the staffing will work. TRC proposes, for example, 0.3 home training nurses, bio-medical technicians, dieticians, and social workers, 0.75 nocturnal nurses and patient care technicians, and 0.5 of a reuse staff member. *App. p. 45.* 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 5 on page 47 requires TRC to provide an outline of the training programs and continuing education programs to be used at the facility. TRC refers to Exhibit 20, which, as noted previously, is nonspecific and addresses only initial training, and not continuing education. The Application is therefore nonconforming with 10A NCAC 14C.2205(b) and Criterion 7.

C. In response to Section VII, Question 7, TRC reveals that its proposed Medical Director, Dr. Halstenberg, is already the medical director at four other dialysis centers. *App. p. 47.* If Dr. Halstenberg becomes the medical director of a *fifth* dialysis facility, in addition to his office practice and hospital obligations, it is difficult to imagine that he could do an adequate job of oversight at the Project, or any other facility, if he is spread so thinly between five dialysis facilities in addition to his other obligations. TRC fails to address how he might adequately perform these functions, however, and the Application should be found nonconforming with Criterion 7.

VIII. Capital Costs and Financing

A. In Section VIII of the Application (beginning on page 49), as addressed in Section I of these Comments above, TRC fails to identify and account for the site costs and base building costs associated with the Project. These items affect not only the capital costs of the Project, but also the financial projections that are based on the incomplete financial data provided. For the reasons described in Section I of these Comments, the Application must be found nonconforming with Criterion 4, 5, and 12.

B. Section VIII, Question 7 (page 51) requires TRC to provide copies of its two most recent audited financial reports. TRC refers to Exhibit 22, 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 for TRC itself. The Application is therefore nonconforming with Criterion 5.

C. 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 proposed landlord, as discussed in Section I of these Comments. There is no evidence that the TRC's proposed lease amounts will be reasonable, and TRC's summary dismissal of this question further renders its Application nonconforming with Criteria 4, 5 and 12.

X. Charges and Estimated Annual Operating Costs

In Section X on page 59, TRC states that *"the number of in-center patients is based on 36 in-center patients being treated at the beginning of the year with a growth during the year to 39 in-center patients."* Nowhere in the Application does TRC explain how it expects to have 36 new patients already in place on "Day One" of operations. TRC does state that the Project will have no impact on the other dialysis facilities in Cabarrus County, and that TRC is not trying to compete with other providers in the surrounding counties. *App. p. 40.* TRC does not explain, however, how it will have such a large complement of patients on Day One without drawing patients from its other existing facilities in Cabarrus or the adjoining counties. In the absence of a foundation to support its assumption, TRC's projection is unreliable and unreasonable, and the revenue estimates resulting from the projection is likewise unreasonable. The Application is therefore nonconforming with Criteria 3 and 5.

XI. Site Information/Construction Design

A. As previously discussed in Section I of these Comments, on page 61 TRC identifies that RHGC Investments, LLC both intends to purchase the property, referring to Exhibit 24 (Question 1), and already owns the property (Question 2(b)) *See also App. p. 10* (Question 4), stating that RHGC owns the property. Exhibit 24, however, contains documents from Hillco, Ltd., not

RHGC Investments, LLC. TRC thus fails to reasonably identify the site owner (Question XI(1)), and the Application is nonconforming with Criterion 12.

B. Section XI, Question 3 (page 62) requires TRC to identify a secondary site, which it identifies as a storefront in a shopping center. Question 3(d) requires TRC to *"submit a copy of the schedule of permitted uses for the site."* TRC fails to provide any schedule of permitted uses for the site, and it is impossible to determine from the information provided whether the site is or is not suitable for a dialysis facility. It is also unclear from the included emails whether the proposed secondary site has an adequate water supply. *See Ex. 24.* The Application is thereby nonconforming with Criterion 12.

Finally, TRC's Application (at the Exhibits Index) also refers to a Vocational Rehabilitation Letter of Intent at Exhibit 11, and a Transportation Letter of Support at Exhibit 13, but no such letters are provided.

