

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

**IN RE: REQUEST FOR DECLARATORY )  
RULING BY TOTAL RENAL CARE OF )  
NORTH CAROLINA, LLC CONCERNING THE ) DECLARATORY RULING  
DEVELOPMENT AND OPERATION OF THE )  
SMOKY MOUNTAINS DIALYSIS CENTER )**

I, Robert J. Fitzgerald, Director of the Division of Facility Services of the North Carolina Department of Health and Human Services (the “Department”), do hereby issue this Declaratory Ruling to Total Renal Care of North Carolina, LLC (“TRC”) pursuant to N.C.G.S. § 150B-4 and 10A NCAC 14A .0310, and the authority granted to me by the Secretary of the Department of Health and Human Services. TRC seeks a declaratory ruling to allow it to develop and operate the Smoky Mountain Dialysis Center, for which it has previously received a certificate of need (“CON”), at a location other than the primary or secondary sites described in its CON application. For the reasons set out below, I conclude that TRC’s change of site for this facility does not constitute a material change in the implementation of the project under N.C.G.S. § 131E-189(b) and is not subject to further CON review as a new institutional health service under N.C.G.S. § 131E-176(16).

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 Poyner & Spruill LLP, has requested this ruling on behalf of TRC and has provided the material facts set out below.

## **STATEMENT OF THE FACTS**

TRC applied for and received a CON to develop and operate a 10-station dialysis center in Murphy, Cherokee County, to be known as the Smoky Mountains Dialysis Center. TRC represents that the primary site that was identified in its CON application is being sold to another party and is therefore no longer available. TRC has determined that the secondary site identified in the application, while available, is less suitable than a new site that TRC has identified.

TRC represents that it has located a new site at 114 Pleasant Valley Road in Murphy, about one-half mile from the primary site identified in the application. It states that distances to key support services identified in the application are very similar. It represents that, if approved, it will develop the same size facility and offer the same services as proposed in the application, and that costs for the facility will not exceed 115% of the amount shown on the certificate of need.

## **ANALYSIS**

The CON law would require a full review of TRC's proposed change of site if that change were to represent a material change in the physical location of the project according to N.C.G.S. § 131E-181(a). N.C.G.S. § 131E-189(b) allows the Department to withdraw TRC's CON if TRC fails to develop the service in a manner consistent with the representations made in its application or with any of the conditions that were placed on the CON. If during development or within one year of completion, a change in a project for which a CON was issued is more than 15% of the approved capital expenditure amount, it is a "new institutional health service" and a new CON may be required unless otherwise exempt. N.C.G.S. § 131E-176(16)(e).

The relocation of the site for TRC's new dialysis center does not constitute a material change in either the physical location or in the scope of the proposed project because TRC will be developing its project in a manner which is not materially different from the representations made in its application and not inconsistent with any conditions that were placed on its CON. The new site is located in close proximity to the primary site identified in TRC's application. The change of site will not materially impact the project's original capital costs.

### **CONCLUSION**

For the foregoing reasons, and assuming the statements of fact in the request to be true, I conclude that the change in the site for the development of the Smoky Mountains Dialysis Center will not violate N.C.G.S. § 131E-181, because it will not constitute a material change in the physical location of the proposed facility, will not constitute a failure to satisfy a condition of the CON in violation of N.C.G.S. § 131E-189(b), and is not subject to additional certificate of need review as a new institutional health service under N.C.G.S. § 131E-176(16).

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

This \_\_\_\_\_ day of \_\_\_\_\_, 2006.

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Robert J. Fitzgerald, Director  
Division of Facility 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  
3600 Glenwood Avenue  
Post Office Box 10096  
Raleigh, NC 27065-0096

This the 22<sup>nd</sup> day of March, 2006.

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Jeff Horton  
Chief Operating Officer