

**STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD**

In re: ACTD LLC, d/b/a The Green Mountain)
Surgery Center) GMCB-010-15con
_____)

STATEMENT OF DECISION

INTRODUCTION

On July 10, 2017, we issued a certificate of need (CON) to ACTD, LLC d/b/a Green Mountain Surgery Center (GMSC).¹ The CON allows GMSC to operate a multi-specialty ambulatory surgery center (ASC) in Colchester, Vermont. We imposed a series of conditions in the CON to ensure the ASC provides low cost, accessible, and medically appropriate care in a manner consistent with the information and assurances GMSC provided during the review process and with the requirements of Vermont’s CON laws and system-wide payment and delivery reform efforts. Prior to opening the ASC, we required GMSC to appear before us and demonstrate its compliance with the conditions of its CON. *In re: Application of ACTD, LLC d/b/a Green Mountain Surgery Center*, CON, Doc. No. GMCB-010-15con (July 10, 2017).

There are three questions currently before us: 1) whether GMSC has demonstrated its compliance with each of the conditions of its CON; 2) whether to grant GMSC’s request to amend Condition 21; and 3) whether to approve proposed changes to the project relating to the services that will be offered at the ASC. *See* Letter from Donna Jerry to Amy Cooper (Feb. 14, 2019). For the reasons set forth below, we conclude GMSC has satisfied some, but not all, of the conditions of its CON, and we therefore require additional reporting before the ASC may open; we grant GMSC’s request to amend Condition 21, in part; and we approve GMSC’s proposed changes to the project, in part (in doing so, we also clarify the scope of the CON). Finally, we require GMSC to file implementation reports for an additional two years.

JURISDICTION & LEGAL FRAMEWORK

The Board has jurisdiction over the CON process pursuant to 18 V.S.A. § 9375(b)(8) and 18 V.S.A. § 9433(a). The purposes of CON review are to prevent unnecessary duplication of health care facilities and services, promote cost containment, guide the establishment of health facilities and services which will best serve public needs, ensure the provision of high quality services and resources, and ensure access to and equitable allocation of facilities and services in Vermont. GMCB Rule 4.000, § 4.102; 18 V.S.A. § 9431. After reviewing a CON application, the Board must either deny it or approve it in whole or in part, “subject to such conditions as the Board may impose for the purposes of [the CON laws].” 18 V.S.A. § 9440(d)(4); *see also* GMCB Rule 4.000, § 4.500(3)(b).

Once issued, the Board has authority to enforce a CON. *See* 18 V.S.A. § 9444. The recipient of the CON must notify the Board of any changes in the scope or cost of the

¹ Other documents in this docket may refer to GMSC as “ACTD” or “the Applicant.”

approved project. GMCB Rule 4.000, § 4.600.1. Material changes must be reviewed and approved by the Board. *Id.* at § 4.600.2; 18 V.S.A. § 9444(b)(1). The Board may, in its discretion, review nonmaterial changes to a project as well. 18 V.S.A. § 9444(b)(2). If the Board decides to review a nonmaterial change, it may provide for any necessary process, including a public hearing, before approval. *Id.* In reviewing proposed changes to an approved project, the Board has the power to clarify the scope of a CON. *In re Prof'l Nurses Serv., Inc.*, 164 Vt. 529, 535, 671 A.2d 1289, 1293 (1996).

A material change is one that constitutes a “new health care project” (i.e., a project requiring a CON) or that increases the approved project’s total costs by more than ten percent. 18 V.S.A. § 9432(11). For health care facilities other than hospitals, a “new health care project” includes the offering of a health care service having an annual operating expense of more than \$500,000 for either of the next two budgeted fiscal years, if the service was not offered or employed by the health care facility within the previous three fiscal years. 18 V.S.A. § 9434(a)(5). A nonmaterial change is one that does not meet the cost threshold of a material change but otherwise modifies the kind, scope, or capacity of a project. 18 V.S.A. § 9432(12).

PROCEDURAL BACKGROUND

On July 10, 2017, the Board issued a CON that allows GMSC to develop a multi-specialty ASC in Colchester, Vermont. The CON included conditions GMSC had to satisfy before it could begin each phase of the project. GMSC was required to satisfy Conditions 1-7 before it could begin construction and was required to appear before the Board to demonstrate its compliance with Conditions 8-22 before it could begin operating. Condition 26 of the CON required GMSC to notify the Board immediately if it contemplated or became aware of a nonmaterial or material change to the scope or cost of the project. Condition 27 provided that the Board may make further orders to accomplish the purposes of the CON and ensure compliance with its terms.

On February 13, 2018, GMSC requested relief from Conditions 4 and 7 of the CON. Specifically, it sought leave to satisfy these two conditions before beginning operations, rather than before beginning construction. The Board granted GMSC’s request on March 9, 2018. *In re: ACTD, LLC*, Order Amending CON, Doc. No. GMCB-010-15con. In March and April of 2018, GMSC provided information to the Board, including at a public Board meeting on April 11, 2018, to demonstrate its compliance with the other “pre-construction” conditions. *See* Minutes, GMCB Board Mtg. (Apr. 11, 2018). On April 20, 2018, the Board notified GMSC that it had satisfied these conditions and could begin construction of the facility. Letter from Kevin Mullin to Amy Cooper.

On September 14, 2018, GMSC notified the Board of “nonmaterial changes in the [project], namely, the addition of new physician owners, and services in ophthalmology and plastic surgery.” Letter from Amy Cooper to Donna Jerry. Four days later, the Board advised GMSC that because the addition of the new physician owners does not constitute a new health care project and is not expected to materially increase costs, it “is therefore a nonmaterial, rather than material, change to the CON.” Letter from Donna Jerry to Amy Cooper (Sept. 18, 2018).

However, given the change, the Board asked GMSC to provide updated projections of the number and types of surgeries to be performed at the ASC. *Id.* GMSC provided the updated projections on September 24, 2018. Letter from Amy Cooper to Donna Jerry.

On October 1, 2018, the Board informed GMSC that its updated projections showed significant changes in the number and allocation of cases by specialty and posed a series of questions to GMSC “to determine whether the changes are material to the scope or costs of the project” and require further review. Letter from Donna Jerry to Amy Cooper. The Board requested updated projections of the ASC’s volume of cases by specialty, its revenue, and its payer mix, updated income and expense information, and information about the ophthalmology and plastic surgery services GMSC intended to offer, including documentation of a need for ophthalmology surgeries that is not being met by hospitals or other facilities. *Id.* GMSC responded on November 19, 2018. Letter from Amy Cooper to Donna Jerry.

On January 10, 2019, GMSC submitted a letter to the Board asking it to amend Condition 21 of the CON. This condition requires GMSC to report on its website and in quarterly implementation reports to the Board certain information about the procedures and surgeries performed by ASC physicians. GMSC sought leave to report this information in aggregate by specialty, rather than by individual provider, asserting that public disclosure of the information at the provider level could harm providers by revealing their individual procedure volumes and financial productivity. Relatedly, GMSC asserted that the information specified in Condition 21 is exempt from public inspection and copying under Vermont’s Public Records Act. Letter from Amy Cooper to Donna Jerry (Jan. 10, 2019).

On January 17, 2019, another series of questions was sent to GMSC “[t]o assist the Board in determining whether the changes necessitate further process and Board review.” Letter from Donna Jerry to Amy Cooper. GMSC responded on January 31, 2019. Letter from Amy Cooper to Donna Jerry. On February 14, 2019, the Board notified GMSC it would hold a hearing on April 17, 2019, to 1) “review [GMSC’s] compliance with CON conditions that must be met prior to commencing operations”; 2) “consider [GMSC’s] request for a change to Condition [21]”; and 3) “consider the proposed changes to the project’s scope – the addition of plastic surgery and ophthalmology – and the change in ownership of the entity, both of which impact the services and payer mix as approved by the Board.” Letter from Donna Jerry to Amy Cooper.

The interested parties in the underlying CON proceedings – the Office of the Health Care Advocate (HCA), Northwestern Medical Center (NMC), and the Vermont Association of Hospitals and Health Systems (VAHHS) – received notice of the hearing and were given an opportunity to present testimony. Testifying on behalf of GMSC at the hearing were GMSC’s Manager, Amy Cooper, and Administrator, John Paoni, as well as the following physicians who plan to perform surgeries at the ASC: Drs. David Weissgold and Michelle Young, vitreoretinal surgeons practicing at the Retina Center of Vermont, and Dr. Donald Laub Jr., a plastic surgeon practicing at Four Seasons Dermatology in Colchester, Vermont. NMC’s CEO, Jill Berry Bowen, testified on behalf of NMC.

Following the April 17, 2019 hearing, GMSC and NMC each provided additional information in response to questions from Board Members. VAHHS/NMC and GMSC also submitted post-hearing briefs on May 3, 2019.

FINDINGS OF FACT

Compliance with CON Conditions

1. Condition 1 of the CON requires GMSC to develop a consumer-friendly website that provides information about each physician planning to offer procedures/surgeries at the ASC, including, but not limited to, the following:

- a. The physician's name, professional credentials and area(s) of specialization;
- b. The types of procedures/surgeries that the physician will perform at the ASC, including an explanation of
 - i. the evidence-basis for recommending the procedure/surgery to a patient, and
 - ii. how the procedure/surgery improves health;
- c. The name and location of hospital(s) where the provider has admitting privileges;
- d. The physician's 24/7 contact information in the event of an emergency;
- e. Disclosure of any ownership interest in the ASC, and
- f. Information as detailed in Condition 21.

2. Condition 8 of the CON requires GMSC to make its consumer-friendly website available to the public no later than two weeks prior to commencing operations.

