

## Constantino, Mike

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**From:** maryjane.yothment@hklaw.com on behalf of Clare.Ranalli@hklaw.com  
**Sent:** Thursday, March 10, 2011 3:02 PM  
**To:** Avery, Courtney  
**Cc:** Constantino, Mike; lori.wright@fmc-na.com; Michelle.Wiest@fmc-na.com; coleen.muldoon@fmc-na.com; julie.hawkins@fmc-na.com  
**Subject:** Project No. 10-066  
**Attachments:** Project No. 10-066.PDF

Ms. Avery:

Please see the attached communication with regard to Project No. 10-066.

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March 10, 2011

*Via Electronic & U.S. Mail*

Courtney Avery  
Administrator  
Illinois Department of Public Health  
525 West Jefferson  
Springfield, Illinois 62761

Re: Project No. 10-066

Dear Ms. Avery:

On behalf of the applicants in the CON Application referenced above, I would like to submit this information in response to the purported "Comments to State Agency Report for Fresenius Medical Care Joliet" submitted by DaVita, Inc. through its legal counsel. The letter submitted focuses on *alleged* deficiencies in the application, and has nothing to do with the State Agency Report itself. The "problems" with the again *alleged* lack of information in the application **should have been submitted** by DaVita during the public comment period prior to the application being heard initially, or during the same period after the application received an Intent to Deny. Instead, DaVita chose to send in misleading and erroneous information in the guise of comment to the SAR in an attempt to get the HFSRB to defer consideration of the Joliet CON Application. The Crest Hill facility proposed by DaVita is 6.5 miles from the proposed Joliet facility. It is clearly in DaVita's interest for the Board to consider its application prior to the consideration (and possible granting of) the Fresenius Joliet facility. However, it submitted its Crest Hill application approximately three months after the Joliet application was submitted and thus it is scheduled to be heard by the HFSRB at its May, 2011 meeting. If DaVita is successful in getting the Board to defer the Joliet application to its May meeting, as it is pending subsequent to an intent to deny, it will be considered after the DaVita Crest Hill application. The Board's rules and statutory provisions allowing comment on SARs should not be used to manipulate the Board's agenda so as to obtain approval of one application prior to another competitive one. The latter is particularly true in this instance where (1) there is no error

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in the SAR and (2) the information submitted is on its face erroneous in interpreting the Board's rules.

DaVita's comment as previously mentioned has nothing to do with the SAR. Rather it claims that the applicants did not submit financial information required by the Board's rules. DaVita claims that (1) the application should have contained financial viability ratios and financial information for Kidney Care Center of Northern Illinois, LLC, (Kidney Care Center) and (2) the joint venture applicant.

First, viability ratios are not required for this application. It is funded through internal resources. See highlighted information from the application, attached, which confirms that if an application is funded through internal resources financial viability ratios are not required.

Second, Fresenius Medical Care of Plainfield, LLC d/b/a Fresenius Medical Care Joliet (the joint venture applicant) did submit financial statements through Fresenius Medical Care Holdings, Inc. which is the entity with "final control" over the joint venture. Fresenius Holdings is the entity with final control of Fresenius Medical Care Ventures, LLC (a co-applicant that has the controlling membership interest in the joint venture applicant that will own/operate the proposed dialysis clinic). As is typical with all Fresenius Medical Care applications, the financial statements submitted are those of Fresenius Holdings, as it is the corporate entity that prepares and holds consolidated audited financial statements for the various corporate entities that own and operate Fresenius Medical Care dialysis clinics in Illinois, including Fresenius Medical Care of Plainfield, LLC d/b/a Fresenius Medical Care Joliet. This ownership and financial interest is what requires Fresenius Holdings to be a co-applicant in all of the Fresenius applications. In sum, the joint venture applicant does not have audited financial statements to submit, but has satisfied the requirement of submitting such statements through the submission of Fresenius Holdings' consolidated audited financial statements. Thus the allegations that the joint venture's financial statement should be part of the application is a non-issue, and a misleading and erroneous statement intended solely to delay this application so that DaVita's Crest Hill application could be heard first by the Board.

