

**STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD**

In re: Application of the University of Vermont)
Medical Center for a Conceptual CON)
For Planning and Design for Relocation) GMCB-002-22con
Of Dermatology and Ophthalmology)
Practices)
_____)

STATEMENT OF DECISION

Introduction

In this Statement of Decision, we review the application of the University of Vermont Medical Center (UVMMC or “the Applicant”) for a Conceptual Development Phase Certificate of Need (Conceptual CON) that would allow it to spend up to \$92,020 for planning and design activities to relocate its outpatient Dermatology and Ophthalmology practices to 350 Tilley Drive in South Burlington, Vermont (the Project). We also review UVMMC’s request for relief from sanctions for spending \$452,499 on planning and design activities without a Conceptual CON.

For the reasons set forth below, we approve the application and issue the Applicant a Conceptual CON, subject to the conditions set forth therein. Based on the explanation provided by UVMMC, we also conclude that UVMMC spent \$452,499 on planning and design activities in reliance on its good faith projection that capital costs for the Project would be under \$30 million and a Conceptual CON would not be required. Thus, we will not impose sanctions on these facts.

Procedural Background

On January 20, 2022, UVMMC filed a Conceptual CON application and request for expedited review under 18 V.S.A. § 9434(c) and 18 V.S.A. § 9440(c)(5)(A). The Board granted UVMMC’s request for expedited review on January 31, 2022, pursuant to GMCB Rule 4.000, § 4.304(1)(d).

Jurisdiction

The Board has jurisdiction over this matter pursuant to 18 V.S.A. § 9375(b)(8) and 18 V.S.A. § 9434(c).

Findings of Fact

1. UVMMC currently operates outpatient Dermatology practices on its main campus and Ophthalmology practices at 462 Shelburne Road. Letter of Intent (LOI), 1. In a separate application, UVMMC is seeking a CON that would permit it to relocate these practices to an

unoccupied building located at 350 Tilley Drive in South Burlington (the Project). *See* LOI, 1. As part of the Project, UVMMC would purchase the unoccupied building at 350 Tilley Drive from Pizzagalli Properties, fit up 24,115 department gross square feet (DGSF) on the first floor and 25,032 DGSF on the second floor of the building, and construct a 2,220 square foot addition for staff entry, elevators, loading area and space for storage and waste management. LOI, 1. The Project's total capital cost is \$35,246,100. Request for Relief from Sanctions, 3.

2. Where a project requiring a CON is anticipated to cost more than \$30 million, an applicant must first secure a conceptual CON that permits the applicant to make expenditures for architectural services, engineering design services, or any other planning services, needed in connection with the project. *See* 18 V.S.A. § 9434(c).

3. In this application, UVMMC seeks a Conceptual CON that would authorize it to spend up to \$92,020 to complete pre-construction planning activities for the Project. LOI, 3.

4. UVMMC has already spent \$452,499 on pre-construction planning for the Project based on its belief that the total cost of the Project would be below \$30 million and a Conceptual CON was therefore not required. LOI, 2.

5. UVMMC began planning the Project in 2018 with the intent to lease the 350 Tilley Drive building from Pizzagalli Properties for a 13-year term with an option to purchase. At that time, Project planners applied the then-effective Financial Accounting Standards Board ("FASB") lease classification rules to determine that lease costs would be an operating expense because the Net Present Value of rent payments was less than 90% of the building's Fair Market Value. As planning activities and negotiations with Pizzagalli Properties proceeded over the next few years, Project planners periodically confirmed that lease payments would be an operating expense under the FASB standard and the Project's capital costs remained well under \$30 million. Request for Relief from Sanctions, 2-3.

6. In September – November 2021, UVMMC reevaluated the Project and decided it made sense to purchase the 350 Tilley Drive Building rather than lease it, in part because a cash flow analysis showed that purchasing the property will save \$2.3 million over twenty years and because of UVMMC's potential plans for other long-term investments in the Tilley Drive area. When UVMMC's in-house accountants evaluated the purchase option, they also advised Project planners that UVMMC had adopted a revised FASB standard for lease classification effective October 1, 2019, and the contemplated lease is a capital lease under the new standard because UVMMC is "reasonably certain" to exercise an option to purchase. Because of the change in the classification of the lease costs, the Project's capital costs rose above the \$30 million threshold for a Conceptual CON. *See* Request for Relief from Sanctions, 3-4.