3. GMSC's consumer-friendly website is currently on a development server and "is not live to the public yet." Testimony of Amy Cooper, TR (4/17/19) at 9. GMSC does have a "live" website that is accessible by the public, but it is "mostly a splash page." *Id.* at 12. GMSC plans to launch its consumer-friendly website to the public two weeks before becoming operational, as required by the CON. *Id.* at 9. The development website includes several physician profiles that contain the types of information required by Condition 1, except the profiles do not contain information required by Condition 21. *Id.* at 10-12. GMSC plans to develop all the physician profiles using the same format. *Id.* at 10. However, not all the profiles have been loaded yet. *Id.*

4. Condition 2 of the CON requires GMSC to develop and implement a policy, which it must post to the ASC's consumer website, requiring that each ASC physician use a patient decision aid such as shared decision-making that: a) fully informs the patient of the benefits and risks of all care alternatives; b) incorporates the best available scientific evidence; c) takes into account a patient's values, goals and preferences; and d) advises the patient of the pros and cons, including the comparative costs, of having the procedure performed in an ASC, rather than a hospital. Condition 2 also requires that the policy include a provision requiring certification by the provider of his or her compliance with the policy.

5. GMSC adopted a policy requiring each ASC physician to engage in shared decision-making that: a) fully informs the patient of the benefits and risks of all care alternatives; b) incorporates the best available scientific evidence; c) takes into account the patient's values, goals and preferences; and d) advises the patient of the pros and cons, including the comparative

costs, of having the procedure performed in an ASC, rather than a hospital. The policy requires each physician to certify his or her compliance with the policy. GMSC, Documents Supporting Compliance with Conditions, Shared Decision-Making Policy (Mar. 3, 2018). GMSC posted the policy on its “live” website and its development website. Testimony of Amy Cooper, TR (4/17/19) at 12-13. GMSC has drafted a certification page each physician will have to sign. GMSC will keep certifications at the ASC in physicians’ credentialing files. *Id.* at 13. GMSC was unable to describe how it would implement the policy. *Id.* at 53.

6. Condition 3 of the CON requires GMSC to develop and implement a policy, which it must post to the ASC’s consumer website, requiring each physician to certify that he or she will accept patients without regard to payer type, insurance status, or ability to pay for services. Condition 3 also requires each physician to further certify that he or she will not consider the source of payment or a patient’s ability to pay when determining whether to perform a patient’s procedure/surgery at the ASC.

7. GMSC adopted a policy requiring each physician to certify that he or she will accept patients without regard to payer type, insurance status, or ability to pay for services. GMSC, Documents Supporting Compliance with Conditions, Payment Status Non-Discrimination Policy (Mar. 13, 2018). GMSC posted the policy on its “live” website. Testimony of Amy Cooper, TR (4/17/19) at 13. GMSC provided the Board with the certification page each physician will have to sign. GMSC will keep the certifications at the ASC in physicians’ credentialing files. *Id.*

8. When asked how GMSC would enforce its Payment Status Non-Discrimination Policy, GMSC’s Manager testified that the ASC would compile payer mix data quarterly and would review all of the cases that come to the ASC to determine if, for example, certain physicians are bringing only commercial cases or only self-pay cases. GMSC also has a peer review policy under which surgeons review other surgeons, looking at their cases and chart notes. GMSC has discussed including case mix and payer mix as part of the peer review policy. Testimony of Amy Cooper, TR (4/17/19) at 52-53.

9. Condition 4 of the CON requires GMSC to enter into a transfer agreement with at least one local hospital or obtain a binding Memorandum of Agreement from such hospital(s) confirming that it will enter into a transfer agreement with the ASC once it becomes operational.

10. GMSC signed an emergency transfer agreement with University of Vermont Medical Center, Inc. (UVMHC) on March 29, 2019. Letter from Karen Tyler to Michael Barber (Apr. 8, 2019), Emergency Transfer Agreement (Mar. 29, 2019); Testimony of Amy Cooper, TR (4/17/19) at 14.

11. Condition 5 of the CON requires GMSC to enter into a transport agreement with an EMS service for emergency patient transportation.

12. GMSC signed a memorandum of agreement with Colchester Rescue Squad on March 7, 2019. The agreement provides that Colchester Rescue Squad will provide emergency ambulance transport services between GMSC and UVMHC. Letter from Amy Cooper to Donna Jerry (Mar.

18, 2019), Memorandum of Agreement between Green Mountain Surgery Center and Colchester Rescue Squad (Mar. 7, 2019); Testimony of Amy Cooper, TR (4/17/19) at 15.

13. Condition 6 of the CON requires GMSC to enter into a participation agreement with one or more risk-bearing ACO(s) to receive fixed payment reimbursement in lieu of fee-for-service for patients attributed to the ACO, or obtain a binding Memorandum of Agreement from such ACO(s) confirming that it will enter into such participation agreement once the ASC becomes operational.

14. In January 2018, GMSC's Manager met with the CEO of OneCare Vermont Accountable Care Organization, LLC. ("OneCare") to discuss potential contracting relationships between GMSC and OneCare. Letter from Amy Cooper to Donna Jerry (Mar. 26, 2019). On April 18, 2018, GMSC and OneCare executed a memorandum of understanding. The memorandum of understanding provided that once GMSC becomes operational, OneCare will enter into an agreement with GMSC on such terms and conditions as are approved by the OneCare Board of Managers and consistent with the requirements of the programs in which OneCare is participating. In the memorandum of understanding, OneCare acknowledged that the ASC would seek a fixed payment arrangement and OneCare agreed to work toward that in a manner consistent with program requirements, available information and ACO strategy. Memorandum of Understanding Between GMSC and OneCare (Apr. 18, 2018).

15. On April 8, 2019, GMSC signed a non-binding expression of interest to have GMSC included in financial modeling and preliminary provider rosters for all of OneCare's 2020 payer programs. Letter from Karen Tyler to Michael Barber (Apr. 8, 2019), 2020 Participant Letter of Interest (Apr. 8, 2019); Testimony of Amy Cooper, TR (4/17/19) at 16. At the April 17, 2019 hearing, in response to a question about whether GMSC would be amenable to having a deadline included in the CON for participation in an accountable care organization, GMSC's Manager stated that "final contracts are due [with OneCare] in the September/October period and [GMSC] would certainly be amenable and would sign that contract, and if the Board wants to put a condition that we sign that contract, we are comfortable with that as well." Testimony of Amy Cooper, TR (4/17/19) at 60-61.

16. Condition 7 of the CON requires GMSC to obtain approval to enter into an agreement with the Centers for Medicare & Medicaid Services (CMS) to operate as a Medicare-certified ambulatory surgery center.

17. Condition 17 of the CON requires GMSC to immediately begin the process for accreditation by the Joint Commission on Accreditation of Healthcare Organizations (Joint Commission), and to earn such accreditation no later than 18 months after it commences operations.

18. There are two ways a health care organization can obtain certification of compliance with federal conditions of participation. One is to have a survey done by a state agency on behalf of the federal government. In Vermont, the state survey agency is the Department of Disabilities, Aging, and Independent Living. The other is to have a survey done by an approved national accreditation organization such as the Joint Commission that has been recognized as having

standards and a survey process that meet or exceed Medicare's requirements. Testimony of Amy Cooper, TR (4/17/19) at 16-17; 42 C.F.R. § 416.26. To satisfy Conditions 7 and 17, GMSC is pursuing accreditation from the Joint Commission. Testimony of Amy Cooper, TR (4/17/19) at 17. GMSC has begun the process of accreditation and plans to earn accreditation before becoming operational. *Id.* at 23.

19. Condition 9 of the CON requires GMSC to establish and post to the ASC's website the commercial/self-pay and Medicare prices for each of the twenty-five (25) most frequently performed procedures/surgeries, or the commercial/self-pay and Medicare prices of each of the procedures/surgeries that comprise at least 75 percent of the ASC's overall volume if it will result in disclosure of a greater number of prices. Condition 9 also requires GMSC to regularly update and post this information, no less than quarterly, whether or not prices or procedures have changed.

20. When GMSC presented its development website at the Board's April 17, 2019 hearing, it included a PDF showing Medicare prices for the procedures/surgeries GMSC anticipates will be its twenty-five most frequently performed procedures/surgeries. GMSC took this information from Medicare's outpatient ASC fee schedule published in January of 2019. Testimony of Amy Cooper, TR (4/17/19) at 17-18. GMSC did not have commercial/self-pay prices on the development website yet. The page with this pricing information will also have links to the websites of insurance carriers that the ASC contracts with so patients can get an estimate from their insurer as to what the out-of-pocket costs will be for their procedures. *Id.* at 18.

21. Condition 10 of the CON prohibits GMSC from offering services, procedures or surgeries without first demonstrating to the Board that such services, procedures or surgeries are evidence-based and fall within the scope of those approved in the CON.

22. GMSC provided the Board with a number of studies concerning procedures and surgeries that will be performed at the ASC. Letter from Amy Cooper to Donna Jerry (Mar. 18, 2019). GMSC's Manager testified at the April 17, 2019 hearing that GMSC interpreted the reference in Condition 10 to "scope of services" to mean those procedures that can be performed safely and reliably in an ASC. Testimony of Amy Cooper, TR (4/17/19) at 19.

23. Condition 11 of the CON states that GMSC must require that each physician performing procedures/surgeries at the ASC have admitting privileges at one or more local hospitals.

24. Under GMSC's bylaws, membership on the ASC's medical staff will only be extended "to those professionally competent practitioners . . . who maintain active privileges at a local hospital, accredited and approved by the Governing Board if they perform procedures/surgeries at the Center." Letter from Amy Cooper to Donna Jerry (Mar. 18, 2019), GMSC Medical Staff Bylaws, Sec. 4.2; Testimony of Amy Cooper, TR (4/17/19) at 20. The ASC also has evidence of its physicians' admitting privileges at local hospitals in its credentialing files. Testimony of Amy Cooper, TR (4/17/19) at 20.

25. Condition 12 of the CON reads as follows:

[GMSC] must successfully negotiate with Blue Cross and Blue Shield of Vermont to accept reimbursement that is below the community fee schedule rate. For insurer(s) that do not use a community hospital schedule, [GMSC] shall negotiate reimbursements that it can demonstrate are below reimbursements for the same procedures/surgeries when performed in a hospital setting.

26. On January 17, 2019, the Board asked GMSC to “[c]onfirm that all surgeries and procedures, including those performed in the specialties of ophthalmology and plastic surgery will be offered at GMSC at a lower cost than the same offered [sic] surgeries and procedures offered in a hospital outpatient setting.” Letter from Donna Jerry to Amy Cooper. On January 31, 2019, GMSC responded, stating: “We confirm that surgeries and procedures offered at the GMSC will be offered at a lower cost than the same surgeries and procedures offered in a hospital outpatient setting, including surgeries and procedures offered in the specialties of plastic surgery and ophthalmology.” Letter from Amy Cooper to Donna Jerry.