The next allegation made by DaVita is that the minority member in the joint venture clinic proposed to the Board, Kidney Care Center, should have submitted financial viability ratios and financial statements. DaVita relies on rule 1120.120 of Part 77 of the Illinois Administrative Code. A copy of that rule is attached. It specifically states: "The applicant must provide . . ." in all of its references to required financial information. It is very clear from the Board's rules and the application for a CON permit itself that the only entities that must submit financial information are applicants and co-applicants. Kidney Care Centers, who will hold a minority and non-controlling interest in Fresenius Medical Care Joliet is not an applicant, **and is not required by the Board's rules to be an applicant or co-applicant in this proceeding.** The Board's rules address who is required to be an applicant or a co-applicant on a CON permit. They state:

"The following persons must be the applicants for permit or exemption, as applicable:

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1) For construction or modification projects (including projects to establish or change the ownership of health care facilities and including projects to acquire major medical equipment by or on behalf of health care facilities) of one or more existing or proposed health care facilities:

1) the person who will hold and who currently (as applicable) holds the license (or Medicare and/or Medicaid certification if licensing is not applicable) for each facility; **(this is the applicant Fresenius Medical Care of Plainfield, LLC d/b/a Fresenius Medical Care Joliet)**

2) the person who will have final control of the person who will hold or who currently holds (as applicable) the license (or Medicare and/or Medicaid certification if applicable) for each facility; **(this is Fresenius Ventures, LLC, the majority interest holder in Fresenius Medical Care of Plainfield, LLC d/b/a Fresenius Medical Care Joliet)**

3) any related person who is or will be financially responsible for guaranteeing or making payments on any debt related to the project; **(Kidney Care Center is not a related person as defined within the Board's rules and is not financially responsible for guaranteeing or making payments for debt related to the project - the project is funded with cash on hand and the applicant Fresenius Medical Care of Plainfield, LLC d/b/a Fresenius Medical Care Joliet is financially responsible for paying for the construction, equipment and is the tenant on the lease for space - no guarantees have been issued other than by Fresenius Holdings)**

4) any other person who actively will be involved in the operation or provision of care and who controls the use of equipment or other capital assets that are components of the project, such as, but not limited to fixed equipment mobile equipment, building or portions of buildings, structures such as parking garages, etc. **(this is Fresenius Medical Care of Plainfield, LLC d/b/a Fresenius Medical Care Joliet, and Fresenius Ventures, the controlling member of the applicant)**

Kidney Care Center meets none of these criteria. It is simply the minority interest holder in the entity that will be certified. It does not hold a controlling interest in the facility and is not guarantying any debt for the project. Even if it were, it would not be required to be an applicant or co-applicant unless it met the definition of a "related person" which it does not. Clearly, DaVita knows this as it is familiar with the Board's rules.

It is interesting that DaVita does not address the issue of why Kidney Care Center was not an applicant. It did not do so because it knows that it is not required to be an applicant. Rather, it chose to try to confuse the issue by alleging that it should have provided financial information, forcing the applicant to issue this long explanation regarding the applicability of the rules, which also then causes the Board to have to either defer the matter (exactly what DaVita wants) or to try to review a plethora of information. **We urge the Board to reject DaVita's comment as "comment to the SAR" as it clearly is not. It could have been submitted any time during the two time frames for public comment on this application.**

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In sum, viability ratios are not required at all for this project, as it is funded with internal resources. Financial statements for the joint venture are required, and have been provided through the consolidated audited financial statements of Fresenius Holdings. Financial information of any kind is not required from Kidney Care Center, as it is not, and is not required to be, an applicant or co-applicant on this application.

On behalf of Fresenius Medical Care, we respectfully submit this information for the Board's consideration. We urge the Board not to allow DaVita to abuse the Board's process for comment on SARs in this manner.

Sincerely yours,

HOLLAND & KNIGHT LLP

  
Clare Connor Ranalli

CCR/mjy  
Enclosure

cc: Mike Constantino  
Lori Wright, CON Specialist  
Michelle Wiest, Group Vice President  
Coleen Muldoon, Regional Vice President  
Julie Hawkins, Associate General Counsel

**WEST'S ILLINOIS ADMINISTRATIVE CODE**  
**TITLE 77: PUBLIC HEALTH**  
**CHAPTER II: HEALTH FACILITIES PLANNING BOARD**  
**SUBCHAPTER B: OTHER BOARD RULES**  
**PART 1120: HEALTH FACILITIES PLANNING FINANCIAL AND ECONOMIC FEASIBILITY**  
**REVIEW**  
**SUBPART B. INFORMATION REQUIREMENTS**  
Current with amendments received through October 21, 2005.

