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May 22, 2014

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**HEALTH FACILITIES &
SERVICES REVIEW BOARD**

Mr. Michael Constantino
Supervisor, Project Review Section
Illinois Department of Public Health
Health Facilities and Services Review Board
525 West Jefferson Street, Second Floor
Springfield, Illinois 62761

**Re: Northwestern Medical Faculty Foundation Dialysis Center (Proj. No. E-007-14)
Comments to the State Agency Report**

Dear Mr. Constantino:

As you are aware, this office represents DaVita HealthCare Partners Inc. (“DaVita”). In this capacity, Polsinelli P.C. submits this comment to the Northwestern Medical Faculty Foundation (“NMFF”) Dialysis Center Board Staff Report pursuant to Section 6(c-5) of the Illinois Health Facilities Planning Act (20 ILCS 3960/6(c-5)). NMFF Dialysis Center is not eligible for an exemption for a change of ownership because pre-application changes of ownership have invalidated the underlying project permit and the incomplete project is ineligible for an “existing health care facility” exemption. We appreciate the opportunity to comment on the NMFF Dialysis Center Board Staff Report and will limit our comment to this issue and how it relates to the Board Staff Report.

On December 4, 2012, NMFF Dialysis Center, LLC submitted an application to the CON Board to establish a 36-station end stage renal disease facility in Chicago (Project No. 12-099). The applicant for Project No. 12-099 was NMFF Dialysis Center, LLC, which was a newly formed entity owned 80% by NMFF and 20% by Ambulatory Services of America, Inc. (“ASA”). On March 26, 2013, the CON Board approved the NMFF Dialysis Center application and granted a permit for Project No. 12-099.

On or about August 12, 2013, ASA transferred its 20% ownership interest in the permit holder to U.S. Renal Care, Inc. (“U.S. Renal”) in violation of the CON Board’s rules. Section 1130.710(c) of the CON Board’s Rules provides “the transfer, assignment, or other disposition of

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10% or more of the stock or voting rights of a for-profit corporation that is the permit holder, invalidates the permit.” When ASA transferred (or undertook some other disposition of) 20% of the ownership of NMFF Dialysis Center, LLC to U.S. Renal, that transaction invalidated the permit for Project No. 12-099 as a matter of law. Accordingly, NMFF Dialysis Center is not eligible for an exemption from the CON Board’s requirements for a change of ownership because, pursuant to Rule 1130.710(c), the transfer of ASA’s 20% of the ownership interest to U.S. Renal invalidated the underlying permit for Project No. 12-099.

Notwithstanding the fact the permit for Project No. 12-099 is invalid and no longer in effect, the NMFF Dialysis Center change of ownership is not eligible for an exemption. As detailed more fully in DaVita’s Written Comments in Opposition to Project No. E-007-14 dated May 12, 2014, an exemption is only possible for an “existing health care facility.” The proposed NMFF Dialysis Center is merely a permitted project and not a completed facility. (See Attachment 1). The CON Board does not allow a project’s permit to be transferred. (See 77 Ill. Admin. Code § 1130.710(d), “A permit shall not be bought, sold, or transferred either on its own or as part of a transaction for a change of ownership of a health care facility or for the acquisition of major medical equipment.”) Rather, the CON Board’s Rules mandate a change of ownership for a project requires a permit from the CON Board—unless the CON Board issues an exemption. 77 Ill. Admin. Code § 1130.310(a)(5). An exemption may be issued by the Board for “the change of ownership of an existing health care facility.” 77 Ill. Admin. Code § 1130.410(a).

Importantly, NMFF Dialysis Center is not an “existing health care facility” pursuant to the CON Board’s rules; it is neither completed nor operational. The CON Board’s rules define an “Existing Health Care Facility” as

any health care facility subject to the Act that:

has a license issued by IDPH and has provided services within the past 12 months, unless the failure to provide such service is the result of pending license revocation procedures, and has not surrendered or abandoned its license or had its license revoked or voided or otherwise deemed invalid by IDPH; or

is certified under Titles XVIII or XIX of the Social Security Act (42 USC 1395); or

is a facility operated by the State of Illinois.

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HFSRB NOTE: Projects approved by HFSRB for establishment of a health care facility that have not been deemed complete in accordance with the provisions of this Part shall not be considered existing facilities, but the approved number of beds or services shall be recorded in the Inventory of Health Care Facilities and shall be counted against any applicable need estimate.