27. On March 22, 2019, the Board asked GMSC to explain how it intended to demonstrate compliance with Condition 12 and whether it anticipated any surgery or procedure performed at GMSC being reimbursed at the same or higher amount as the same procedure or surgery performed in a Vermont hospital outpatient setting. Letter from Donna Jerry to Amy Cooper. GMSC responded on March 26, 2019, stating that it plans to ask commercial insurers that it contracts with to provide letters stating that reimbursements that will be paid to GMSC for procedures/surgeries are below the average equivalent reimbursements paid to hospitals for providing the same services. Letter from Amy Cooper to Donna Jerry. GMSC plans to finish the contracting process with Blue Cross Blue Shield of Vermont (BCBSVT) and other commercial payers before it opens to the public in the summer of 2019 and to submit these letters to the Board as it completes its contracting. *Id.*; Testimony of Amy Cooper, TR (4/17/19) at 20-21.

28. At the April 17, 2019 hearing, GMSC acknowledged that, while it had not yet finalized its commercial contracts, if it were allowed to satisfy Condition 12 with the letters it described, there could be hospitals that are less expensive than the ASC for some procedures offered at the ASC. Testimony of Amy Cooper, TR (4/17/19) at 49-50.

29. Citing “operational differences” between ASCs and hospitals, GMSC claimed in its application for a CON that it could “offer lower charge structures and lower-cost contracts with insurers than hospitals would find feasible to accept,” resulting in “significant savings” for payers and patients compared to what they currently pay hospitals in connection with the same cases. Application (App.) at 23. In asserting that the project would not result in an undue increase in the costs of medical care, GMSC elaborated, as follows:

[O]ne of the primary advantages of ASCs is that they can provide outpatient surgical services at a lower cost than hospitals, which, in Vermont are presently the only alternative for multi-specialty surgery sites of care. ASCs characteristically have lower building, staffing and overhead costs than hospitals. These and other operational efficiencies enable ASCs to offer lower charge structures, and enter into lower-cost contracts with insurers than hospitals, resulting in reduced costs to patients and payers.

App. at 59.

30. In terms of the amount of savings the project would generate, GMSC stated in its application that, because “Medicare reimburses ASCs at 56% of what hospitals would receive for the same procedure by the same physician” and “because most private insurers set their outpatient surgery rates based on a percentage of the current Medicare rates, we expect substantial savings to be passed on to the private insurers and their patients for services offered by the proposed ASC.” App. at 24, 59. GMSC also stated, “for privately insured patients, the cost of a procedure at a free-standing ambulatory surgery center is typically 45-60% less than in a hospital setting, but sometimes 80-90% less.” *Id.* at 69.

31. At the public hearing on its CON application, GMSC stated that its “[c]harges for procedures will be about half of hospital rates for Medicare/Medicaid and Commercial.” GMSC Hearing Presentation (Apr. 13, 2017) at 2. Consequently, GMSC applied a 50% adjustment factor to hospital outpatient department revenues to estimate that the project would result in \$3 million annually in commercial savings (over half of GMSC’s projected total savings of \$5.5 million per year). *Id.* at 12; Testimony of Amy Cooper, TR (4/13/18) at 17-18. GMSC also told the Board at the hearing that it would “guarantee as a center policy to ensure that [its] prices will always be lower than hospitals . . . and making sure that stays true” and would display its written policy on its website and communicate it to commercial insurers during rate negotiations. *In re: Application of ACTD, LLC d/b/a Green Mountain Surgery Center*, Statement of Decision, Doc. No. GMCB-010-15con (July 10, 2017), Findings, ¶ 50 (citing Testimony of Amy Cooper, TR (4/13/17) at 34-35).

32. GMSC maintains that there is no uniform community fee schedule for facility payments to hospitals for outpatient surgery in the commercial market like there is in the Medicare market and GMSC does not know what hospitals receive from commercial insurers in equivalent facility payments for the procedures/surgeries offered at the ASC. Testimony of Amy Cooper, TR (4/17/19) at 45. GMSC’s Manager asked BCBSVT for information about its payments to hospitals for equivalent outpatient surgeries and BCBSVT declined to provide it. *Id.* at 46.

33. GMSC has not described its negotiating process with commercial insurers in detail. However, GMSC’s Manager testified at the April 17, 2019 hearing: “I need to negotiate with commercial insurers and say here’s what I think my costs are for providing this, here’s what I would like in reimbursement, and they need to come back to me and say we think that one is too high, this one is fine, okay, and that’s how we’ll have an agreement.” Testimony of Amy Cooper, TR (4/17/19) at 45-46.

34. GMSC expressed concern at the April 17, 2019 hearing that, because hospitals offer a wide variety of services and GMSC offers a limited set of procedures, hospitals could threaten GMSC’s existence by artificially lowering their prices on procedures offered at GMSC. Testimony of Amy Cooper, TR (4/17/19) at 49. GMSC did not, however, make this argument in its post-hearing brief.

35. Condition 13 of the CON provides that the price of a procedure/surgery that is billed to GMSC patients that self-pay may not exceed the lowest price billed to patients covered by commercial insurance.

36. GMSC adopted a self-pay policy that provides that the self-pay rate billed to a patient for any code/service that is medically necessary will be equal to the lowest allowed amount the ASC gets paid by contracted commercial insurers for the same procedure(s). The policy also provides that where a self-pay patient undergoes multiple procedures, procedures subsequent to the first will be subject to a 50% discount off the self-pay rates. Letter from Amy Cooper to Donna Jerry (Mar. 18, 2019), GMSC Self-Pay Policy. In response to questions posed by the Board at the April 17, 2019 hearing, GMSC amended its self-pay policy to clarify the term “medically necessary” and to also clarify that, where a patient undergoes multiple procedures, the 50% discount for procedures subsequent to the first will be applied to the lowest allowed amount the ASC gets paid by contracted commercial insurers for the same procedure(s). Testimony of Amy Cooper, TR (4/17/19) at 54-56, 67-68; Email from Amy Cooper to Michael Barber (Apr. 26, 2019), GMSC Self-Pay Policy (Mar. 2019).

37. Condition 14 of the CON requires GMSC to dedicate a staff member to provide potential patients with written price estimates for their surgeries on request. It also requires GMSC to provide all patients with written disclosures in advance of surgery that outline the total price of the procedure/surgery and the portion of the price for which the patient will be responsible.

38. GMSC has adopted a benefits verification policy. The policy provides that, as a service to the ASC’s patients, the ASC’s Business Office will verify benefits for both primary and secondary insurance carriers. The policy states that patients will be informed in advance of their surgery of their benefits, the total price of their surgery, and any monies that will be due to the ASC subsequent to the verification of benefits and calculation of patient financial responsibility. Patients will be offered the opportunity to receive this information in writing in advance of their surgery either via email, first class mail, or printed out on the day of their procedure. Email from Amy Cooper to Michael Barber (Apr. 26, 2019), GMSC Benefits Verification Policy (Mar. 2019); *see also* Testimony of John Paoni, TR (4/17/19) at 22-23 (stating that every patient will receive a phone call prior to the procedure and a full explanation of what their co-insurance is, their co-payment, and any deductible, and patients will have the ability to have this information sent to them via post mail in writing or via email), 96-97.

39. Condition 15 of the CON requires GMSC to establish and implement a policy to provide charity care on par with the policies at UVMHC and NMC. Condition 15 also requires GMSC to post its charity care policy on the ASC’s consumer website.

40. GMSC has adopted a charity care policy. Letter from Amy Cooper to Donna Jerry (Mar. 18, 2019), GMSC Free or Discounted Care Policy. In response to Board questioning at the April 17, 2019 hearing, GMSC amended the policy to more clearly define when procedures/surgeries are “elective or cosmetic” and to remove references to assets, given that GMSC does not verify patients’ assets. Testimony of Amy Cooper, TR (4/17/19) at 57; Email from Amy Cooper to Michael Barber (Apr. 26, 2019), GMSC Free or Discounted Care Policy (Mar. 2019).

41. GMSC’s charity care policy provides that, to be eligible for free or discounted care, an individual must be a full-time resident of Vermont or have resided in Vermont for more than six consecutive months. Email from Amy Cooper to Michael Barber (Apr. 26, 2019), GMSC Free or Discounted Care Policy (Mar. 2019). UVMMC’s financial assistance program is available for permanent residents within the UVMMC financial eligibility area, which includes all of Vermont, and certain counties in New York and New Hampshire. Letter from Amy Cooper to Donna Jerry (Mar. 26, 2019), UVMMC Financial Assistance Program, 1. NMC’s financial assistance program is available to individuals with a primary residence in Franklin or Grand Isle Counties (i.e., people who live in these counties for over 6 months a year). Letter from Amy Cooper to Donna Jerry (Mar. 26, 2019), NMC Patient Financial Assistance Program, 2.

42. GMSC’s charity care policy, as amended, provides that free or discounted care is available for all services offered by GMSC in conjunction with medically necessary procedures; services offered in connection with cosmetic procedures (unless considered medically necessary by physician review), infertility treatments, and fertility services are not covered by the policy. Nor are services that have been denied by insurance due to the patient’s non-compliance with the requirements of the patient’s plan or services reimbursed directly to the patient/guarantor by the insurance carrier or covered by another third party. Email from Amy Cooper to Michael Barber (Apr. 26, 2019), GMSC Free or Discounted Care Policy (Mar. 2019). UVMMC’s financial assistance program applies to medically necessary essential health care services. Services not eligible for assistance include cosmetic procedures (unless medically necessary based upon diagnosis with physician review), birth control, infertility treatments, fertility services, sterilization and reversal of sterilization, services that have been placed in collections beyond 120 days of placement, and services reimbursed directly to the patient by the patient’s insurance carrier or already covered by a third party. Letter from Amy Cooper to Donna Jerry (Mar. 26, 2019), UVMMC Financial Assistance Program, 1. NMC’s financial assistance program applies to emergent care, except elective services such as teeth extractions, voluntary sterilizations, cosmetic surgery and routine eye exams. Letter from Amy Cooper to Donna Jerry (Mar. 26, 2019), NMC Patient Financial Assistance, 2.

