

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

IN RE: REQUEST FOR DECLARATORY)	
RULING BY DVA HEALTHCARE)	
RENAL CARE, INC. CONCERNING THE)	DECLARATORY RULING
DEVELOPMENT AND OPERATION OF)	
DURHAM DIALYSIS CENTER)	
Project I.D. No. J-8305-09)	

I, Drexdal Pratt, 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.

On December 7, 2009, Petitioner received a certificate of need (CON) to add three dialysis stations, for a total of 24 stations, to its existing dialysis facility and relocate the facility to a new building to be constructed on the same site, located at 601 Fayetteville Street, Durham, North Carolina. By request dated February 13, 2012, Petitioner is requesting a declaratory ruling permitting a change in site from 601 Fayetteville Street to the 200 block of Walker Street at the intersection of Hood Street in Durham. Petitioner asserts that the proposed change will not result in a material change in the implementation of the project and that the proposed site change is not subject to CON review as a “new institutional health service” under any part of the definition of that term found under N.C. Gen. Stat. § 131E-176(16). 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 has requested this ruling on behalf of Petitioner and has provided the material facts upon which this ruling is based.

STATEMENT OF THE FACTS

Petitioner applied for and received a CON for Project I.D. No. J-8305-09 in which it was authorized to replace its existing Durham Dialysis Center in Durham, North Carolina. Due to the age and condition of the facility at that site, and to provide an updated and state-of-the-art facility for its patients, Petitioner applied for a CON to operate the facility in a new building to be constructed on the same site at 601 Fayetteville Street in Durham. Petitioner originally proposed to have a developer construct a new shell building at the same site and Petitioner would up-fit and lease the building, adding three dialysis stations in the new building for a total of 24 stations upon completion of the project. Petitioner requests this ruling because it has been unable to reach a satisfactory agreement with the owners of the existing site for the expansion and relocation of the Durham Dialysis Center at that location.

Petitioner requests a ruling confirming that it may develop and operate Project I.D. No. J-8305-09 at a new site which is located at the corner of Hood and Walker Streets in Durham. The precise address of the proposed site is unclear at this time, but is located in the 200 block of Walker Street at the intersection with Hood Street. An exact address is expected to be issued by the Post Office before the building permit is issued. The newly proposed site is approximately four-tenths of one mile from the existing site and consists of 1.322 acres. Petitioner expects the relocation and construction of the facility at the new site to be more cost-effective and, thereby, a superior location for Petitioner's Durham Dialysis Center. Petitioner has concluded that the new

site is available and suitable in all respects for the relocation and expansion of the dialysis facility as originally configured and designed.

ANALYSIS

N.C.G.S. § 131E-181(a) provides that “[a] certificate of need shall be valid only for the defined scope, physical location, and person named in the application.” The recipient of the CON must also materially comply with the representations made in the CON application. N.C.G.S. § 131E-181(b). If Petitioner’s proposal were to represent a material change in the physical location or scope of the project, the CON law would require a full review of Petitioner’s proposal. N.C.G.S. § 131E-181(a).

Given the close proximity to the originally proposed site, Petitioner’s proposal does not constitute a material change in the physical location or scope of the project and is allowable. Petitioner’s facility will be the same size as proposed in its application and will offer the same services as those proposed in the application. Furthermore, the facility’s proximity to other health services will not be materially different from the original site identified in the application. Petitioner further represents that the cost of development will not exceed 115% of the capital expenditure originally proposed.

CONCLUSION

For the foregoing reasons, assuming the statements of fact in the request to be true, I conclude that Petitioner’s proposed site change 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 certificate of need in violation of N.C.G.S. § 131E-189(b).

This the _____ day of April, 2012.

Drexdal Pratt, 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 (27601)
Post Office Box 1801
Raleigh, North Carolina 27602-1801

This the _____ day of April, 2012.

Dr. Patsy Christian, Assistant Director
Healthcare Quality and Safety