1120.120 Information Requirements for Financial Feasibility

The applicant must provide (for the health care facility or for the person who controls the health care facility) either the most recent bond rating (that must be less than two years old) from Fitch's, Moody's, or Standard and Poor's rating agencies that documents a rating of "A" or better or provide evidence of financial resources to fund the project and any related costs as follows:

a) Cash and Securities

The applicant must provide statements (e.g., audited financial statements, letters from financial institutions, board resolutions) as to the amount of cash and securities available for the project. The applicant must provide the identification of any security, its value, and availability of such funds. Interest to be earned or depreciation account funds to be earned on any asset from the date of application submittal through project completion are also considered cash.

b) Pledges

For anticipated pledges, the applicant must provide a letter or report as to the dollar amount feasible showing the discounted value and any conditions or action the applicant would have to take to accomplish this goal. The time period, historical fund raising experience and major contributors also must be specified.

c) Gifts and Bequests

For gifts and bequests available for the project, the applicant must provide verification of the dollar amount and identify any conditions and timing of its use.

d) Debt Financing

The applicant must provide the estimated terms and conditions for the following types of debt financing proposed to fund the project:

- 1) For general obligation bonds, the applicant must provide proof of passage of the required referendum or evidence that the governmental unit has the authority to issue such bonds and also provide evidence of the dollar amount of the issue and any discounting or shrinkage anticipated;
- 2) For revenue bonds, the applicant must provide proof of the feasibility of securing the specified amount;
- 3) For mortgages, the applicant must provide a letter from the prospective lender attesting to the expectation of making the loan in the amount and time indicated;
- 4) For leases, the applicant must provide a copy of the lease including all the terms and conditions of the lease including any purchase options.

e) Governmental Appropriations

The applicant must provide a copy of the appropriation Act or ordinance accompanied by a statement of funding availability from an official of the governmental unit. If funds are to be made available from subsequent fiscal years, the applicant must provide a resolution or other action of the governmental unit attesting to this intent.

f) Grants

The applicant must provide a letter from the granting agency as to the availability of funds in terms of the amount and time of receipt.

g) All Other Funds and Sources

The applicant must provide verification of the amount and type of any other funds that will be used for the project.

(Source: Amended at 24 Ill. Reg. 6052, effective April 7, 2000)

<General Materials (GM) - References, Annotations, or Tables >

77 ILAC § 1120.120

77 IL ADC 1120.120  
END OF DOCUMENT

**WEST'S ILLINOIS ADMINISTRATIVE CODE**  
**TITLE 77: PUBLIC HEALTH**  
**CHAPTER II: HEALTH FACILITIES PLANNING BOARD**  
**SUBCHAPTER B: OTHER BOARD RULES**  
**PART 1120: HEALTH FACILITIES PLANNING FINANCIAL AND ECONOMIC FEASIBILITY**  
**REVIEW**  
**SUBPART B. INFORMATION REQUIREMENTS**  
Current with amendments received through October 21, 2005.

1120.130 Information Requirements for Economic Feasibility

a) Bond Rating or Historical Financial Statements

The applicant must provide (for the healthcare facility or for the person who controls the healthcare facility) either the most recent bond rating (that must be less than two years old) from Fitch's, Moody's, or Standard and Poor's rating agencies that documents a rating of "A" or better or provide the most recent three years' audited financial statements that include the following:

- 1) Balance sheet;
- 2) Income statement;
- 3) Changes in fund balance; and
- 4) Change in financial position.

b) Projected Capital Costs

The applicant must provide the annual projected capital costs (depreciation, amortization, and interest expense) for:

- 1) The first full fiscal year after project completion; or
- 2) The first full fiscal year when the project achieves or exceeds target utilization pursuant to 77 Ill. Adm. Code 1100, whichever is later.