43. Under GMSC’s charity care policy, assistance is granted on a sliding scale based on an individual’s household income. Discounts are available for individuals at or below 400% of the federal poverty level guidelines (FPLG), as follows:

Federal Poverty Level	Up to 250%	251% - 300%	301% - 350%	351% - 400%
Discount	100%	75%	65%	55%

Email from Amy Cooper to Michael Barber (Apr. 26, 2019), GMSC Free or Discounted Care Policy (Mar. 2019). Under UVMMC’s financial assistance program, assistance is also granted on a sliding scale based on an individual’s household income. Discounts are available to individuals with assets of \$50,000 or less who are at or below 400% of the FPLG, as follows:

FPLG	< 200%	201% - 250%	251% - 300%	301% - 250%	351% - 400%
Discount	100%	85%	75%	65%	55%

Letter from Amy Cooper to Donna Jerry (Mar. 26, 2019), UVMMC Financial Assistance Program, 7. Under NMC's financial assistance program, assistance is provided on a sliding scale based on individual or family income—up to 300% of the federal poverty level—and on individual or family net worth—up to \$250,000, with certain exceptions. Letter from Amy Cooper to Donna Jerry (Mar. 26, 2019), NMC Patient Financial Assistance, 2.

44. Condition 16 of the CON provides that GMSC must require that all physicians maintain after hours on-call policies and 24-hour call coverage to answer patient inquiries and must provide all patients with written instructions for after hour care, including instructions that if their condition warrants, to call 911 and go to the nearest emergency room. Condition 16 also requires GMSC to provide the same emergency information, recorded on its phone line, for after hours callers.

45. GMSC has adopted an after-hours care policy that requires all physicians to maintain on-call policies and 24-hour call coverage to answer patient inquiries. The policy provides that patients will be instructed to contact their surgeon, the surgeon's designee, or go to the nearest emergency room if the condition warrants, after the ASC is closed for the day. The policy also provides that patients' discharge instructions will include the physician's office telephone number and instructions on follow-up care and appointment information. These discharge instructions will direct the patient to contact 911 or their nearest emergency room. Finally, the policy provides that the main telephone line will have an after-hours recording that instructs patients to call 911 or go to the nearest emergency room. Letter from Amy Cooper to Donna Jerry (Mar. 18, 2019), GMSC After-Hours Care Policy.

46. Condition 18 of the CON states that GMSC must require that all physicians sign a Collaborative Care Agreement that includes the following principles: (i) timely access to care, (ii) communication, (iii) adherence to widely accepted evidence-based principles of care, and (iv) support of the primary care practice (PCP) as the Medical Home for most patients.

47. GMSC submitted to the Board a collaborative care agreement that includes the principles required in Condition 18. Letter from Amy Cooper to Donna Jerry (Mar. 18, 2019), GMSC Collaborative Care Agreement. There is a line at the end of the agreement for a "collaborating practitioner" to sign. *Id.* However, GMSC has not provided evidence that ASC physicians are required to sign the agreement, for example, by the ASC's bylaws or a policy.

48. Condition 19 of the CON requires GMSC to participate in the CMS Ambulatory Surgical Center Quality Reporting Program and periodically, but no less often than annually, post its performance on each quality measure on the ASC's website.

49. Condition 20 of the CON requires GMSC to quarterly compile for inclusion in its next-due implementation report and post to its website within forty-five (45) days of the close of each quarter, the ASC's payer mix by number of procedures/surgeries and by revenues.

50. The Board did not ask GMSC to address Conditions 19 or 20 at the April 17, 2019 hearing. *See* Letter from Donna Jerry to Amy Cooper (Feb. 14, 2019).

51. In addition to information specified in Condition 1, Condition 21 of the CON requires GMSC to quarterly update, compile for inclusion in its next-due implementation report, and post to its website within forty-five (45) days of the close of each quarter, the following information for each ASC provider:

- a. A breakdown of the types of procedures/surgeries he or she performed at the ASC;
- b. A breakdown of the procedures/surgeries he or she performed at the ASC, by payer mix;
- c. A breakdown of the procedures/surgeries he or she performed at local hospitals (specify the hospital) by payer mix;
- d. The number of patients he or she determined were inappropriate for care at the ASC, and the reason for each determination.

52. On January 10, 2019, GMSC requested relief from, and modification of, Condition 21. GMSC asked for leave to report the information specified in Condition 21 “on an aggregated level by specialty for the ASC, rather than on an individual level by provider.” Request to Modify Condition 21 (Jan. 10, 2019), 1. GMSC asserted that Condition 21 requires GMSC to reveal each ASC provider’s “individual procedure volumes and concomitant financial productivity,” which it claimed is private and competitively sensitive personal financial information that the providers keep confidential and that GMSC will not disclose other than as required by the Board. *Id.* GMSC claimed that public disclosure of this information on the ASC’s website, in implementation reports, or via a public records request to the Board may harm providers by disadvantaging them in negotiating future offers of employment with hospitals or other potential employers. *Id.* at 1-2. GMSC claimed that the public disclosure of this information could also increase a provider’s risk of retaliation from local hospitals if a particular hospital is not satisfied with the number or types of cases an individual provider performs at the hospital versus the ASC. *Id.* at 2. GMSC also claimed that the information is exempt from public inspection and copying under Vermont’s Public Records Act, specifically the “personal documents” and “trade secrets” exemptions of 1 V.S.A. §§ 317(c)(7) and (c)(9). *Id.*

53. At the April 17, 2019 hearing, GMSC raised the possibility that the public disclosure of the information specified in Condition 21 could also harm physicians who may wish to sell their practice because it would provide a prospective purchaser with information about the patient base of the practice, the practice’s payer mix, and how active the surgeon is. Statements of Karen Tyler, TR (4/17/19) at 70-71. In its post-hearing brief, GMSC asserted that Condition 21(d) may require it to reveal information protected by the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule. GMSC Post-Hearing Brief, 17-18.

54. When the Board conditionally approved GMSC’s application for a CON, GMSC had nine investors with ownership interests. A total of 16 physicians, including seven of the nine owners, planned to perform surgeries at the ASC in the following specialties: gastrointestinal (GI), pain management, obstetrics/gynecology (OB/GYN), orthopedics, and general surgery. Statement of Decision, Findings, ¶ 2 (citing Resp. to Q006 (1/25/17), Ownership Table (corrected) (2/27/17)); Letter from Amy Cooper to Donna Jerry (Sept. 14, 2018).

55. During the Board’s review of the CON application, GMSC provided the following revenue projections, by payer:

	Year 1	Year 2	Year 3	Year 4
Medicare	\$2,221,818	\$2,604,440	\$2,668,195	\$2,736,866
Medicaid	\$566,720	\$664,074	\$681,023	\$697,878
Commercial	\$2,435,229	\$2,852,448	\$2,925,109	\$2,998,647
Self Pay	\$624,939	\$731,382	\$750,354	\$767,960
Total	\$5,848,706	\$6,852,344	\$7,024,680	\$7,201,351

Statement of Decision, Findings, ¶ 40 (citing App. at 28). Based on its anticipated payer mix, GMSC projected 38% of its net patient revenue would come from Medicare, 9.7% would come from Medicaid, and 52.3% would come from commercial and self-pay. Statement of Decision, Findings, ¶ 39 (citing App. at 28).

56. During the Board’s review of the CON application, GMSC provided the following table projecting the numbers of surgeries that would be performed, by specialty, at the ASC in its first four years of operation:

Specialty	Year 1	Year 2	Year 3	Year 4
GI	3,150	3,636	3,672	3,709
OB/GYN	579	668	675	681
ORTHO	284	327	330	334
PAIN MGT	847	978	988	998
GENERAL SURGERY	273	315	318	321
TOTAL BY SPECIALTY	5,132	5,924	5,983	6,043

Statement of Decision, Findings, ¶ 18 (citing App. at 28).

57. In its application for a CON, GMSC stated that “[t]he ASC’s initial scope of service will include GI, OB/GYN, pain medicine, general surgery, and orthopedics procedures.” App. at 12; *see also* App. at 10 (stating that the bulk of procedures performed at the ASC would be GI and pain management procedures and the remaining minority of procedures will be spread across orthopedics, general surgery and gynecology). In approving the CON, the Board found that “[t]he majority of procedures performed at the ASC would be gastrointestinal (GI)—the highest volume of which will be screening and diagnostic colonoscopies” and that “[t]he ASC will also offer pain management, obstetrics and gynecology (OB/GYN), orthopedic and general surgery.” Statement of Decision, Findings, ¶ 18 (citing App. at 20, 28, 50).

58. In its decision approving GMSC’s application for a CON, the Board wrote “[GMSC] expects that once the ASC is fully operational, there will be strong demand for other specialties which may include oral surgery, podiatry, and plastic surgery.” Statement of Decision, Findings, ¶ 20 (citing App. at 20; Resp. to Q006 (1/25/17) at 2).

59. On September 14, 2018, GMSC notified the Board of “nonmaterial changes in the [project], namely, the addition of new physician owners, and services in ophthalmology and plastic surgery.” Letter from Amy Cooper to Donna Jerry. Four days later, the Board advised GMSC that because the addition of the new physician owners does not constitute a new health care project and is not expected to materially increase costs, it “is therefore a nonmaterial, rather than material, change to the CON.” Letter from Donna Jerry to Amy Cooper (Sept. 18, 2018). However, given the change, the Board asked GMSC to provide updated projections of the number and types of surgeries to be performed at the ASC. *Id.* GMSC provided the updated projections on September 24, 2018. Letter from Amy Cooper to Donna Jerry.

