



February 14, 2022

By Electronic Mail and U.S. Mail

Kevin Mullin, Chairman
Green Mountain Care Board
144 State Street
Montpelier, VT 05602
Kevin.Mullin@vermont.gov

**Re: The University of Vermont Medical Center Inc.
Request for Jurisdictional Determination – Employee Housing Development**

Dear Chairman Mullin:

The University of Vermont Medical Center Inc. (“UVMC”) hereby requests a determination, pursuant to Green Mountain Care Board (the “Board”) Rule 4.301, that the Board does not have Certificate of Need (“CON”) jurisdiction over a proposed project for development of employee housing.

The Proposed Project

The Board has long recognized the severe workforce shortage facing Vermont’s hospitals and has encouraged those hospitals to work proactively and creatively to address it. As UVMC works to attract and retain the talented workforce necessary to care for Vermonters, it has consistently found that one of the biggest obstacles its employees face is the lack of affordable housing in Chittenden County. In response, UVMC has been exploring all of the ways it can help to address this acute need.

Recently, UVMC was approached by an experienced builder/developer (the “developer”) that is planning on constructing an approximately 61-unit apartment building in South Burlington. The developer has an option to own the property, has secured all of the necessary development rights, and has designed the building. It has asked UVMC if it would be interested in investing in the project and making the units available to its workforce.

UVMC, seeing an innovative opportunity to make affordable housing available to its employees, has been negotiating a possible arrangement with the developer. The goals of the arrangement are to ensure availability of the apartments to members of the UVMC workforce,

often at a discount, and in a manner that is at least cost neutral to UVMMC. To that end, the parties have discussed the following terms:

- UVMMC (either directly or through one of its corporate affiliates) would make an up-front capital investment of less than \$3,000,000.00 in the project through the purchase of a passive equity interest in a new corporate entity formed and managed by the developer to construct and own the apartment building. The developer would own 51% of the new entity and actively manage all of its affairs and operations.
- The new corporate entity would borrow the additional capital necessary to construct the apartment building; UVMMC would not be responsible for that debt or those expenditures, which would be borne by the developer. The developer would bear the responsibility to apply for, negotiate and finalize the financing arrangements and may be required to guarantee the debt. UVMMC will not guarantee the debt and will not be responsible for any additional capital costs, including construction cost overruns.
- The developer will oversee and manage the construction of the apartment building.
- UVMMC would enter into a ten-year master lease agreement of the apartment building to ensure that its employees have first option to rent the apartments. The developer would serve as the property manager, taking on the responsibility of sub-leasing the units to UVMMC employees and overseeing the maintenance and operation of the building. Net rent payable by UVMMC (the master rent less the aggregate amount of tenant rents discounted for UVMMC workforce tenants) would be an operating expense to UVMMC, rather than a capital cost, under applicable FASB rules.
- The most recent apartment vacancy rate for Chittenden County was less than 1%. In the unlikely event that there is insufficient UVMMC workforce demand to fill all of the apartments, the apartments will be rented to non-UVMMC employees.
- UVMMC and its employees would not deliver any health care services from the apartment building; it would simply be an apartment building.

At its essence, this is the developer's project. The developer owns the property. The developer has permitted it and designed the building. The developer will form the legal entity, obtain the financing, oversee the construction and manage the building once built and operating. UVMMC's role is limited to a passive investment and taking a master lease that is designed not for UVMMC to occupy or use the building, but to ensure the apartments are available to its workforce. The projected return on UVMMC's investment should offset all its subsidy cost during the term of the lease and should return all of its investment at the end of the lease. When the lease is concluded, UVMMC will either sell its interest or retain it as a pure financial investment.

Under the proposal, UVMMC's modest capital contribution could yield significant and lasting benefits to its workforce, at little financial risk to the hospital. Indeed, the overall expenditure would be far, far less than the approximately \$120 million UVMMC is currently paying annually for travelers and other extraordinary efforts to secure both temporary and long-term workers.

Legal Analysis

The question of whether UVMMC should be required to seek a CON for the project is governed by 18 V.S.A. § 9434(b)(1), which states:

A hospital shall not develop or have developed on its behalf a new health care project without issuance of a certificate of need by the Board. For purposes of this section, a "new health care project" includes the following:

- (1) The construction, development, purchase, renovation, or other establishment of a health care facility, or other capital expenditure by or on behalf of a hospital, for which the capital cost exceeds \$3,000,000.00.

The proposed apartment building itself clearly does not meet the statutory definition of "a health care facility," which includes only those buildings from which UVMMC offers "diagnosis, treatment, inpatient, or ambulatory care." 18 V.S.A. § 9402(6). In addition, the proposed project clearly would not require a capital expenditure exceeding 3,000,000.00 "by" UVMMC, since UVMMC's own capital investment would be limited to less than that amount, is made as a passive investment, is not contemplated to lead to further ownership of the building, and is only made as a means of assuring availability of the apartments for its workforce.

The only remaining jurisdictional question is whether the project would meet the statutory definition of "a capital expenditure . . . *on behalf of* a hospital," because the capital cost of the building built by the developer will be greater than 3,000,000.00. For the following reasons, we do not believe the project requires a CON under that provision.

Neither the Hospital's nor the Developer's Capital Investment is for Plant or Equipment

As an initial matter, the cost of the apartment building does not meet the definition of "capital expenditure" under the CON statute, which defines that term to mean "an expenditure *for plant or equipment* that is not properly chargeable as an expense of operation and maintenance." 18 V.S.A. § 9432(5) (emphasis added). This definition does not purport to capture all expenditures that are treated as capital expenditures under FASB. Nor does it include all capital expenditures for "construction" or even for "buildings." Instead, it is intentionally limited to capital expenditures on "plant" or "equipment." While "equipment" is not defined in statute, the Board's rules limit the term to apply to "a single unit of medical equipment or a single system of components with related functions used in a patient care environment to support patient treatment and diagnosis or to provide medical and other health care services." Board Rule 4.104(7). That definition is inapplicable here.