77 Ill. Admin. Code § 1130.140 (emphasis added).

Applying the CON Board's definition to NMFF's Project No. 12-099 for the establishment of a 36-station dialysis facility, it is clear the project is not an "existing health care facility." NMFF's proposed dialysis facility: 1) has not had a license issued by IDPH and has not provided services within the past 12 months; 2) is not certified under Titles XVIII or XIX of the Social Security Act (Medicare or Medicaid); 3) and is not operated by the State of Illinois. Furthermore, Project No. 12-099 has not been deemed complete by the CON Board, and as of the March 2014 Annual Progress Report, the project is only 6% complete. Importantly, the Board explicitly notes that establishment projects that have not been deemed complete "shall not be considered existing facilities." *Id.*

NMFF's COE application (Project No. E-007-14) requesting the CON Board's exemption from the typical permit process for a change of ownership of its proposed new dialysis facility (Project No. 12-099) does not qualify for consideration of an exemption because Project No. 12-099, as an incomplete project, is not an existing health care facility. Therefore, the Board's Rules on exemptions do not apply, and NMFF is not eligible for an exemption for the change of ownership.

Thank you for considering our comments to the NMFF Dialysis Center Board Staff report.

Sincerely,



Anne M. Cooper

Attachment



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Group Administration &
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May 12, 2014

Via FedEx

Ms. Kathryn Olson
Chair
Illinois Health Facilities and Services Review Board
525 West Jefferson Street, Second Floor
Springfield, IL 62761

**Re: Written Comments in Opposition to Project No. E-007-14,
Northwestern Medical Faculty Foundation Dialysis Center, Chicago**

Dear Chair Olson:

I am Vice President, Group Administration and Strategy Development for DaVita HealthCare Partners Inc. ("DaVita"). I write on behalf of DaVita to oppose Northwestern Medical Faculty Foundation's ("NMFF") application for exemption for a change of ownership to NMFF's pending new dialysis center in Chicago. The Illinois Health Facilities and Services Review Board (the "Board") cannot grant NMFF an exemption for a change of ownership because pre-application changes of ownership have invalidated the underlying project permit and the incomplete project is not eligible for an "existing health care facility" exemption.

I. Background of NMFF's dialysis center (Project 12-099)

On December 4, 2012, NMFF submitted an application to the Board for establishment of a 36-station end stage renal disease (ESRD) facility in Chicago (Project 12-099). The applicant for Project 12-099 was Northwestern Medical Faculty Foundation Dialysis Center, LLC, which was a newly formed entity owned 80% by NMFF and 20% by a national, corporate dialysis operator, Ambulatory Services of America, Inc. ("ASA").

On March 26, 2013, the Board approved the application and granted a permit for Project 12-099. The Board's Permit Approval letter indicates that the permit holder is "Northwestern Medical Faculty Foundation Dialysis Center, LLC, 680 North Lake Shore Drive, Suite 1118, Chicago, Illinois, 60611," the permit amount is \$9,007,464, the obligation date is September 26, 2014, and the project completion date is June 30, 2016.



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NMFF obligated Project 12-099 on August 26, 2013 through signing a lease. NMFF submitted an Annual Progress Report for Project 12-099 to the Board on March 24, 2014 and stated that the project is approximately 6% complete.

II. Changes of ownership of NMFF's dialysis center

According to NMFF, on September 13, 2013, NMFF was acquired by Northwestern Memorial HealthCare ("NMHC"), and NMFF became a wholly owned subsidiary of NMHC. NMFF recognizes that its acquisition by NMHC constitutes a "change of ownership." Therefore, NMFF filed an Application for Exemption for the Change of Ownership for an Existing Health Care Facility ("Exemption") with the Board on February 6, 2014 (Project E-007-14).

It is not clear from the Exemption application, however, exactly how operational control was transferred or is now held by NMHC. The Exemption application does not include the Affiliation Agreement between NMFF and NMHC even though that agreement consummated the change of ownership transaction. (See Exemption application, p. 7, 10.) In a February 10, 2014 follow up to the Exemption application, Mr. Constantino (Board staff) asked NMFF's representative for additional information including, "the transaction document signed and dated as well as the completion date." NMFF's March 18, 2014 response to the Board omits the transaction document and does not respond to the request besides suggesting that, "NMFF's potential acquisition by NMHC was generally known, and noted by HFSRB Staff." While the specifics of the change of ownership transaction have not been disclosed and cannot be gleaned from NMFF's submissions for Project E-007-14, it is nevertheless undisputed that NMFF underwent a change of ownership relating to Project 12-099, the proposed new dialysis facility.

Further, although NMFF only mentions this in passing, there was another change of ownership for Project 12-099 when ASA (the 20% owner of Northwestern Medical Faculty Foundation Dialysis Center, LLC) was acquired by U.S. Renal Care, Inc. on August 12, 2013. As such, U.S. Renal Care, Inc. became the new owner of 20% of the permit holder for Project 12-099. NMFF indicates that there was technical assistance discussions with Board staff about the transaction, and claims that "it was concluded that ASA's acquisition did not require any IHFSRB action." (See Exemption application, p. 7.) It is not clear who concluded that ASA's change of ownership did not require Board action (Board staff, ASA, NMFF?) or why.