60. The updated projections GMSC provided on September 24, 2018 differed significantly from projections GMSC provided to the Board during the application review process. *Compare* Letter from Amy Cooper to Donna Jerry (Sept. 24, 2018) *with* Statement of Decision, Findings, ¶ 18. The Board therefore posed a series of questions “to determine whether the changes are material to the scope or costs of the project” and require further review. Letter from Donna Jerry to Amy Cooper (Oct. 1, 2018). The Board requested updated projections of the ASC’s volume of cases by specialty, its revenue, and its payer mix, updated income and expense information, and additional information about the ophthalmology and plastic surgery services GMSC intended to offer, including documentation of a need for ophthalmology surgeries that is not being met by hospitals or other facilities. *Id.* GMSC responded on November 19, 2018. Letter from Amy Cooper to Donna Jerry.

61. GMSC’s November 19, 2018 submission stated that, of the 16 physicians who were included in GMSC’s original projections, ten still plan to utilize the ASC and there are fourteen additional physicians who now plan to operate at the ASC. Letter from Amy Cooper to Donna Jerry. Among these fourteen new physicians who were not included in the original projections, two are plastic surgeons and four are ophthalmologists. *Id.* at 3; GMSC Updated Physician Tables (Apr. 24, 2019). Only one of these four ophthalmologists plans to offer cataract surgeries at the ASC. Letter from Amy Cooper to Donna Jerry (Nov. 19, 2018) at 12.

62. GMSC’s projected cases by specialty have changed from initial projections, as follows:

Specialty	Year 1			Year 2			Year 3			Year 4		
	ORIG	REV	% CHG	ORIG	REV	% CHG	ORIG	REV	% CHG	ORIG	REV	% CHG
GI	3,150	2,599	-17%	3,636	3,345	-8%	3,672	3,448	-6%	3,709	3,548	-4%
OB/GYN	579	307	-47%	668	395	-41%	675	408	-40%	681	420	-38%
Orthopedics	284	400	41%	327	515	57%	330	530	61%	334	546	63%
Pain Mgmt.	847	48	-94%	978	62	-94%	988	64	-94%	998	66	-93%
General Surgery	273	150	-45%	315	194	-38%	318	199	-37%	321	206	-36%
Plastic Surgery	0	240	-	0	309	-	0	319	-	0	328	-
Ophthalmology	0	364	-	0	469	-	0	482	-	0	497	-
TOTAL BY SPECIALTY	5,132	4,108	-20%	5,924	5,289	-11%	5,938	5,448	-9%	6,043	5,611	-7%

Letter from Amy Cooper to Donna Jerry (Nov. 19, 2018) at 2.

63. GMSC’s projected payer mix has also changed from initial projections, as follows:

	Year 1	+/-	Year 2	+/-	Year 3	+/-	Year 4	+/-
Medicare	\$1,123,584	-49%	\$1,461,627	-44%	\$1,520,550	-43%	\$1,581,276	-42%
Medicaid	\$382,174	-33%	\$497,205	-25%	\$517,314	-24%	\$538,526	-23%
Commercial	\$2,107,860	-13%	\$2,739,380	-4%	\$2,850,513	-3%	\$2,966,875	-1%
Self Pay	\$420,067	-33%	\$545,670	-25%	\$568,108	-24%	\$590,884	-23%
Total	\$4,033,685	-31%	\$5,243,882	-23%	\$5,456,485	-22%	\$5,677,561	-21%

Letter from Amy Cooper to Donna Jerry (Nov. 19, 2018) at 7. Of its overall revenues during the ASC's first four years of operation, GMSC now projects approximately 63% will come from commercial/self-pay, 28% will come from Medicare, and 10% will come from Medicaid. *Id.*

64. GMSC now expects it will do fewer cases than initially expected in each payer category in each of the first four years of operation, except in the commercial category, where GMSC expects it will do more cases than expected in each of the first four years of operation. Letter from Amy Cooper to Donna Jerry (Nov. 19, 2018) at 9.

65. The total project cost approved in the CON was \$11,623,238.46. Statement of Decision, Findings, ¶ 6. Based on updated projections, the total cost of the project has decreased to \$11,352,966.96. GMSC's Response to Request for Information dated 01/07/2019 (Jan. 31, 2019), Exhibit 2 – Table 1 – Project Costs.

66. The costs associated with the addition of ophthalmology that were not included in the initial project costs are as follows: \$325,000 in medical equipment costs (total cost of financing over the life of the leases) and non-medical equipment costs of \$127,400 in the first year of operation, \$164,150 in the second year of operation, \$168,700 in the third year of operation, and \$173,950 in the fourth year of operation. GMSC's Response to Request for Information dated 01/07/2019 (Jan. 31, 2019), 3, Exhibit 2 – Table 1 – Project Costs.

67. The costs associated with the addition of plastic surgery that were not included in the initial project costs are as follows: \$8,000 in medical equipment costs (total cost of financing over the life of the lease) and non-medical equipment costs of \$84,000 in the first year of operation, \$108,150 in the second year of operation, \$111,650 in the third year of operation, and \$114,800 in the fourth year of operation. Response to Request for Information dated 01/07/2019 (Jan. 31, 2019), 3, Exhibit 2 – Table 1 – Project Costs.

68. During the application review process, GMSC did not include ophthalmology or plastic surgery in the projections it provided the Board and, unlike plastic surgery, did not identify a potential future demand for ophthalmology procedures to be performed at the ASC. GMSC stated it "did not discover that there was a need for additional ophthalmology facilities until after the CON was issued." GMSC Post-Hearing Brief at 14. However, Dr. David Weissgold and Dr. Michelle Young, vitreoretinal surgeons who plan to perform procedures at GMSC, began conversations with GMSC in 2015 about the possibility of bringing their cases there. Testimony of Dr. David Weissgold, TR (4/17/19) at 30.

69. GMSC stated that ophthalmology services were not included in its projections because it "did not have as many interested surgeons as [it does] now and [it] had not completed due

diligence on the cost and efficiency of moving vitreoretinal cases in particular over to the ASC setting.” Letter from Amy Cooper to Donna Jerry (Nov. 19, 2018) at 3. GMSC also stated that “[o]nly after the CON was approved, and we were approached by other ophthalmologists asserting the need to move their surgeries out of the hospital setting and into the ASC environment, did we become convinced that there was a need in this specialty that GMSC could meet, and that it would be cost effective for us to do so.” GMSC Post-Hearing Brief at 14.

70. The Eye Surgery Center is the only other ASC in Vermont and offers a variety of ophthalmology services. When asked to provide a list of ophthalmology services that will be offered at GMSC that are not offered at The Eye Surgery Center, GMSC stated that the only ophthalmology services it will offer that are currently provided at The Eye Surgery Center relate to cataract removal (CPT 66982-66984). GMSC stated that vitreoretinal procedures and those oculoplastics procedures requiring the use of general anesthesia are currently only offered in the hospital setting. Letter from Amy Cooper to Donna Jerry (Jan. 31, 2019) at 5.

71. When asked at the April 17, 2019 hearing whether GMSC plans to do any surgeries performed in The Eye Surgery Center, GMSC’s Manager testified that “none of the surgeries that are in our updated ophthalmology projections would be moving from one ambulatory surgery center to another. All of the cases in the updated projections would be moving out of the hospital into an ambulatory surgery center for the first time.” Testimony of Amy Cooper, TR (4/17/19) at 85.

72. In response to the Board’s request for documentation of a need for ophthalmology services that is not being met by the existing hospitals or other facilities, GMSC stated that “[t]he one other ASC operating in Vermont that offers ophthalmology services does not provide vitreoretinal services nor general anesthesia services required for some vitreoretinal and some oculoplastics surgeries” and that GMSC, which has “more robust anesthesia staffing and support,” would meet a “need for lower cost, greater efficiency, and enhanced patient experience in this area.” Letter from Amy Cooper to Donna Jerry (Nov. 19, 2018) at 11-12. GMSC acknowledged that cataract surgery has been performed in both hospital and ASC settings in Vermont but asserted that “there are indications that the existing ASC and hospitals cannot meet the demand that exists with our aging population.” *Id.* at 12. In support, GMSC stated that the one surgeon planning to offer cataract surgeries at the ASC has had his or her block time cut by approximately 15% at each of the two local hospitals and “is not confident that they would be able to find enough surgical time [at The Eye Surgery Center] on days that are feasible for this surgeon’s patients at this facility.” *Id.* GMSC also cited a need to combine cataract and vitreoretinal cases for patients in the ASC. Combined surgery, GMSC claimed, with one trip to the operating room, rather than two sequential encounters – one for cataract surgery, another for 1-3 weeks later, for vitreoretinal surgery – saves money for the patient and healthcare system and is more convenient for patients. *Id.*

73. Dr. David Weissgold testified at the April 17, 2019 hearing that UVMMC is not fully meeting the needs of his practice at this time due in part to a recent policy change requiring surgeons to release operating room block time that is not fully scheduled with cases seven days in advance of the proposed date of surgery. TR (4/17/19) at 31. Dr. Weissgold testified that this is problematic for him since many vitreoretinal surgeries are urgently needed and cannot be

scheduled more than a week in advance. He stated that last year approximately half of his practice's procedures were scheduled fewer than seven days in advance. *Id.* Dr. Weissgold stated that he could schedule operating room time outside his normal block time for urgent and emergent procedures under the new policy. However, he would then have to reschedule office appointments for patients, many of whose clinical needs are pressing. *Id.* at 31-32.

74. Dr. Weissgold testified that some patients needing vitreoretinal surgeries also need cataract surgeries. Sometimes this need is known in advance, and other times it "only becomes evident right in the middle of a vitreoretinal surgical procedure." For unspecified reasons, Dr. Weissgold testified that it has been nearly impossible to schedule cataract extractions simultaneous with vitreoretinal surgical repairs at UVMMC. Testimony of Dr. David Weissgold, TR (4/17/19) at 34-35.

75. The testimony offered by Dr. Michelle Young, also a vitreoretinal surgeon, was similar to that of Dr. Weissgold. Dr. Young performs surgeries at UVMMC, which is the only facility in Vermont that has the equipment and staff needed to handle vitreoretinal surgeries. Testimony of Dr. Michelle Young, TR (4/17/19) at 35-36. Like Dr. Weissgold, Dr. Young characterized UVMMC's recent policy change as problematic, given that most vitreoretinal surgeries need to be scheduled within one to seven days. She stated that the policy change has required her to reschedule clinic patients, some of whom are just as urgent as patients needing surgery. *Id.* at 36.

