

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

**IN RE: REQUEST FOR DECLARATORY)
RULING BY CAPE FEAR DIAGNOSTIC) **DECLARATORY RULING**
IMAGING, INC.)**

I, Robert J. Fitzgerald, as Director of the Division of Facility Services, North Carolina Department of Health and Human Services (“Department” or “Agency”), do hereby issue this Declaratory Ruling pursuant to North Carolina General Statute § 150B-4 and 10A NCAC 14A .0103 under the authority granted me by the Secretary of the Department of Health and Human Services.

Cape Fear Diagnostic Imaging, Inc. (“Cape Fear”) has requested a declaratory ruling allowing for a change in host sites for Project I.D. No. O-6434-01 on the grounds that the change does not constitute a material change in physical location or a failure to materially comply with the conditions of its Certificate of Need (“CON”). N.C.G.S. §§ 131E-181(a) and (b). This ruling will be binding upon the Department and the entity requesting it, as long as the material facts stated herein are accurate. This ruling pertains only to the matters referenced herein. Except as provided by N.C.G.S. § 150B-4, the Department expressly reserves the right to make a prospective change in the interpretation of the statutes and regulations at issue in this Declaratory Ruling. S. Todd Hemphill of the law firm of Bode, Call & Stroupe has requested this ruling on behalf of Cape Fear and has provided the material facts upon which this ruling is based.

STATEMENT OF THE FACTS

Effective July 23, 2002, the CON Section issued a CON to Cape Fear for Project I.D. No. O-6434-01 to acquire a mobile MRI scanner (the “Project Unit”) to provide MRI services at

“two or more” host sites. The initial host sites were Cape Fear’s Wilmington, North Carolina office and Columbus County Hospital in Whiteville, North Carolina.

Cape Fear currently provides mobile MRI services to its Wilmington office and to Atlantic Diagnostic Center, P.A. (“ADC”) in Wallace, North Carolina (“ADC-Wallace”).

Cape Fear represents that ADC has notified Cape Fear that it no longer requires its mobile MRI services at ADC-Wallace. Instead, ADC wishes to utilize the mobile MRI scanner one day per week at its facility in Morehead City (“ADC-Morehead City”), located at 3722 Bridges Street, Suite B, Morehead City, NC. Cape Fear seeks a declaratory ruling that the substitution of ADC-Morehead City for ADC-Wallace as a host site for the Project Unit does not violate its CON.

Cape Fear projects that utilization of the Project Unit at ADC-Morehead City will exceed the minimum procedures specified in the conditions to its CON. It also states that the addition of ADC-Morehead City will not create any new capital expenditures for Cape Fear, because the site already has a mobile MRI pad and electrical hook-up.

ANALYSIS

The CON law would require a full review of Cape Fear’s proposed change of host site if that change were to represent a material change in the physical location or scope of the project. N.C.G.S. § 131E-181(a). The proposed change of the host site for Cape Fear’s project to ADC-Morehead City does not constitute a material change in the physical location or the scope of the proposed project because the use of ADC-Morehead City as a host site will not affect the scope of services offered or the material expenditures by Cape Fear. In addition, there is no proposed change in the person named in the application such that a violation of N.C.G.S. § 131E-181(a) would result.

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

CONCLUSION

For all the foregoing reasons, assuming the statements of fact in the request to be true, I conclude that subject to the conditions set out herein, the substitution of ADC-Morehead City for ADC-Wallace as a host site for Cape Fear's mobile MRI scanner will not constitute a material change in the physical location or scope of the project, will not violate N.C.G.S. § 131E-181, and will not constitute a failure to satisfy a condition of the CON in violation of N.C.G.S. § 131E-189(b). This ruling is subject to the following conditions:

1. Cape Fear shall enter into a service agreement with ADC-Morehead City that is substantially similar to the agreements signed by its other host sites;
2. Cape Fear shall satisfy all the requirements and representations regarding the host sites in its original CON application.

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

This the _____ day of _____, 2007.

Robert J. Fitzgerald, Director
Division of Facility Services
N.C. Department of Health and Human Services

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Declaratory Ruling has been served upon the nonagency party by certified mail, return receipt requested, by depositing the copy in an official depository of the United States Postal Service in first-class, postage pre-paid envelope addressed as follows:

CERTIFIED MAIL

S. Todd Hemphill
Bode, Call & Stroupe, L.L.P.
3105 Glenwood Avenue, Suite 300
Raleigh, NC 27612

This the _____ day of _____, 2007.

Jeff Horton
Chief Operating Officer