

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

**IN RE: REQUEST FOR)
DECLARATORY RULING BY) DECLARATORY RULING
DVA HEALTHCARE RENAL CARE, INC.)
Project I.D. No. F-7527-06**

I, Jeff Horton, Acting Director of the Division of Health Service Regulation (the “Department”), hereby issue this declaratory ruling to DVA Healthcare Renal Care, Inc. (“DVA”) pursuant to N.C.G.S. § 150B-4, 10A NCAC 14A.0103, and the authority delegated to me by the Secretary of the North Carolina Department of Health and Human Services. DVA has filed a Declaratory Ruling Request (the “Request”) asking the Department to issue a ruling as to the applicability of N.C.G.S. Chapter 131E, Article 9 to its request to develop and operate the Marshville Dialysis Center, for which it has previously received a certificate of need (“CON”), at the secondary site described in its CON application instead of the primary site. For the reasons set out below, I conclude that DVA's change of site for this facility does not constitute a material change in the implementation of the project.

This ruling is binding on the Department and the person requesting it if the material facts stated in the Request are accurate and no material facts have been omitted from the request. The ruling applies only to this request. Except as provided by N.C.G.S. § 150B-4, the Department reserves the right to change the conclusions which are contained in this ruling. William R. Shenton of the law firm of Poyner Spruill LLP has requested this ruling on behalf of DVA and has provided the statement of facts upon which this ruling is based. The material facts as provided by counsel for DVA are set out below.

STATEMENT OF THE FACTS

DVA is a corporation that is engaged in the development and operation of dialysis facilities across the state of North Carolina. DVA applied for and received a CON to relocate 10 dialysis stations from its Union County Dialysis Center to develop a dialysis center in Marshville, Union County, to be known as Marshville Dialysis Center. In its application, DVA identified the primary site for its project as 6017 Marshville Road in Marshville (“Marshville Road Site”), and that address is reflected on the CON. The secondary site DVA identified in its application was 7260 East Marshville Boulevard in Marshville (“East Marshville Boulevard Site”). In the Request, DVA represents that the primary and secondary sites in the application were inadvertently switched, and that it always intended to build its facility at the East Marshville Boulevard Site.

DVA states that the East Marshville Boulevard Site is two miles away from the Marshville Road Site, and therefore, distances to the key support services identified in the application are the same for both sites. DVA will operate the same size facility and offer the same services at the secondary site as were proposed in the application. Costs for the development of the facility will not exceed 115% of the amount shown on the certificate of need, and operation of the facility at this new site should not create any additional operational problems or burdens.

ANALYSIS

The CON law would require a full review of DVA’s proposed change of site if that change were to represent a material change in the physical location or scope of the project. N.C.G.S. § 131E-181(a). The proposed change of the site for DVA’s project does not constitute a material change in the physical location or the scope of the proposed project because locating

the project at the East Marshville Boulevard Site will not affect the scope of services offered or the costs and charges to DVA or to the public. Because of the close proximity of the East Marshville Boulevard Site to the Marshville Road 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 DVA's CON if DVA 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. DVA will not be developing its project in a manner that is materially different from the representations made in its application, nor will it be developing its project in a manner that is inconsistent with any of the conditions that were placed on its CON.

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the Request to be true, I conclude that DVA may locate its project at 7260 East Marshville Boulevard in Marshville.

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 ____ day of _____, 2008.

Jeff Horton, Acting Director
Division of Health Service Regulation
N.C. Department of Health and Human Services

CERTIFICATE OF SERVICE

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

CERTIFIED MAIL

William R. Shenton
Poyner Spruill LLP
301 Fayetteville Street, Suite 1900
Raleigh, NC 27601

This _____ day of _____, 2008.

Jesse Goodman
Acting Chief Operating Officer