76. Dr. Young testified that she does not "perform routine cataract surgery," but does "perform cataract surgeries in conjunction with complicated vitreoretinal procedures." She testified that it is not always possible to know in advance whether a patient will need a lens procedure done in addition to their scheduled vitreoretinal surgery. TR (4/17/19) at 37.

77. Dr. Donald Laub Jr., a practicing plastic surgeon, testified that since he separated from UVMMC in October of 2017, he has had difficulty getting scheduled operating room time and this has resulted in treatment delays for his patients. Testimony of Dr. Donald Laub Jr., TR (4/17/19) at 38-39.

78. NMC is unable to estimate the numbers of ophthalmology and plastic surgery procedures and surgeries that would transfer from NMC to GMSC. However, in fiscal year (FY) 2018, NMC performed 439 extra capsular cataract removals with insertion of intraocular lens prosthesis (CPT Code 66984), which NMC estimates contributed \$354,399 to its margin. NMC performed 511 ophthalmology procedures in total in 2018, which it estimates contributed \$584,495 to its margin. Only one vitreoretinal procedure was performed at NMC in FY 2018. The number of plastic surgeries performed at NMC is currently very small. Response of Northwestern Medical Center to Data Request (Apr. 25, 2019).

79. Of the two physicians planning to perform plastic surgeries at the ASC, one did not perform any surgeries at NMC in FY 2018 and the other performed approximately 30 surgeries at NMC in FY 2018. Of the four physicians planning to perform ophthalmology procedures at the ASC, none performed surgeries at NMC in FY 2018. GMSC has not had any conversations with ophthalmologists currently performing surgeries at NMC. In FY 2018, one of the four physicians planning to perform surgeries at the ASC performed an unspecified number of

cataract surgeries at The Eye Surgery Center not requiring general anesthesia. This physician plans to move cataract surgeries that require general anesthesia, which the physician currently performs in a hospital setting, to the ASC. GMSC did not indicate that this surgeon plans to move cataract surgeries not requiring general anesthesia, which the surgeon currently performs at The Eye Surgery Center, to GMSC. Letter from Amy Cooper to Michael Barber (Apr. 25, 2019).

CONCLUSIONS OF LAW

Compliance with CON Conditions

Condition 1 (Amended; Not Fully Satisfied): As discussed below, we will allow GMSC to publicly post the information described in Condition 21 at the specialty level, rather than the physician level. Condition 1.f. refers to Condition 21. Findings of Fact (Findings), ¶ 1. Because Condition 1 deals with “information about each physician planning to offer procedures/surgeries at the ASC,” this reference to Condition 21 no longer makes sense. Therefore, Condition 1.f. is stricken.

GMSC’s development website includes several physician profiles that contain the types of information required by Condition 1.a. – e. Findings, ¶ 3. While GMSC plans to create physician profiles for each physician using the same format, it has not yet done so. *Id.* We therefore require GMSC to notify us when its consumer-friendly website is up and accessible to the public (which must be at least two weeks prior to opening) so that we or our staff can review it to determine whether this condition has been fully satisfied.

Condition 2 (Not Fully Satisfied): GMSC has developed a shared decision-making policy that meets the requirements of Condition 1. Findings, ¶¶ 4-5. However, unlike the Payment Status Non-Discrimination Policy, GMSC was unable to describe how it will implement its shared decision-making policy. Findings, ¶ 5. We therefore require GMSC to describe how it will implement the policy before it opens.

Condition 3 (Satisfied): GMSC has satisfied this condition. GMSC developed a payment status non-discrimination policy that meets the requirements of this condition and posted the policy on its “live” website. Findings, ¶¶ 6-7. GMSC will enforce the policy by reviewing payer mix data quarterly to identify physicians who may not be complying with the policy. Findings, ¶ 8. In addition to GMSC’s enforcement of its policy, as discussed below, we plan to review the physician-level data we receive under Condition 21 for indications of noncompliance.

Condition 4 (Satisfied): GMSC has satisfied this condition. Findings, ¶¶ 9-10.

Condition 5 (Satisfied): GMSC has satisfied this condition. Findings, ¶¶ 11-12.

Condition 6 (Amended; Not Fully Satisfied): This condition requires GMSC to enter into a participation agreement with one or more risk-bearing ACOs to receive fixed payment reimbursement in lieu of fee-for-service for patients attributed to the ACO, or to obtain a binding memorandum of agreement from such ACO(s) confirming that it will enter into such participation agreement once the ASC becomes operational. Findings, ¶ 13. The condition was

intended to ensure GMSC participates in an ACO. *See* Statement of Decision at 13 (stating that the Board was “condition[ing] [its] approval [of the CON] on [GMSC] entering into . . . a participation agreement with one or more risk-bearing ACOs to ensure that it becomes integrated into a state-wide system of care”), 19 (stating that the Board was “condition[ing] [its] approval on [GMSC’s] participation in an ACO”).

We have no reason to doubt GMSC’s intent to sign a participation agreement with a risk-bearing ACO to receive fixed payment reimbursement. However, the memorandum of understanding GMSC provided in April 2018 was not sufficiently definite, at least not with respect to the fixed payment arrangement, to be binding; it was an agreement to agree. *See Miller v. Flegenheimer*, 2016 VT 125, ¶ 21, 203 Vt. 620, 628–29, 161 A.3d 524, 530 (2016) (“While it is true that ‘not all terms of a contract need to be fixed with absolute certainty,’ it is also true that an agreement ‘in which a material term is left for future negotiations, is unenforceable.’”). Moreover, the Participant Letter of Interest GMSC provided in April 2019 is expressly non-binding. Findings, ¶ 15.

At the April 17, 2019 hearing, GMSC said it would be amenable to having a deadline included in the CON to participate in an ACO and suggested that a deadline in the September or October time period would coincide with the ACO contracting cycle. Findings, ¶ 15. We therefore require GMSC enter into a participation agreement with one or more risk-bearing ACOs by October 1, 2019, and, no later than October 1, 2020, agree to receive fixed payment reimbursement in lieu of fee for service for patients attributed to the ACO. GMSC must notify us when it has signed an agreement with a risk-bearing ACO and must describe its payment arrangement with the ACO. If GMSC is unable to participate in a fixed payment arrangement for 2020, it must notify us by October 1, 2020 of its payment arrangement for 2021 so that we or our staff may determine whether this condition has been fully satisfied.

Condition 7 (Not Fully Satisfied): GMSC has begun the process of accreditation by the Joint Commission and plans to earn accreditation before becoming operational. Findings, ¶ 18. GMSC must notify the Board of the Joint Commission’s arrival at the ASC and, when it receives approval to operate as a Medicare-certified ASC, must provide the Board with documentation of such approval.

Condition 8 (Not Fully Satisfied): This condition has not been fully satisfied. GMSC’s consumer-friendly website is currently on a development server and is not live to the public yet. GMSC does have a website that is accessible by the public, but it is mostly a splash page. GMSC plans to launch its consumer-friendly website to the public two weeks before becoming operational. Findings, ¶ 3. GMSC must notify us when its website is up and accessible to the public (which must be at least two weeks prior to GMSC commencing operations) so that we or our staff may review it to determine whether this condition has been fully satisfied.

Condition 9 (Not Fully Satisfied): This condition has not been fully satisfied. GMSC has not posted any commercial/self-pay prices on its website yet. Findings, ¶ 20. GMSC must notify us when the website is up and accessible to the public (which must be at least two weeks prior to opening) so that we or our staff can review it to determine whether this condition has been fully satisfied.

Condition 10 (Satisfied with Approval of Change in Scope): GMSC established that the procedures and surgeries to be performed at the ASC are evidence-based. *See* Findings, ¶ 22. As discussed below, while they were not included in the scope of the CON, we approve GMSC’s addition of plastic surgery and certain ophthalmology services.

Condition 11 (Satisfied): GMSC has satisfied this condition. Findings, ¶¶ 23-24.

Condition 12 (Not Satisfied): Condition 12 requires GMSC to “successfully negotiate with [BCBSVT] to accept reimbursement that is below the community fee schedule rate”² and, for insurers that do not use a community hospital fee schedule, to “negotiate reimbursements that it can demonstrate are below reimbursements for the same procedures/surgeries when performed in a hospital setting.” Findings, ¶ 25. GMSC initially confirmed that it will offer surgeries and procedures at a lower cost than a hospital outpatient setting. Findings, ¶ 26. However, when asked how it would prove this, GMSC said that it plans to ask commercial insurers to provide letters confirming that their reimbursements to GMSC are below “the average equivalent reimbursements paid to hospitals for providing the same services.” Findings, ¶ 27.

The letters GMSC plans to provide will not satisfy Condition 12. One of the primary justifications for this project was the cost savings it would generate. Citing “operational differences” between ASCs and hospitals, GMSC claimed it could “offer lower charge structures and lower-cost contracts with insurers than hospitals would find feasible to accept,” resulting in “significant savings” for payers and patients compared to what they currently pay hospitals. Findings, ¶ 29. The Board realized that the extent of any savings for commercial and self-pay payers would depend on the rates GMSC negotiates with insurers.³ The Board included Condition 12 in the CON to ensure the project does in fact realize significant commercial/self-pay savings and meets a need for a low cost alternative to a hospital (outpatient) setting of care in Vermont, not on average, but in all cases. *See* Statement of Decision at 17, 24 (Member Lunge concurring) & Findings, ¶ 50. If we were to accept the letters GMSC plans to provide as proof of compliance with Condition 12, procedures and surgeries performed at the ASC could cost more, perhaps much more, than the same procedures and surgeries when performed in hospital settings across Vermont. *See* Findings, ¶ 28. This is not what the Board intended.