c) Projected Operating Costs

The applicant must provide projected operating costs (excluding depreciation and stated in current dollars based on the full-time equivalents (FTEs) and other resource requirements) for the first full fiscal year after project completion or the first full fiscal year when the project achieves or exceeds target utilization pursuant to 77 Ill. Adm. Code 1100, whichever is later, including:

- 1) Annual operating costs; and
- 2) Annual operating costs change (increase or decrease) attributable to the project

(Source: Amended at 24 Ill. Reg. 6052, effective April 7, 2000)

<General Materials (GM) - References, Annotations, or Tables >

77 ILAC § 1120.130

77 IL ADC 1120.130

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77 IL ADC 1120.130  
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**WEST'S ILLINOIS ADMINISTRATIVE CODE**  
**TITLE 77: PUBLIC HEALTH**  
**CHAPTER II: HEALTH FACILITIES PLANNING BOARD**  
**SUBCHAPTER B: OTHER BOARD RULES**  
**PART 1120: HEALTH FACILITIES PLANNING FINANCIAL AND ECONOMIC FEASIBILITY**  
**REVIEW**  
**SUBPART C. FINANCIAL FEASIBILITY REVIEW CRITERIA**  
Current with amendments received through October 21, 2005.

1120.210 Financial Feasibility Review Criteria

If an applicant has not documented a bond rating of "A" or better (pursuant to Section 1120.120), then the applicant must address the review criteria in this Section.

a) Financial Viability--Review Criterion

1) Viability Ratios

Applicants (including co-applicants) must document compliance with viability ratio standards detailed in Appendix A of this Part or address a variance. Applicants must document compliance for the most recent three years for which audited financial statements are available. For Category B applications, the applicant also must document compliance through the first full fiscal year after project completion or for the first full fiscal year when the project achieves or exceeds target utilization pursuant to 77 Ill. Adm. Code 1100, whichever is later, or address a variance.

2) Variance for Applications Not Meeting Ratios

Applicants not in compliance with any of the viability ratios must document that another organization, public or private, shall assume the legal responsibility to meet the debt obligations should the applicant default.

b) Availability of Funds--Review Criterion

The applicant must document that financial resources shall be available and be equal to or exceed the estimated total project cost and any related cost.

c) Operating Start-up Costs--Review Criterion

The applicant must document that financial resources shall be available and be equal to or exceed any start-up expenses and any initial operating deficit.

(Source: Amended at 24 Ill. Reg. 6052, effective April 7, 2000)

<General Materials (GM) - References, Annotations, or Tables>

77 ILAC § 1120.210

77 IL ADC 1120.210  
END OF DOCUMENT

c

**WEST'S ILLINOIS ADMINISTRATIVE CODE**  
**TITLE 77: PUBLIC HEALTH**  
**CHAPTER II: HEALTH FACILITIES PLANNING BOARD**  
**SUBCHAPTER B: OTHER BOARD RULES**  
**PART 1120: HEALTH FACILITIES PLANNING FINANCIAL AND ECONOMIC FEASIBILITY**  
**REVIEW**  
**SUBPART D: ECONOMIC FEASIBILITY REVIEW CRITERIA**  
Current with amendments received through October 21, 2005.

1120.310 Economic Feasibility Review Criteria

a) Reasonableness of Financing Arrangements--Review Criterion

This criterion is not applicable if the applicant has documented a bond rating of "A" or better pursuant to Section 1120.210. An applicant that has not documented a bond rating of "A" or better must document that the project and related costs will be:

1) funded in total with cash and equivalents including investment securities, unrestricted funds, and funded depreciation as currently defined by the Medicare regulations (42 USC 1395); or

2) funded in total or in part by borrowing because:

A) a portion or all of the cash and equivalents must be retained in the balance sheet asset accounts in order that the current ratio does not fall below 2.0 times; or

B) borrowing is less costly than the liquidation of existing investments and the existing investments being retained may be converted to cash or used to retire debt within a 60 day period. The applicant must submit a notarized statement signed by two authorized representatives of the applicant entity (in the case of a corporation, one must be a member of the board of directors) that attests to compliance with this requirement.