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 13.* At a minimum, this requires TRC to identify each shareholder of Neil Realty Co., as they are indirect owners of fifteen (15%) percent of TRC. Further, any party (such as RHGC or Hillco, 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 disclose its relationship with the landowner/developer/landlord for its proposed Project, TRC's failure to include that landowner/developer/landlord as a necessary co-applicant, and TRC's failure to report and include the base cost of the land and the building shell in its Application and financial calculations, each substantially violate multiple provisions of the CON law. For these reasons, along with the many other errors in its Application, TRC's Application must be disapproved.

SOSID: 898351
Date Filed: 2/14/2007 9:45:00 AM
Elaine F. Marshall
North Carolina Secretary of State
C200703800351

State of North Carolina
Department of the Secretary of State

Limited Liability Company
ARTICLES OF ORGANIZATION

Pursuant to §57C-2-20 of the General Statutes of North Carolina, the undersigned does hereby submit these Articles of Organization for the purpose of forming a limited liability company.

1. The name of the limited liability company is: RHGC Investments, LLC

2. If the limited liability company is to dissolve by a specific date, the latest date on which the limited liability company is to dissolve: (*If no date for dissolution is specified, there shall be no limit on the duration of the limited liability company.*) Perpetual existence

3. The name and address of each person executing these articles of organization is as follows: *(State whether each person is executing these articles of organization in the capacity of a member, organizer or both. Note: This document must be signed by all persons listed here).*

   Robert E. Langdon, II - Organizer

   223 Hwy 70 East, Suite 100
   Garner, NC 27529

4. The street address and county of the initial registered office of the limited liability company is:

   Number and Street 223 Hwy 70 East, Suite 100

   City, State, Zip Code Garner, NC 27529 County Wake

5. The mailing address, ***if different from the street address***, of the initial registered office is:

   Same

6. The name of the initial registered agent is: Robert E. Langdon, II

7. Principal office information: (*Select either a or b.)*

   a. [X] The limited liability company has a principal office.

   The street address and county of the principal office of the limited liability company is:

   Number and Street 223 Hwy 70 East, Suite 100
   City, State, Zip Code Garner, NC 27529 County Wake

   The mailing address, ***if different from the street address***, of the principal office of the corporation is:

   b. [ ] The limited liability company does not have a principal office.

8. Check one of the following:

______(i) ***Member-managed LLC***: all members by virtue of their status as members shall be managers of this limited liability company.

__x__(ii) ***Manager-managed LLC***: except as provided by N.C.G.S. Section 57C-3-20(a), the members of this limited liability company shall not be managers by virtue of their status as members.

9. Any other provisions which the limited liability company elects to include are attached.

10. These articles will be effective upon filing, unless a date and/or time is specified:

____

This is the 2nd day of February, 20 07.

Robert E. Langdon II
Signature

Robert E. Langdon, II Manager
Type or Print Name and Title

ORGANIZER

NOTES:
1. **Filing fee is $125. This document must be filed with the Secretary of State.**

CORPORATIONS DIVISION P.O. Box 29622 RALEIGH, NC 27626-0622
(Revised January 2002) *(Form L-01)*

Instructions for Filing

CA201012303552

RHGCINVE 04/15/2010 10:29 AM

SOSID: 0898351
Date Filed: 8/25/2010 4:42:00 PM
Elaine F. Marshall
North Carolina Secretary of State
CA201012303552

LIMITED LIABILITY COMPANY ANNUAL REPORT

NAME OF LIMITED LIABILITY COMPANY: RHGC INVESTMENTS, LLC

STATE OF INCORPORATION: NC

SECRETARY OF STATE L.L.C. ID NUMBER: 0898351

FEDERAL EMPLOYER ID NUMBER: *Privacy Redaction*

NATURE OF BUSINESS: REAL ESTATE INVESTMENTS

REGISTERED AGENT: ROBERT E. LANGDON, II

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

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

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

PRINCIPAL OFFICE TELEPHONE NUMBER: 919-662-1001

PRINCIPAL OFFICE MAILING ADDRESS: 223 HIGHWAY 70 EAST, SUITE 100
GARNER NC 27529

PRINCIPAL OFFICE STREET ADDRESS: 223 HIGHWAY 70 EAST, SUITE 100
GARNER NC 27529

MANAGERS/MEMBERS/ORGANIZERS:

Name: ROBERT HILL, JR
Title: MANAGER
Address: 7919 MASONBORO SOUND ROAD
City: WILMINGTON State: NC Zip: 28409

Name: ROBERT E. LANGDON II
Title: MANAGER
Address: 223 HWY 70 EAST, SUITE 100
City: GARNER State: NC Zip: 27529

Name: STEPHEN B. HILL
Title: MANAGER
Address: 3320 PAULS PATH ROAD
City: LA GRANGE State: NC Zip 28551

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

Robert E. Langdon II (signature)
FORM MUST BE SIGNED BY A MANAGER/MEMBER

4-15-2010
DATE

Robert E. Langdon II
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

C200811201021

RHGCINVE

LIMITED LIABILITY COMPANY ANNUAL REPORT

SOSID: 0898351
Date Filed: 4/21/2008 3:54:00 PM
Elaine F. Marshall
North Carolina Secretary of State
C200811201021

NAME OF LIMITED LIABILITY COMPANY: RHGC INVESTMENTS, LLC

STATE OF INCORPORATION: NC

SECRETARY OF STATE L.L.C. ID NUMBER: 0898351

FEDERAL EMPLOYER ID NUMBER: Privacy Redaction

NATURE OF BUSINESS: REAL ESTATE INVESTMENTS

REGISTERED AGENT: ROBERT E. LANGDON, II

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

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

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

PRINCIPAL OFFICE TELEPHONE NUMBER: 919-662-1001

PRINCIPAL OFFICE MAILING ADDRESS: 223 HIGHWAY 70
GARNER NC 27529

PRINCIPAL OFFICE STREET ADDRESS: 223 HIGHWAY 70
GARNER NC 27529

MANAGERS/MEMBERS/ORGANIZERS:

Name: ROBERT HILL, JR
Title: MANAGER
Address: 2510 TRAILS END
City: KINSTON State: NC Zip: 28504

Name: R. GREGG HILL
Title: MANAGER
Address: 6275 NORTH OCEAN BLVD
City: OCEAN RIDGE State: FL Zip: 33435

Name: STEPHEN B. HILL
Title: MANAGER
Address: 3320 PAULS PATH ROAD
City: LA GRANGE State: NC Zip 28551

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

[signature] 4-2-08
FORM MUST BE SIGNED BY A MANAGER/MEMBER DATE

Stephen B. Hill Manager
TYPE OR PRINT NAME TYPE OR PRINT TITLE

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

SOSID: 0101997
Date Filed: 11/3/2009 3:15:00 PM
Elaine F. Marshall
North Carolina Secretary of State
2009 229 00478

BUSINESS CORPORATION ANNUAL REPORT

NAME OF BUSINESS CORPORATION: *Hillco, Ltd.*

FISCAL YEAR ENDING: 9/30/2008

STATE OF INCORPORATION: *NC*

SECRETARY OF STATE CORPORATE ID NUMBER: *0101997*

NATURE OF BUSINESS: *construction company and other business*

REGISTERED AGENT: *Lindberg Erik P*

REGISTERED OFFICE MAILING ADDRESS: *PO Box 1010*
Garner, NC 27529

REGISTERED OFFICE STREET ADDRESS: *223 Highway 70 East*
Garner, NC 27529 WAKE County

SIGNATURE OF THE NEW REGISTERED AGENT: ____________________

SIGNATURE CONSTITUTES CONSENT TO THE APPOINTMENT

PRINCIPAL OFFICE TELEPHONE NUMBER: *(800) 228-8993*

PRINCIPAL OFFICE MAILING ADDRESS: *PO Box 6159*
Kinston, NC 28501-0000

PRINCIPAL OFFICE STREET ADDRESS: *1435 Hwy 258 North*
Kinston, NC 28501

PRINCIPAL OFFICERS:

NAME - STEPHEN L FARRAR
TITLE - TREASUROR
ADDRESS - 1435 HWY 258
KINSTON NC 28501

Name: Stephen B Hill *Title: President* *Address:* *1435 Hwy 258 North* *Kinston, NC 28501*	*Name: Robert Hill Jr* *Title: Vice President* *Address:* *1435 Hwy 258 North* *Kinston, NC 28501*	*Name: R Gregg Hill* *Title: Vice President/Asst. Secretary* *Address:* *1435 Hwy 258 North* *Kinston, NC 28501*

CERTIFICATION OF ANNUAL REPORT MUST BE COMPLETED BY ALL BUSINESS CORPORATIONS

Stephen G. Farrar — 7-15.09

FORM MUST BE SIGNED BY AN OFFICER OF THE CORPORATION — DATE

STEPHEN FARRAR — TREASURER

TYPE OR PRINT NAME — TYPE OR PRINT TITLE

ANNUAL REPORT FEE: $ 25 MAIL TO: Secretary of State • Corporations Division • Post Office Box 29525 • Raleigh, NC 27626-0525

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 55399503900000

Lookup   2009 Appraisal File   Additional Information

Click on a parcel number to view the property record card

Parcel	Card	Address	Owner Name
55399503900000	001		HILLCO LTD

Click on a parcel number to view the property record card

MON, JUN 22, 2009, 2:00 AM

HILLCO LTD 5539 95 03900000

MAP BL PIN COND CC L H

000003367801 ID NO: 11049 0044.120000

CABARRUS COUNTY 2008 APPRAISAL C CN02 CARD NO. 1 OF 1

N/S HIGHWAY 49 9.46AC 9.460AC

APPRAISED BY 07 ON 01/01/2008 50012 HWY 601/49 TW-11 C-02 EX- AT- LAST ACTION 20071212

CONSTRUCTION DETAIL MARKET VALUE 1010

U	M	EFF AR	IN	EFF B	REPL CST	E	A	NRM	E	F	% CD
1000											
COMMERCIAL											

CREDENCE TO	MARKET
DEPR BLDG VALUE	
DEPR OBXF VALUE	
LAND VAL - MKT	740,150
MKT VAL - CARD	740,150
REGR VAL - CARD	
INC VAL - CARD	
APPR VAL - CARD	740,150
APPR VAL - PARCEL	740,150

PRIOR PERMIT INFO

709,500

709,500

SALES DATA

DEED BK	DEED PG	DT M	DT Y	TYP	Q V	SALE PRICE
2236	0139	07	98	WD	QV	175,000

NOTES

APPEALED 04

CD	DESC	LN	WD	UNITS	UNIT PRICE	% O	L B	A Y	E Y	AN DP	% C	OBXF DEPR VAL

TOTAL OB/XF VALUE

BUILDING DIMENSIONS

LAND USE	UCD	LOCAL ZONE	FRNT	DEP	SZ	L M	CF	OTHER ADJUST RF AC LC TO OT T	LND UNIT PRICE	TOT LAND UNITS	U T	TL AD	ADJUST PRICE	LAND VALUE	LAND NOTES
COMMERCIAL	0700	C-2	60		118	06	0.55	-11-04-10-20+00PS	120,000.00	9.460	AC	.65	78,240.00	740,150	
TOTAL LAND DATA										9460				740150	

0-0101997

94 356 9011

FILED
9:00 AM
DEC 27 1994
EFFECTIVE
RUFUS L. EDMISTEN
SECRETARY OF STATE
NORTH CAROLINA

State of North Carolina
Department of the Secretary of State
ARTICLES OF AMENDMENT
BUSINESS CORPORATION

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: Neil Realty Company

2. The text of each amendment adopted is as follows (*State below or attach*):

Change name of company to HILLCO, Ltd.

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:

4. The date of adoption of each amendment was as follows: 12/1/94

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(s) was (were) duly adopted by the board of directors without shareholder action as shareholder action was not required because (*set forth a brief explanation of why shareholder action was not required*) ______________________________

d. ✓ The amendment(s) was (were) approved by shareholder action, and such shareholder approval was obtained as required by Chapter 55 of the North Carolina General Statutes.