Because of shifts in GMSC’s projected payer mix, it is even more important now than it was when the Board granted the CON that the project generate significant commercial/self-pay savings. According to GMSC’s revised projections, it will do fewer procedures than initially anticipated in each payer category except commercial. Findings, ¶ 64. And while GMSC’s new projections show decreased revenues across all payers, commercial/self-pay revenues are projected to decrease the least. Of its overall revenues during the first four years, GMSC now expects 63% will come from commercial/self-pay, up from 52% in the initial projections; 28%

² GMSC asserts that the Board misunderstood how BCBSVT determines reimbursement rates for hospital facility fees. We accept that BCBSVT does not employ a community fee schedule for facility fees, as it does for physician fees. However, this means GMSC’s negotiations with BCBSVT are covered in the second part of the condition, which applies to “insurers that do not use a community hospital fee schedule.”

³ In Condition 13, the Board required that self-pay patients be billed at the lowest of the GMSC’s commercial rates.

will come from Medicare, down from 38% in the initial projections; and 10% will come from Medicaid, consistent with the initial projections. *Compare Findings*, ¶ 55, *with Findings*, ¶ 63.

We believe Condition 12 clearly requires GMSC to negotiate reimbursements for procedures and surgeries performed at the ASC that are lower than the reimbursements paid by insurers for the same procedures and surgeries when performed in any hospital outpatient setting in Vermont. However, to the extent the condition was not clear, GMSC has had almost two years to seek clarification from the Board. Unfortunately, instead of doing so, it chose to adopt what we believe to be a strained interpretation and to inform us of its interpretation only a few months prior to the ASC's planned opening. We believe GMSC's interpretation is strained because it imports the concept of an average onto language that makes no reference to an average and is inconsistent with representations GMSC made during the application review process.

During the application review process, GMSC estimated the project would result in commercial savings of 45% to 60% percent, noting that most commercial insurers tie their reimbursement rates to Medicare rates. Findings, ¶ 30. GMSC also stated its commercial charges would be about half of hospital rates. Findings, ¶ 31. Finally, GMSC told the Board it would guarantee as a center policy that its prices will always be lower than hospitals and that it would display its written policy on its website and communicate it to commercial insurers during rate negotiations. *Id.* We have not found any suggestion in the lengthy record in this case that GMSC might be close to the average of hospital reimbursements. To the contrary, the record indicates that GMSC planned to charge significantly less than hospitals.

GMSC argues that it cannot comply with Condition 12 because it has “no way to identify a schedule of rates that any insurer (including Blue Cross) pays other (hospital) facilities for identical services and then peg [its] rates to some fraction of those.” GMSC Post-Hearing Brief at 3. It also argues that, “given the capacity for wide variation in reimbursement rates even within the same hospital (not to mention across geographies outside GMSC's catchment area), some kind of averaging seems to be the only plausible way to assess whether [GMSC has satisfied Condition 12].” *Id.* at 5. Furthermore, while GMSC did not make the argument in its post-hearing brief, it suggested at the April 17, 2019 hearing that hospitals might intentionally lower their fees to put GMSC out of business. Findings, ¶ 34.

GMSC may not know what hospitals receive from insurers in equivalent facility payments for the procedures and surgeries offered at the ASC. *See Findings*, ¶ 32. However, GMSC has not demonstrated that this makes compliance with Condition 12 impossible. GMSC described the negotiating process only briefly. GMSC's Manager testified “I need to negotiate with commercial insurers and say here's what I think my costs are for providing this, here's what I would like in reimbursement, and they need to come back to me and say we think that one is too high, this one is fine, okay, and that's how we'll have an agreement.” Findings, ¶ 33. We do not see why this process could not accommodate the requirements of Condition 12 if the expectation is clear that GMSC's rates must be below the rates of Vermont hospitals.

GMSC also failed to demonstrate that “some kind of averaging is the only plausible way to assess whether [GMSC has satisfied Condition 12].” It should be easier for an insurer to confirm that its reimbursements to GMSC are lower than its reimbursements to any Vermont

hospital than it would be for the insurer to confirm that its reimbursements to GMSC are lower than an average of rates it pays to all Vermont hospitals. To be clear, we would find Condition 12 satisfied if GMSC were to provide attestations or confirmations from commercial insurers that the rates they pay GMSC for procedures and surgeries are lower than the rates they pay for the same procedures and surgeries when performed in any hospital outpatient setting in Vermont.

GMSC suggested briefly at the April 17, 2019 hearing that if its reimbursements are required to be below hospital reimbursements in all cases, hospitals could reduce their prices for surgeries performed at the ASC in an attempt to put the ASC out of business. *See Findings, ¶ 34.* However, GMSC did not address whether such conduct would be legal. Were the hospitals to engage in this kind of conduct, it would seem to implicate “predatory pricing” prohibitions in state and federal law. *See 9 V.S.A. § 2461c(a); see also Franklin Cty. Sheriff’s Office v. St. Albans City Police Dep’t*, 2012 VT 62, ¶ 21, 192 Vt. 188, 197, 58 A.3d 207, 214 (2012) (discussing federal precedent under the Sherman Act). We will not modify Condition 12, which was so central to the Board’s decision to grant the CON, based on a fear that hospitals will at some point in the future engage in what we see as legally questionable conduct.

Condition 13 (Satisfied): GMSC has satisfied this condition. Findings, ¶¶ 35-36.

Condition 14 (Satisfied): GMSC has satisfied this condition. Findings, ¶¶ 37-38.

Condition 15 (Satisfied): GMSC has satisfied this condition. While there are differences between them, we conclude GMSC’s charity care policy is “on par” with, and in some respects more generous than, the charity care policies of UVMHC and NMC. Findings, ¶¶ 39-43.

Condition 16 (Satisfied): GMSC has satisfied this condition. Findings, ¶¶ 44-45.

Condition 17 (Not Fully Satisfied): GMSC has begun the process of accreditation by the Joint Commission. Findings, ¶ 18. To fully satisfy the condition, GMSC must earn accreditation. Findings, ¶ 17. We therefore require GMSC to notify us when it has achieved accreditation and provide us with documentation of accreditation so that we or our staff can determine whether this condition has been fully satisfied.

Condition 18 (Not Fully Satisfied): GMSC has a collaborative care agreement that meets the requirements of this condition. However, GMSC has not demonstrated that it requires all physicians to sign the agreement. Findings, ¶ 47. Therefore, GMSC must provide documentation that it requires all physicians to sign the agreement prior to opening.

Condition 19 (Deferred): GMSC cannot comply with this condition until it begins operating. We will therefore not require this condition to be satisfied prior to opening. GMSC must notify us when it posts its first set of quality performance results on its website.

Condition 20 (Deferred): GMSC cannot comply with this condition until it begins operating. We will therefore not require this condition to be satisfied prior to opening. Board staff will review GMSC’s implementation reports and website for compliance with this condition.

Condition 21 (Amended; Not Fully Satisfied): GMSC cannot comply with this condition until it begins operating. We will therefore not require this condition to be satisfied prior to opening. GMSC has asked to amend the condition. As discussed immediately below, we grant that request in part. Board staff will review GMSC’s implementation reports and website for compliance with this condition, as amended.

Request to Amend Condition 21

GMSC has asked for leave to report all information under CON Condition 21 “on an aggregate level by specialty for the ASC, rather than on an individual level by provider.” GMSC argues that the information in Condition 21, if disclosed publicly on an individual level, could harm ASC providers and is the type of information that the providers and GMSC protect. *See Findings, ¶¶ 52-53.* GMSC also claims certain information may be protected by HIPAA. *Findings, ¶ 53.* Relatedly, GMSC claims the information is exempt from public inspection and copying under Vermont’s Public Records Act. *Findings, ¶ 52.*

While GMSC cites Vermont’s Public Records Act, that Act does not limit the Board’s authority to impose conditions in a CON. Rather, the Act gives the public a right to inspect and copy records of a public agency. *See 1 V.S.A. § 315.* Nevertheless, we conclude that the information specified in Condition 21, at least at the provider level, is sensitive, and that the Board’s purpose in including Condition 21 in the CON can be satisfied without disclosing the information publicly. We therefore grant GMSC’s request to amend the condition in part.

It is important that the Board receives the information specified in Condition 21 at the individual provider level. During the Board’s review of GMSC’s application, there was a concern that the ASC’s physician owners might treat their most profitable patients at the ASC and their least profitable patients at hospitals (i.e., make decisions about where a procedure should be performed based on their potential to profit rather than the patient’s needs). Physician owners of an ASC might have an incentive to engage in this type of “cream skimming” because they share in the facility fees paid to the ASC but not the facility fees paid to hospitals. *See Plotzke, M. R., & Courtemanche, C., Does procedure profitability impact whether an outpatient surgery is performed at an ambulatory surgery center or hospital?, Health Economics, 20, 7, 817-30 (Apr. 3, 2011).* Condition 3 was intended to address this concern (and to ensure compliance with CON Standard 3.16 of the Health Resource Allocation Plan or HRAP).⁴ Condition 3 requires each physician practicing at the ASC to certify that he or she will not consider the source of payment or a patient’s ability to pay when determining whether to perform a surgery at the ASC. The information in Condition 21 will help the Board monitor compliance with Condition 3 and information at the provider level is needed because information at the specialty level may mask provider-level concerns.

While it is important that the Board receives the information at the individual provider level, the information does contain sensitive financial information and, in some cases, might

⁴ CON Standard 3.16 provides that “[a]n applicant proposing to establish an ambulatory surgical center shall demonstrate how the applicant will provide access to all residents of each community within the identified service area without regard to an individual’s payer type, insurance status or ability to pay for necessary services.”

enable the identification of individual patients. Furthermore, the public disclosure of the information is not necessary to carry out the purpose of the condition. We therefore modify Condition 21 to allow GMSC to present the information on an aggregate level by specialty on its website but continue to require GMSC to report the information to the Board on an individual provider level. The information should be provided as a separate attachment to GMSC's implementation reports. Since the physician owners have changed and may continue to change in the future, the attachments must identify the physician owners of the ASC.

The implementation reports submitted by GMSC are part of the official record in this case and as such, are public records. GMCB Rule 4.000, § 4.403. Since GMSC has asserted that the information in Condition 21 is confidential, at least at the provider level, we must consider whether to treat the information as exempt from public inspection and copying under Vermont's Public Records Act. We will do so in a separate order.

