

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

**IN RE: REQUEST FOR DECLARATORY )  
RULING BY THE EVERGREENS, INC. and ) DECLARATORY RULING  
ASHTON PLACE HEALTH & REHAB, LLC )  
Project ID No. G-7720-06 )**

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

The Evergreens, Inc., and Ashton Place Health & Rehab, L.L.C. (“Petitioners”) have requested a declaratory ruling allowing for a change of site for Project I.D. No. G-7720-06 on the grounds that the change does not constitute a material change in physical location or a failure to materially comply with the representations made by Petitioners in their Certificate of Need (“CON”) application for the project. N.C.G.S. §§ 131E-181(a) and (b). This ruling will be binding upon the Department and the entity requesting it, as long as the material facts stated herein are accurate. This ruling pertains only to the matters referenced herein. Except as provided by N.C.G.S. § 150B-4, the Department expressly reserves the right to make a prospective change in the interpretation of the statutes and regulations at issue in this Declaratory Ruling. Gary S. Qualls, of Kennedy Covington Lobdell & Hickman, P.L.L.C., has requested this ruling on behalf of Petitioners and has provided the material facts upon which this ruling is based.

## STATEMENT OF THE FACTS

Effective 1 May 2007, the CON Section issued a CON to Petitioners for Project G-7720-06 to relocate 134 nursing facility beds to a new nursing facility to be built in Guilford County, North Carolina. The primary site identified in the application for the new facility was 10 Franz Warner Parkway, Rock Creek Center, Whitsett, North Carolina (the “Original Site”). Petitioners now have requested a declaratory ruling approving an alternate site for the facility at 400/420 First Street, Gibsonville, Guilford County, North Carolina (the “Alternate Site”).

Petitioners represent that after the CON was issued, several facts have changed or become apparent:

1. The cost of the Original Site escalated from the time the application for the project was filed;
2. The Original Site is not properly zoned;
3. Ashton has identified difficulties connecting to the water or sewer lines and is concerned whether the Original Site can be connected to a substation for sewer and water;
3. The proposed facility would have to be built facing a cemetery.

Petitioners propose to build their facility on the Alternate Site, which they state is 6 miles from the Original Site. They state that the Alternate Site is already properly zoned and has water and sewer access ready for hook-up. Facility residents would not view a cemetery from the Alternate Site.

Petitioners state that the capital costs to acquire the Alternate Site will cost \$90,000 less than the Original Site, and the change in site will not increase the project’s capital or operating costs.

## **ANALYSIS**

The CON law would require a full review of Petitioners' proposed change of site if that change were to represent a material change in the physical location or scope of the project. N.C.G.S. § 131E-181(a). The proposed change of the site for Petitioners' project does not constitute a material change in the physical location or the scope of the proposed project for several reasons. Locating the project at the Alternate Site will not affect the scope of services offered. The change does not increase the approved capital expenditure. Both Sites are in Guilford County. Because of the close proximity of the Alternate Site to the Original Site, the change will not affect the population to be served. 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 Petitioners' CON if Petitioners fail 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. Petitioners will not be developing the project in a manner that is materially different from the representations made in their application, nor will they be developing the project in a manner that is inconsistent with any of the conditions that were placed on their 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 change of site from the Original Site to the Alternate Site for Petitioners' new facility (Project I.D. No. G-7720-06) will not constitute a material change in the physical location or scope of the project, will not violate N.C.G.S. §

131E-181, and will not constitute a failure to satisfy a condition of the CON in violation of N.C.G.S. § 131E-189(b).

This ruling is not intended, and should not be interpreted, to authorize any additional 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.

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

**CERTIFICATE OF SERVICE**

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

**CERTIFIED MAIL**

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This the \_\_\_\_\_ day of \_\_\_\_\_, 2007.

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Jeff Horton  
Chief Operating Officer