III. Comments and analysis in opposition to NMFF's Exemption application

The Exemption application for a change of ownership relating to Project 12-099 cannot legally be granted pursuant to the Board's Rules. First, the changes of ownership in August and September 2013 invalidated the permit for Project 12-099. Alternatively, an exemption is only possible for an "existing health care facility" but the proposed new dialysis center is merely a permitted project and not a completed facility.

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First, the Board's Rules explicitly state that a change in the permit holder invalidates the permit:

A permit is valid only for the defined construction or modification, equipment, site, amount, time period and persons named in the application for the permit and shall not be transferable or assignable. **A change in the person who is the permit holder; a change in the membership or sponsorship of a not-for-profit corporation that is the permit holder; or the transfer, assignment, or other disposition of 10% or more of the stock or voting rights of a for-profit corporation that is the permit holder, invalidates the permit.**

77 Ill. Admin. Code § 1130.710(c) (emphasis added).

Definitions in the Board's Rules also provide greater explanation and examples for what constitutes a "change of ownership" for purposes of the Illinois Health Facilities Planning Act and its regulations:

"Change of Ownership" means a change in the person who has operational control of an existing health care facility or a change in the person who has ownership or control of a health care facility's physical plant and capital assets. A change of ownership is indicated by, but not limited to, the following transactions: sale, transfer, acquisition, leases, change of sponsorship or other means of transferring control. [20 ILCS 3960/3] Examples of change of ownership include:

a transfer of stock or assets resulting in a person obtaining majority interest (i.e., over 50%) in the person who is licensed or certified (if the facility is not subject to licensure), or in the person who owns or controls the health care facility's physical plant and capital assets; or

the issuance of a license by IDPH to a person different from the current licensee; or

for facilities not subject to licensing, the issuance of a provider number to a different person by certification

agencies that administer Titles XVIII and XIX of the Social Security Act; or

a change in the membership or sponsorship of a not-for-profit corporation; or

a change of 50% or more of the voting members of a not-for-profit corporation's board of directors, during any consecutive 12 month period, that controls a health care facility's operations, license, certification (when the facility is not subject to licensing) or physical plant and capital assets; or

a change in the sponsorship or control of the person who is licensed or certified (when the facility is not subject to licensing) to operate, or who owns the physical plant and capital assets of a governmental health care facility; or

any other transaction that results in a person obtaining control of a health care facility's operations or physical plant and capital assets, including leases.

77 Ill. Admin. Code § 1130.140. And further, the Board expands on its definition of "control":

"Control" means that a person possesses any of the following discretionary and non-ministerial rights or powers:

In the case of an entity, the ability to direct the management and policies of the entity, whether through the voting of securities, corporate membership, contract, or otherwise. Examples of such control include, without limitation:

holding 50% or more of the outstanding voting securities of an issue;

in the case of an entity that has no outstanding voting securities, having the right to 50% or more of the profits or, in the event of dissolution, the right to 50% or more of the assets of the entity;

having the power to appoint or remove 50% or more of the governing board members of an entity;

having the power to require or approve the use of funds or assets of the entity; or

having the power to approve, amend or modify the entity's bylaws or other governance documents.

Id.

Prior to the transaction between NMFF and NMHC, there was a substantial change of ownership relating to the permit holder (Northwestern Medical Faculty Foundation Dialysis Center, LLC) that invalidated the permit for Project 12-099. On or about August 12, 2013, the 20% ownership of the permit holder changed from ASA to U.S. Renal Care, Inc. The Board's Rule 1130.710(c) requires that, "the transfer, assignment, or other disposition of 10% or more of the stock or voting rights of a for-profit corporation that is the permit holder, invalidates the permit." When ASA transferred (or undertook some other disposition of) 20% of the ownership of Northwestern Medical Faculty Foundation Dialysis Center, LLC to U.S. Renal Care Inc., that transaction invalidated the permit for Project 12-099 as a matter of law.

Similarly, NMFF's change of ownership is another trigger to invalidate the permit for Project 12-099. Considering the Board's definitions and applying them to NMFF's acquisition by NMHC in September 2013, the transaction was a transfer of "control" and a "change of ownership." NMFF concedes this change of ownership transaction through its Exemption application.¹ While NMFF acknowledges the change of ownership, it seeks to side-step the consequence of the change of ownership. NMFF requests the Board's exemption from the permit requirements relating to a change of ownership, but that exemption is not available because, pursuant to Rule 1130.710(c), the change of ownership *invalidated* the underlying permit for Project 12-099.