Although the term "plant" is not defined in any applicable statute or rule, the context in which it is used – namely the CON criteria enumerated in the statute and related regulations and the

related Healthcare Resource Allocation Plan (“HRAP”) requirements – makes clear that it is referring to the physical plant of a health care facility, rather than a building that is not utilized or involved in the provision of health care. As a result, it too is inapplicable to an apartment building for workforce housing.

The Developer’s Investment is not “On Behalf Of” the Hospital

A capital expenditure is “on behalf of a hospital” only when there is an actual and meaningful link between the hospital and the expenditure. *See, District of Columbia Hosp. Ass’n v. Barry* 586 A.2d 686, 691 (D.C. 1991) (stating that an independently developed parking lot leased by a hospital should not be subject to a CON). *See also, SSM Health Care v. Missouri Health Facilities Committee*, 894 S.W.2d 674, 677 (Mo. 1995) (en banc) (holding that the cost of an independently developed office building leased by a hospital is not a capital expenditure on behalf of the hospital for determining CON expenditure threshold). Both the *Barry* and the *SSM Health Care* courts noted that the nature of a link triggering CON jurisdiction is tied to the prospect of incurring costs that will be passed on to health care consumers. *Id.* In the proposed project, the developer has planned, designed, and permitted the apartment building without the participation of UVMMC. The arrangement by which UVMMC would invest in and lease the apartment building was suggested after the developer already performed the preliminary work for the building, and UVMMC’s involvement in the project is designed for the limited purpose of obtaining access to affordable workforce housing. UVMMC’s investment will be passive and serves as a financial mechanism to recapture the rent subsidy that it plans to offer some workforce members who rent the apartments. UVMMC has no plans to acquire the apartment building or increase its investment. Accordingly, there is no meaningful link between UVMMC’s investment, which would be below the CON limit even if it were a “capital expenditure,” and the cost of the building.

Perhaps more importantly, the developer’s proposed capital investment in the apartment building project cannot reasonably be viewed as “on behalf of” UVMMC. Rather, the developer is proposing to make its capital investment on its own behalf, as for-profit developers do. The developer will form the entity that builds and owns the apartment building, and the developer will hold a controlling interest in that entity. The developer will be compensated for developing, overseeing construction and managing the building and will receive an income stream attributable to its equity interest. That income stream will be no different whether the apartment building is fully occupied by UVMMC employees at subsidized rates, or by non-UVMMC employees paying market rates. Simply put, the developer is financially ambivalent as to whether its building is occupied, and its income stream is supplied, by UVMMC employees or other tenants. So, the developer’s capital investment is not made on behalf of the hospital.

In light of this analysis, it is unsurprising that the “Policy and Purpose” of the CON statute – which focuses on “promoting the rational allocation” of high quality, non-duplicative health care services – has no logical bearing on this project. *See* 18 V.S.A. § 9431(a). Indeed, any attempt to apply the statutory CON criteria, the Board’s CON rules, or the HRAP to this project highlights the inapplicability of the CON regulatory scheme. For instance, it is hard to imagine how the Board would determine whether this project “takes into consideration health care payment and delivery reform,” 18 V.S.A. § 9437(1); or how the applicant will “collect and monitor data

relating to health care quality and outcomes related to the . . . project,” CON Standard 1.6; or how it will comply with the Guidelines for Design and Construction of Health Care Facilities as issued by the Facilities Guidelines Institute, which are inapplicable to apartment buildings. CON Standard 1.12.

Of course, to the extent UVMMC would be putting capital at risk and incurring operating expenses by virtue of the master lease and the proposed subsidies, those expenditures will still be subject to the Board’s review in the budget-setting process. It is that budget regulatory framework, rather than the CON regulatory framework that provides the appropriate level and type of oversight of investments such as this.

Conclusion

UVMMC and its employees have been struggling with the impacts of Chittenden County’s lack of affordable workforce housing. This problem has been driving UVMMC’s staffing costs, particularly with the need to engage traveling staff at much higher rates. The developer has offered an innovative investment opportunity that has the real potential to make 61 affordable apartments available to UVMMC staff and to do so in a manner that creates no real risk of increased costs to UVMMC.

It is worth noting that if an innovative workforce housing project such as this requires a CON, it will not come to fruition. For-profit real estate developers are understandably unwilling to voluntarily subject themselves to the additional expense, delay, and detailed oversight of another regulatory body, much less one that is expert in health care policy rather than housing development. In fact, this developer has informed UVMMC that it plans to aim for a spring construction start and that there are other parties waiting in the wings to invest if UVMMC cannot meet that timetable.

In this case, we believe that UVMMC’s passive investment for the sole purpose of obtaining the availability of the apartments for its staff and the fact that the developer will oversee and control the financing, permitting, construction, operation and maintenance of the building demonstrate that this is not the kind of capital expenditure for plant or equipment that is being made “on behalf of” the hospital as contemplated by the CON statute and that, under these specific circumstances, the project should be considered outside of the jurisdiction of the statute.

Thank you for your consideration. Please let me know if there is any additional information that would be helpful to you in your review of this request.

Sincerely,



Eric Miller
General Counsel and Senior Vice President
The University of Vermont Health Network Inc.