b) Conditions of Debt Financing--Review Criterion

The applicant must certify that the selected form of debt financing the project will be at the lowest net cost available or if a more costly form of financing is selected, that form is more advantageous due to such terms as prepayment privileges, no required mortgage, access to additional indebtedness, term (years), financing costs, and other factors. In addition, if all or part of the project involves the leasing of equipment or facilities, the applicant must certify that the expenses incurred with leasing a facility and/or equipment are less costly than constructing a new facility or purchasing new equipment. Certification of compliance with the requirements of this criterion must be in the form of a notarized statement signed by two authorized representative (in the case of a corporation, one must be a member of the board of directors) of the applicant entity.

c) Reasonableness of Project and Related Costs--Review Criterion

1) Construction and Modernization Costs

Construction and modernization costs per square foot for non-hospital based ambulatory surgical treatment centers and for facilities for the developmentally disabled, and for chronic renal dialysis treatment centers projects shall not exceed the standards detailed in Appendix A of this Part unless the applicant documents construction constraints or other design complexities and provides evidence that the costs are similar or consistent with other projects that have similar constraints or complexities. For all other projects, construction and modernization costs

per square foot shall not exceed the adjusted (for inflation, location, economies of scale and mix of service) third quartile as provided for in the Means Building Construction Cost Data publication unless the applicant documents construction constraints or other design complexities and provides evidence that the costs are similar or consistent with other projects that have similar constraints or complexities.

## 2) Contingencies

Contingencies (stated as a percentage of construction costs for the stage of architectural development) shall not exceed the standards detailed in Appendix A of this Part unless the applicant documents construction constraints or other design complexities and provides evidence that the costs are similar or consistent with other projects that have similar constraints or complexities. Contingencies shall be for construction or modernization only and shall be included in the cost per square foot calculation.

**BOARD NOTE:** If, subsequent to permit issuance, contingencies are proposed to be used for other line item costs, an alteration to the permit (as detailed in 77 Ill. Adm. Code 1130.750) must be approved by the State Board prior to such use.

## 3) Architectural Fees

Architectural fees shall not exceed the fee schedule standards detailed in Appendix A of this Part unless the applicant documents construction constraints or other design complexities and provides evidence that the costs are similar or consistent with other projects that have similar constraints or complexities.

## 4) Major Medical and Movable Equipment

A) For each piece of major medical equipment, the applicant must certify that the lowest net cost available has been selected, or if not selected, that the choice of higher cost equipment is justified due to such factors as, but not limited to, maintenance agreements, options to purchase, or greater diagnostic or therapeutic capabilities.

B) Total movable equipment costs shall not exceed the standards for equipment as detailed in Appendix A of this Part unless the applicant documents construction constraints or other design complexities and provides evidence that the costs are similar or consistent with other projects that have similar constraints or complexities.

## 5) Other Project and Related Costs

The applicant must document that any preplanning, acquisition, site survey and preparation costs, net interest expense and other estimated costs do not exceed industry norms based upon a comparison with similar projects that have been reviewed.

### d) Projected Operating Cost--Review Criterion

The applicant must provide the projected direct annual operating costs (in current dollars per equivalent patient day or unit of service) for the first full fiscal year after project completion or the first full fiscal year when the project achieves or exceeds target utilization pursuant to 77 Ill. Adm. Code 1100, whichever is later. Direct costs means the fully allocated costs of salaries, benefits, and supplies for the service.

### e) Total Effect of the Project on Capital Costs--Review Criterion

The applicant must provide the total projected annual capital costs (in current dollars per equivalent patient day) for the first full fiscal year after project completion or the first full fiscal year when the project achieves or exceeds target utilization pursuant to 77 Ill. Adm. Code 1100, whichever is later.

### f) Non-patient Related Services--Review Criterion

The applicant must document that projects involving non-patient related services (medical office buildings) will be self-supporting and not result in increased charges to patients or that increased charges to patients are justified based upon such factors as, but not limited to, a cost benefit or other analysis which demonstrates that the project will improve the applicant's financial viability.

(Source: Amended at 27 Ill.Reg. 2960, effective February 21, 2003)

< General Materials (GM) - References, Annotations, or Tables >

77 ILAC § 1120.310

77 IL ADC 1120.310  
END OF DOCUMENT