¹ Again, because NMFF's Exemption application does not disclose the Affiliation Agreement, the Board cannot precisely see the method and extent that operational control over the proposed new dialysis facility was transferred to NMHC. From NMFF's brief description of the transaction in the Exemption application, it appears that the transaction resulted in NMHC obtaining the control of the health care facility's operations or physical plant/assets and a change to the membership (or possibly the sponsorship or 50% or more of the voting members) of the permit holder. While the details have not been disclosed, there is no question that the transaction was a "change of ownership," as even NMFF acknowledges in its Exemption application.

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As such, in response to NMFF's Exemption application (Project E-007-14), the Board should deny NMFF's request for exemption because it cannot logically or legally be granted when the underlying permit has already been invalidated.

Second, and as an alternative, Project 12-099 is not eligible for an exemption under the Board's Rules because it is an incomplete project. The Board does not allow a project's permit to be transferred. (*See* 77 Ill. Admin. Code § 1130.710(d), "A permit shall not be bought, sold, or transferred either on its own or as part of a transaction for a change of ownership of a health care facility or for the acquisition of major medical equipment.") Rather, the Board's Rules mandate that a change of ownership for a project requires a permit from the Board—unless the Board issues an exemption. 77 Ill. Admin. Code § 1130.310(a)(5). An exemption may be issued by the Board for "the change of ownership of an existing health care facility." 77 Ill. Admin. Code § 1130.410(a).

The problem with NMFF's Exemption application is that it mischaracterizes the proposed new dialysis center (Project 12-099) as an "existing health care facility" although the permitted project is neither completed nor in operation.

The Board's definitions explain what constitutes an existing health care facility for purposes of a change of ownership exemption:

"Existing Health Care Facility" means any health care facility subject to the Act that:

has a license issued by IDPH and has provided services within the past 12 months, unless the failure to provide such service is the result of pending license revocation procedures, and has not surrendered or abandoned its license or had its license revoked or voided or otherwise deemed invalid by IDPH; or

is certified under Titles XVIII or XIX of the Social Security Act (42 USC 1395); or

is a facility operated by the State of Illinois.

HFSRB NOTE: Projects approved by HFSRB for establishment of a health care facility that have not been deemed complete in accordance with the provisions of this Part shall not be considered existing facilities, but the approved

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number of beds or services shall be recorded in the Inventory of Health Care Facilities and shall be counted against any applicable need estimate.

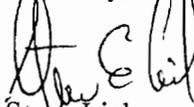
77 Ill. Admin. Code § 1130.140.

Applying that definition to NMFF's Project 12-099 for the establishment of a 36-station dialysis facility, it is clear that the project is not an "existing health care facility." NMFF's proposed dialysis facility: 1) has not had a license issued by IDPH and has not provided services within the past 12 months; 2) is not certified under Titles XVIII or XIX of the Social Security Act (Medicare or Medicaid); and is not operated by the State of Illinois. Furthermore, Project 12-099 for the establishment of a new dialysis facility has not been deemed complete by the Board (as of the March 2014 Annual Progress Report, the project is only 6% complete), and the Board explicitly notes that establishment projects that have not been deemed complete "shall not be considered existing facilities." *Id.*

NMFF has filed an Exemption application (Project E-007-14) requesting the Board's exemption from the typical permit process for a change of ownership of its proposed new dialysis facility (Project 12-099), but NMFF does not even qualify for consideration of an exemption because Project 12-099, as an incomplete project, is not an existing health care facility. Therefore, the Board's Rules on exemptions do not apply, and NMFF cannot be granted an exemption for the change of ownership.

For the reasons set forth above, DaVita respectfully requests that the Board deny NMFF's Exemption application and determine that the permit for Project 12-099 is invalidated.

Sincerely,



Steve Lieb

Vice President, Group Administration and Strategy
Development
DaVita HealthCare Partners Inc.

Attachment

cc: Michael Constantino

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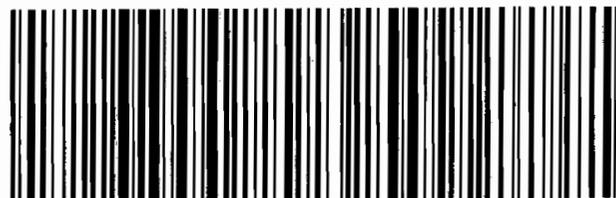
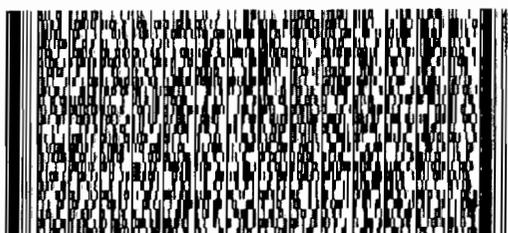
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