ARTICLES OF AMENDMENT
Page 2

6. These articles will be effective upon filing, unless a delayed time and date is specified:

____

This the 20 day of December, 1994

Neil Realty Co.
Name of Corporation

Signature

R. Gregg Hill V.P
Type or Print Name and Title

NOTES:
1. Filing fee is $50. This document and one exact or conformed copy of these articles must be filed with the Secretary of State.

97321 9016

0-019131O

FILED
3:21 PM.
NOV 17 1997
EFFECTIVE ____________
ELAINE F MARSHALL
SECRETARY OF STATE
NORTH CAROLINA

State of North Carolina
Department of the Secretary of State

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

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

Click here to:

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Print apre-populated Annual Report Form | Annual Report Count | File an Annual Report |

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

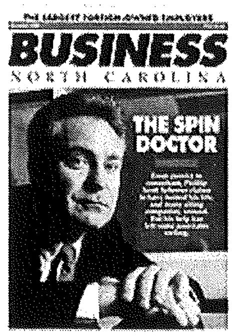
Stock

Class	Shares	No Par Value	Par Value
COMMON	100000		1

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 Gurley



(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.

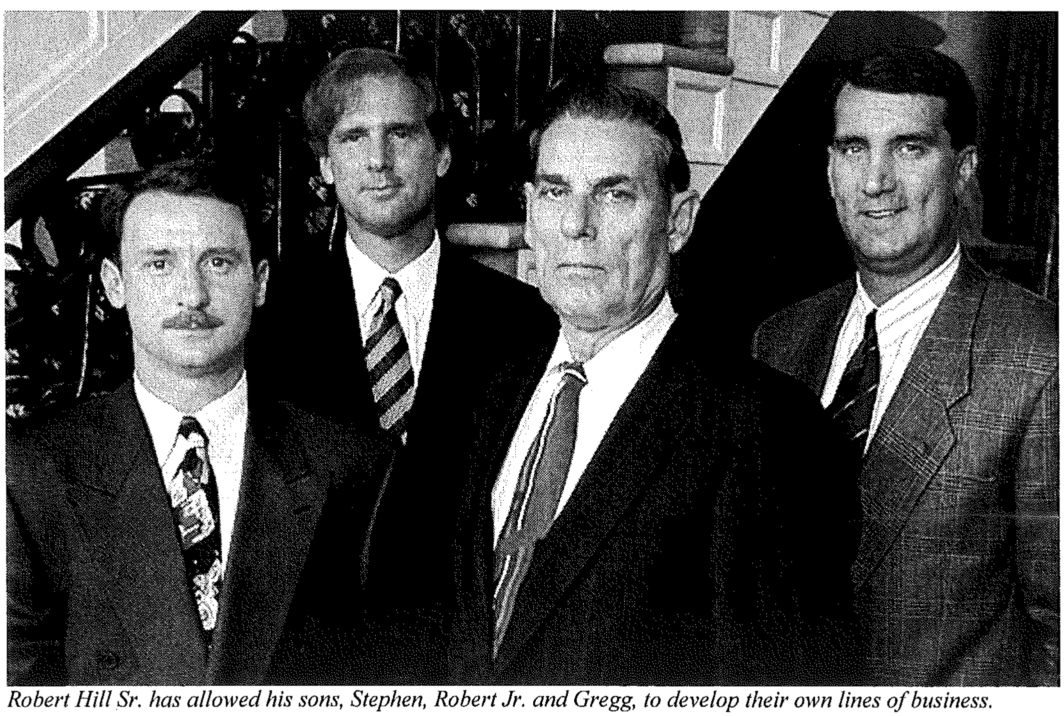
It all began in 1953 when Hill, then in his early 20s, completed an apprenticeship in carpentry and founded Robert Hill Construction, a home-builder and real-estate developer. He continued to tend the family farm as his building business grew. But when his grandmother became seriously ill, his focus 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 exited 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 SNOPHAC, 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.