7. UVMMC requests relief from sanctions on the basis that it reasonably determined that the Project's capital costs would be less than \$30 million based on a totality of the underlying facts and circumstances. *See* Request for Relief from Sanctions.

8. The following table breaks down UVMMC’s projected expenses under the Conceptual CON, as well as expenditures UVMMC has already made for planning activities:

Costs	\$ Invoiced	\$ Outstanding
Design Fees (Architectural, Engineering, Other Related Design Services)	\$344,702	\$82,045
Other Consultant Fees	\$107,797	\$9,975
Total	\$452,499	\$92,020

See Application (App.), Table 1, 5. These costs are included in UVMMC’s budgets and are affordable for the hospital. App., 4.

9. As described further in the application, the work under the Conceptual CON will include architectural design and planning; permitting; LEED certification; commissioning; and pre-construction services. Based on its experience with similar construction projects, UVMMC believes this work is reasonable and necessary and will allow it to complete planning while the Board considers the CON application for the Project. App., 3-4.

10. UVMMC asserts that the Project is needed because demand for Dermatology and Ophthalmology services is strong and projected to increase as the region’s population ages and because the two practices are currently housed in multiple separate spaces that cannot be expanded or renovated to meet growing demand. UVMMC also asserts that the Project will appropriately locate ambulatory services outside the main campus, thereby freeing up limited space on the main campus for services that support inpatient and emergent care. App., 2.

Standard of Review

Vermont’s CON process is governed by 18 V.S.A. §§ 9431-9446 and Green Mountain Care Board Rule 4.000 (Certificate of Need). An applicant bears the burden of establishing that a CON should be granted. GMCB Rule 4.000, § 4.302.3.

Conclusions of Law

UVMMC’s relocation of outpatient Dermatology and Ophthalmology services to an unoccupied building located at 350 Tilley Drive in South Burlington is anticipated to cost more than \$30 million. Findings of Fact (Findings), ¶ 1. Thus, UVMMC must secure a Conceptual CON to make expenditures for architectural, engineering and other related design services, and other consultant services in connection with the project. 18 V.S.A. § 9434(c).

The Board will grant a Conceptual CON if it finds that: 1) the cost of the proposed planning activities is reasonable and the applicant can afford such cost; 2) the project appears to meet an identifiable, existing or reasonably anticipated need which is appropriate for the applicant to

provide; 3) if the project includes or comprises the purchase or lease of health care information technology, the project is consistent with the most current Vermont Health Information Technology Plan. GMCB Rule 4.000, § 4.206(4).

I.

UVMMC has established that the cost of the proposed planning activities is reasonable and affordable for the hospital.

The total cost of the planning activities under the Conceptual CON is \$92,020. Findings, ¶¶ 3, 8. These additional expenditures are needed to complete planning for a proposed project whose total cost is over \$35 million. *See* Findings, ¶¶ 1, 9. These costs are included in UVMMC's budgets and UVMMC can afford them. Findings, ¶ 8.

II.

UVMMC has also demonstrated that the Project appears to meet an identifiable, existing, or reasonably anticipated need which is appropriate for the applicant to provide, namely a need to meet increased demand for services. *See* Findings, ¶ 10. However, we note that whether there is a need for the Project will be assessed in the other docket, GMCB-003-22con, and that “[n]othing in a [Conceptual CON] or the review process associated therewith shall be construed to mean that a Certificate of Need shall be granted for the proposed project.” GMCB Rule 4.000, § 4.206(5).

III.

The project does not include or comprise the purchase or lease of health care information technology and thus the third criterion is inapplicable.

IV.

Regarding UVMMC's request for relief from sanctions, we note that an applicant shall not be subject to sanctions for failure to obtain a Conceptual CON for planning services needed in connection with a project if such failure is solely the result of good faith reliance on verified project cost estimates issued by qualified persons, which cost estimates would have led a reasonable person to conclude the project was not anticipated to be in excess of \$30 million. *See* 18 V.S.A. § 9434(c). Additionally, in determining appropriate sanctions, the Board must consider several factors, including, in the case of a facility that incorrectly projected that it would not exceed monetary jurisdictional thresholds, whether the erroneous projection was reasonable based on a totality of the underlying facts and circumstances. GMCB Rule 4.000, § 4.700(1)(f). Based on the facts presented, it appears that UVMMC expended \$452,499 on pre-construction planning activities without first obtaining a Conceptual CON because Project planners reasonably believed that the total cost of the Project would be below \$30 million. *See* Findings, ¶¶ 5-7. Thus, we do not intend to pursue sanctions absent additional facts.

