

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

IN RE: REQUEST FOR DECLARATORY)	
RULING BY TOTAL RENAL CARE)	
OF NORTH CAROLINA, LLC,)	DECLARATORY RULING
d/b/a CARTHAGE DIALYSIS CENTER)	
Project I.D. No. H-8192-08)	

I, Jeff Horton, 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.

Total Renal Care of North Carolina, LLC d/b/a Carthage Dialysis Center (“TRC”) has requested a declaratory ruling allowing for a change in the site for Project I.D. No. H-8192-08 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 TRC in its Certificate of Need (“CON”) application for its 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. William R. Shenton of Poyner Spruill, LLP, counsel for TRC, has requested this ruling on behalf of TRC and has provided the statement of facts upon which this ruling is based. Certain other facts are based on the Department’s files. The material facts are set out below.

STATEMENT OF THE FACTS

Effective 13 January 2009, the CON Section issued a CON to TRC to develop a new 12-station End Stage Renal Disease (“ESRD”) facility in Carthage, North Carolina by relocating 11 existing, certified ESRD stations from Dialysis Care of Moore County and one station from Southern Pines Dialysis Center. In its application, TRC proposed that a third-party developer would construct a building shell for the new facility on one of two sites. The primary site was located next to 4475 U.S. Highway 15-501, and the secondary site was located next to the primary site at 4480 U.S. Highway 15-501 (collectively the “Original Sites”). The facility would then be leased to Carthage Dialysis Center, which would upfit the building for its use. The physical location noted on the CON was: Carthage Dialysis Center, Next door to 4475 U.S. Highway 15-501, Carthage, NC 28327. In this request, TRC represents that, subsequent to the issuance of the CON, a third site (the “Proposed Site”) became available, which, if selected, would result in a \$10.50 reduction in lease cost, from \$28.25 per square foot to \$17.75 per square foot.

The Proposed Site is located on a side street which intersects U.S. Highway 15-501 and is described as Moore County Tax Parcel 85770073926. The physical address of the Proposed Site is 165 Savannah Gardens Drive and is approximately one-quarter of a mile from the Original Sites. According to TRC, the Proposed Site was not available for sale at the time its CON application was submitted or at the time the CON was issued.

TRC represents that since the Proposed Site is available at a lower cost per square foot, there would be no increase in capital cost to the project. TRC further represents that locating the facility on the Proposed Site will allow for easier and potentially safer ingress and egress to the facility for patients, doctors and staff. TRC states that the Proposed Site is appropriately zoned

for the facility and that water, sewer, and three phase power are available at the Proposed Site. TRC represents that it does not contemplate any change to the scope or scale of the services proposed in its original application.

In a letter submitted subsequent to its Declaratory Ruling Request, TRC represented that, due to confusion over the timing of submission of the request, construction on the Proposed Site had begun prior to receiving a response to its request from the Agency. Also, in progress reports submitted to the Agency on 22 October 2009 and 3 February 2010, TRC indicated that soil tests had been completed on the Proposed Site, a lease had been signed, the developer had purchased the Proposed Site, the facility was under construction, and construction at the Proposed Site should be completed by 30 June 2010.

Since TRC's request for declaratory ruling for a site change for the Carthage Dialysis Center was received by the Agency on 28 May 2010, three months after the 3 February 2010 progress report represented that construction on the facility had already begun, the Agency determined that TRC violated the terms of its CON issued for construction of the facility on the primary site as identified in the CON application and noted as the physical location on the CON. Consequently, in a letter dated 25 June 2010 to William Hyland, Director of Health Planning for TRC, the Agency assessed a civil penalty, pursuant to N.C.G.S. § 131E-190(f), against TRC in the amount of \$3500.00.

ANALYSIS

The CON law would require a full review of TRC's proposed change of site if that change represented a material change in the physical location or scope of the project. N.C.G.S. § 131E-181(a). Notwithstanding that the request for a site change occurred after construction had already begun on the facility, the proposed change of site for TRC's project does not constitute a

material change in the physical location because of the close proximity of the Proposed Site to the Original Sites. The change will not affect the scope of services offered or the costs and charges to the public. 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 TRC's CON if TRC 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. TRC 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 all the foregoing reasons, assuming the statements of fact in the request to be true, I conclude that the substitution of the Proposed Site for the Original Site for TRC's 12-station ESRD facility (Project I.D. No. H-8192-08) 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 the _____ day of _____, 2010.

Jeff Horton, 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 pre-paid envelope addressed as follows:

CERTIFIED MAIL

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

This the _____ day of _____, 2010.

Jesse Goodman
Chief Operating Officer