Addition of Ophthalmology and Plastic Surgery

The scope of the project was limited to the five specialties of gastroenterology, obstetrics/gynecology, orthopedics, pain management, and general surgery, and the addition of ophthalmology and plastic surgery is a nonmaterial change in scope that we have chosen to review. For the reasons discussed below, we approve the addition of plastic surgery, as well as those ophthalmology procedures and surgeries not currently performed at another ASC in Vermont.

- I. *The scope of the project was limited to the five specialties of gastroenterology, obstetrics/gynecology, orthopedics, pain management, and general surgery, and the addition of ophthalmology and plastic surgery is a nonmaterial change in scope that we have chosen to review.*

The CON issued by the Board in this case contained the following language regarding scope:

The applicant shall develop and operate the Project in strict compliance with the Project scope as described in the application, in other materials in the record submitted by the applicant, and in strict conformance with the Statement of Decision issued today by the Board. This certificate of need is limited to the Project and activities described therein.

CON at 1. Based on the application, the materials submitted by GMSC in connection with the application, and the Board's Statement of Decision, we conclude that the scope of the project was limited to the five specialties of gastroenterology, obstetrics/gynecology, orthopedics, pain management, and general surgery.

GMSC stated in its application that "[t]he ASC's initial scope of service will include gastroenterology (GI), obstetrics/gynecology, pain medicine, general surgery, and orthopedics procedures." Findings, ¶ 57. Similarly, in approving the CON, the Board found that "[t]he majority of procedures performed at the ASC would be gastrointestinal (GI)—the highest volume of which will be screening and diagnostic colonoscopies" and that "[t]he ASC will also

offer pain management, obstetrics and gynecology (OB/GYN), orthopedic and general surgery.” *Id.* Furthermore, in its application and during the review process, GMSC submitted projections so the Board could evaluate the project. These projections were limited to the five specialties GMSC initially identified in its application. *See* Findings, ¶¶ 56, 57 (citing App. at 28).

The Board relied on GMSC’s projections in evaluating the project against the statutory CON criteria. For example, in deciding whether to grant a CON, the Board must determine whether the cost of the project is reasonable, which involves evaluating “the financial implications of the project on hospitals and other clinical settings.” 18 V.S.A. § 9437(2)(B)(i). The Board concluded that there would be minimal impact on hospitals as a result of the project based in part on the projections GMSC provided, which did not include plastic surgery or ophthalmology. *See* Statement of Decision at 16 (citing Findings, ¶¶ 33, 35). Had ophthalmology and plastic surgery been considered in-scope, not only would the projections have been different, but the Board’s analysis would likely have been different as well. The Board would have needed to consider the impact of the project on The Eye Surgery Center in South Burlington, since ophthalmology services are the only services it offers. The Board’s analysis of “need” would also likely have been different. The Board found that the project will address a need for more affordable care for individual Vermonters. Statement of Decision at 19. If ophthalmology had been considered in-scope, the Board would likely have needed to analyze whether The Eye Surgery Center is already serving the need for a lower cost setting of care for any of the ophthalmology services that would be offered at GMSC.

GMSC emphasizes that when the Board approved the CON, it acknowledged GMSC’s expectation that there would be strong demand to add specialties: “[GMSC] expects that once the ASC is fully operational, there will be strong demand for other specialties which may include oral surgery, podiatry, and plastic surgery.” GMSC Post-Hearing Brief at 10 (quoting Statement of Decision, Findings, ¶ 20). However, acknowledging GMSC’s expectation of future demand for additional specialties does not mean additional specialties are within the scope of the approved project. The Board had no basis on which to evaluate the potential impacts of a multi-specialty ASC that performs procedures or surgeries in specialties other than the five GMSC identified and provided projections for. We also note that, despite having discussions with vitreoretinal surgeons as early as 2015 about the possibility of moving cases to GMSC, GMSC did not list ophthalmology as a specialty for which there might be future demand. Findings, ¶ 68. Finally, while the Board acknowledged the potential for future demand from surgeons in other specialties, it also clearly intended to limit the types of procedures that could be done at GMSC. It expressly declared that it was imposing conditions in the CON “that limit the expansion of services,” Statement of Decision at 13, and, in Condition 10, prohibited GMSC from offering services, procedures, or surgeries without first demonstrating that they “fall within the scope of those approved in this certificate of need.”

While the addition of ophthalmology and plastic surgery is a change in scope, we agree with GMSC’s initial characterization of the change as nonmaterial because it does not meet the cost threshold of a material change. Findings, ¶¶ 59, 65-67. Nonmaterial changes in the scope of an approved project may be reviewed by the Board in its discretion. 18 V.S.A. § 9444(b)(2). Here, the Board advised GMSC that it would review the proposed changes and instructed GMSC to provide evidence of “need” for the new services, particularly ophthalmology.

II. We approve the addition of plastic surgery, as well as those ophthalmology procedures and surgeries not currently performed at another ASC in Vermont.

The third statutory CON criterion requires that an applicant demonstrate an “identifiable, existing, or reasonably anticipated need for the proposed project which is appropriate for the applicant to provide.” 18 V.S.A. § 9437(3). Since “need” is not defined, the Board looked to the policy and purpose underlying the CON laws in determining whether GMSC satisfied this criterion. Statement of Decision at 18. The purpose of the CON laws is to ensure that new health care projects are developed in a manner that avoids unnecessary duplication, limits health care cost growth, maintains and improves the quality of and access to health care services, and promotes rational allocation of health care resources. Given the “inherent differences between a hospital and ASC setting,” the Board chose to frame the issue of whether the project avoids unnecessary duplication “more broadly than a simple comparison of services to be offered.” *Id.* The Board concluded that the project will address a need for more affordable care for individual Vermonters. *Id.* at 19. Specifically, the Board concluded “there is an identifiable need and demand for more affordable health care services and for controlling the escalating costs of health care statewide.” *Id.*

The Board’s rationale for finding that the need criterion was met with respect to the original project also applies to GMSC’s proposed addition of plastic surgery. Ophthalmology, however, is different because there is an ASC in the same county as GMSC, The Eye Surgery Center, that offers a variety of ophthalmology services. Findings, ¶ 70. GMSC failed to show that The Eye Surgery Center is not already meeting a need for a lower cost setting of care for these services and we are concerned that the addition of ophthalmology at GMSC, without any limitations, will contribute to unnecessary duplication.

The only ophthalmology services GMSC plans to offer that are currently provided at The Eye Surgery Center relate to cataract removal; the others are provided exclusively in a hospital setting. Findings, ¶ 71. Only one of the four ophthalmologists planning to perform surgeries and procedures at GMSC plans to offer cataract surgeries there. Findings, ¶ 61. The surgeon plans to move cataract surgeries that require general anesthesia, which the surgeon currently performs in a hospital setting, to GMSC. GMSC did not indicate that this surgeon plans to move cataract surgeries not requiring general anesthesia, which the surgeon currently performs at The Eye Surgery Center, to GMSC. Findings, ¶ 79. The surgeon did not testify at the April 17, 2019 hearing. However, GMSC stated that this surgeon has had his or her block time cut by approximately 15% at each of the two local hospitals and “is not confident” that he or she would be able to find enough surgical time at The Eye Surgery Center on days that are feasible for his or her patients. Findings, ¶ 72. On this record, we conclude GMSC has not proven a need to do ophthalmology procedures currently performed at The Eye Surgery Center, including cataract surgeries not requiring general anesthesia. Since other ophthalmology services, including cataract surgeries requiring general anesthesia, are offered exclusively in a hospital setting, we approve them to be performed at GMSC.⁵

⁵ With respect to cataract surgeries, Drs. Weissgold and Young testified that cataract extractions are sometimes performed in conjunction with vitreoretinal surgeries. Findings, ¶¶ 74, 76. To avoid confusion, we expressly allow these to be performed at GMSC.

While GMSC has not proven need with respect to those ophthalmology services currently performed at The Eye Surgery Center, we also do not know how The Eye Surgery Center would be impacted financially if we were to allow GMSC to perform these services. As discussed above, the financial impact on other clinical settings is a relevant consideration in CON review. We have received comments that relate to this issue and, while we cannot consider them for their truth, GMCB Rule 4.000, § 4.407.4., they highlight the absence of information in the record.

There is, however, evidence in the record regarding potential financial impacts to NMC from the addition of ophthalmology. NMC submitted evidence regarding the contribution of ophthalmology procedures in general and of cataract removal procedures specifically to its margin. Findings, ¶ 78. While the number of ophthalmology procedures and the contribution of the revenue from these procedures to NMC's margin is not insignificant, none of the four ophthalmologists planning to perform surgeries at GMSC performed any procedures at NMC in FY 2018. Findings, ¶ 79. Thus, the financial impact of adding ophthalmology at GMSC is likely to be minimal, at least in the immediate future.

Additional Reporting

In the almost two years since we granted the CON, many aspects of the project have changed besides the addition of new specialties. Fourteen physicians now plan to perform procedures and surgeries at GMSC that were not included in the original projections the Board reviewed. Findings, ¶ 61. With these changes, GMSC's projected volumes, payer mix, and revenues have changed as well. Findings, ¶¶ 62-64. Given these changes, we will require semi-annual reporting for an additional two years. Thus, GMSC must continue to file quarterly implementation reports for 17 consecutive quarters as required in the initial CON and thereafter must file four additional semi-annual implementation reports containing the same information.

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ORDER

For the reasons set forth above, we amend Conditions 1 and 21 of the CON; we conclude that Conditions 3-5, 10-11, and 13-16 have been satisfied, Conditions 1-2, 7-9, 12, and 17-18 have not been satisfied and must be satisfied before the ASC opens, and Conditions 6, 19, and 20 have not been fully satisfied, but may be satisfied after the ASC opens; and we approve the addition of plastic surgery and those ophthalmology procedures and surgeries not currently performed at another ASC in Vermont. Finally, we require GMSC to file semi-annual implementation reports for an additional two years.

SO ORDERED.

Dated: June 4, 2019 at Montpelier, Vermont

s/ Kevin Mullin)
)
s/ Jessica Holmes)
)
s/ Robin Lunge)
)
s/ Maureen Usifer)
)
s/ Tom Pelham)

GREEN MOUNTAIN
CARE BOARD
OF VERMONT

Filed: June 4, 2019 at Montpelier, Vermont