LLC5

STATE OF NORTH CAROLINA
ANNUAL REPORT
INCLUDE $200.00 FILING FEE
PAYABLE TO N.C. SECRETARY
OF STATE.

97 338 0165

97 DEC -4 AM 9:00
FILED ELAINE F. MARSHALL
SECRETARY OF STATE
NORTH CAROLINA

OFFICE USE ONLY
AMOUNT ______________
PROCESSED BY ______
REPORT DUE DATE- 11-29-1997

LLC ID- 0 4 3 8 6 5 2

FILING NO- A 0 0 1

STATE OF ORG- DE

NOTICE DATE- 09-30-1997

DATE OF ORG- 09-26-1997

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 N/A
SIGNATURE CONSTITUTES CONSENT TO APPOINTMENT

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 HAWTHORNE 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

0-0438652

FILED 4152

FEB 15 1999

EFFECTIVE
ELAINE F MARSHALL
SECRETARY OF STATE
NORTH CAROLINA

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

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: DCNC, 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 27th day of January, 19 99

TOTAL RENAL CARE OF NORTH CAROLINA, LLC
Name of Limited Liability Company

______
Signature

BARRY C. COSGROVE, Vice-Pres.
Type or Print Name and Title

NOTES:
1. Filing fee is $50. This application and one exact or conformed copy of this application must be filed with the Secretary of State.

HILLCO
LIMITED

Hillco Ltd is a family owned North Carolina enterprise.

Yahoo! My Yahoo! Mail Make Y! your home page Search: Web Search

YAHOO! FINANCE Sign In New User? Sign Up Finance Home - Help HOOVERS A D&B COMPANY

Wednesday, October 13 2010 8:52am ET - U.S. Markets open in 38 minutes.

GET QUOTES Finance Search

INDUSTRY CENTER - LONG-TERM CARE FACILITIES

Industry Center > Long-Term Care Facilities > Hillco, Ltd. Company Profile

More On This Industry

- Summary
- News
- Leaders & Laggards
- Company Index
- Industry Browser

Related Industries

- Home Health Care
- Hospitals
- Medical Appliances & Equipment
- Medical Instruments & Supplies
- Medical Laboratories & Research
- Medical Practitioners

Top Industries

- Aerospace/Defense - Major Diversified
- Auto Manufacturers - Major
- Biotechnology
- Business Software & Services
- Chemicals - Major Diversified
- Communication Equipment
- Conglomerates
- Diversified Computer Systems
- Diversified Investments
- Drug Manufacturers - Major
- Electric Utilities
- Food - Major Diversified
- Industrial Metals & Minerals

Hillco, Ltd. Company Profile

Hillco operates about 50 Britthaven Nursing Centers, which offer a variety of elderly care throughout North Carolina, Kentucky, and Virginia. The company provides skilled nursing services, as well as rest homes. Hillco's other subsidiaries operate in industries including insurance, land development, and farming. Robert Hill established the company in 1956.

Contact Information

Address: 1435 US Hwy 258 N
Kinston, NC 28501

Phone: 252-523-9094

Fax:

Financial Highlights

Fiscal Year End:	September
Revenue (2007):	160.90 M
Employees (2007):	7,000

Key People

- CEO: Robert O. Hill Jr.
- President: Stephen Hill
- Director, IT: Bobby Jefferson

Industry Information

Sector: Healthcare

Industry: Long-Term Care Facilities

- Major Airlines
- Major Integrated Oil & Gas
- Money Center Banks
- Property & Casualty Insurance
- Semiconductor - Broad Line
- Telecom Services - Domestic

Complete Industry List...

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

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

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

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).

[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. Timmons, 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:

Project	AHO's Cost Projection	Statutory Threshold for "No Review"
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 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.

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. Ctr. 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-

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.

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

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)f1.5a 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 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 "[l]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.

[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

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:

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 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

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 regardless 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., 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:

$ 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)
$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 indispensible, 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 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 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

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-

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.

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
696 S.E.2d 163

END OF DOCUMENT

(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