



July 1, 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](mailto: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. ("UVMCM") hereby requests a determination that the Green Mountain Care Board (the "Board") does not have Certificate of Need jurisdiction over a proposed project for development of a new residential building to provide staff housing.

**The Proposed Project**

As the Board has previously acknowledged, the severe workforce shortage facing Vermont's hospitals is a persistent problem demanding innovative solutions. The lack of affordable housing in Chittenden County continues to pose a significant challenge to UVMCM in its efforts to attract and retain skilled medical professionals to meet Vermont's health care needs. UVMCM is investing in a range of creative ways to address this and other obstacles contributing to the workforce shortfall.

UVMCM has received another proposal from the same experienced builder/developer with which it has previously collaborated (the "developer") that is planning on constructing a 120-unit apartment building in South Burlington. The developer owns the property, has secured all of the necessary development rights, and has designed the building. It has offered UVMCM an opportunity to invest in the project in exchange for the right to make the units available to its workforce. The proposed structure and arrangement of the development project are identical in all material respects to the project for which UVMCM received a non-jurisdictional determination from the Board in February 2022, with the exception of the increased cost and the inclusion of space for a 5,000-square foot childcare center.

UVMMC has engaged in negotiations with the developer in hopes of realizing this opportunity, which would represent further significant progress toward addressing its staff housing challenges and provide a critical boost for recruitment. The objective remains to ensure availability of the apartments to members of the UVMMC workforce at a discount for personnel for whom housing expenses exceed thirty percent (30%) of their income. Notwithstanding this discount for some workforce members, the arrangement is expected to be at least cost neutral to UVMMC. In addition, this larger planned building includes a 5,000-square foot childcare space, which would be extremely valuable to prospective staff and their family members, making the apartments more desirable. The parties have discussed the following terms in furtherance of these objectives:

- UVMMC (either directly or through one of its corporate affiliates) would make an up-front capital investment of \$5,570,000 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 capital costs, including construction overruns, associated with the project.
- The developer will oversee and manage the construction of the apartment building. UVMMC will have a limited role to identify and contract with a third-party operator for the childcare center.
- UVMMC would enter into a ten-year master lease agreement of the 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 the childcare tenant, 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 or any period during which the childcare space is not leased) would be an operating expense to UVMMC, rather than capital cost, under applicable FASB rules.
- Allen, Brooks & Minor's most recent report of the 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 without any discount.
- UVMMC and its employees would not deliver any health care services from the apartment building; it would simply be an apartment building.

This proposed project is substantially similar to a separate arrangement between UVMMC and the same developer with respect to a smaller 65-unit building which the Board determined was not subject to the CON requirement of 18 V.S.A. § 9434(b)(1) on February 24, 2022. That building is now under construction and by next year will provide much needed workforce housing. As with the previous project, the developer owns the property, designed the building, and obtained the required permits. The developer will form the legal entity, obtain financing, oversee construction, and manage the completed building. As before, UVMMC's role is that of a passive investor holding a master lease to make the apartments available to its workforce. UVMMC itself will not occupy or use the building. UVMMC will identify and engage an organization to lease and operate the childcare space. After making its initial investment, UVMMC will not be responsible for any of the project's debt or expenditures. The projected return on UVMMC's investment should offset all or nearly all of 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.

UVMMC's investment in this project is expected to yield significant and lasting benefits to its workforce, with limited financial exposure for the hospital. Indeed, the overall expenditure in this building and the prior building still represents a fraction of the approximately \$120 million dollars UVMMC has paid annually in recent years for travelling staff and other temporary workers.

### **Legal Analysis**

18 V.S.A. § 9434(b)(1) 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.

Like the project described by UVMMC in its February letter to the Board, this proposed apartment building does not constitute either "a health care facility" or a capital expenditure as contemplated by the CON law.

A "health care facility" is limited to a place from which UVMMC offers "diagnosis, treatment, inpatient, or ambulatory care." 18 V.S.A § 9402(6). This building will only be an apartment building with an associated childcare center. UVMMC will not offer any health care services from this building.

As UVMMC explained in its prior letter, the investment does not meet the definition of a "capital expenditure by or on behalf of [the] hospital," and is therefore outside the scope of the Board's CON jurisdiction. That explanation is repeated below for the convenience of the Board.

### **Investing in the project would not qualify as a capital expenditure by the hospital.**

The CON statute defines a “capital expenditure” 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). As UVMMC has previously observed, “equipment” is limited by Board rules to items “used in a patient care environment to support patient treatment and diagnosis or to provide medical and other health care services.” GMCB Rule 4.104(7). This definition clearly does not apply to an investment in a residential building or the related childcare space.

The term “plant” is not defined by the relevant statute or rules. However, its meaning must be understood in the context of the CON statute, which forms part of the State’s policy to “avoid unnecessary duplication” in the development of new health care projects and improve access to quality health care while “promoting rational allocation of health care resources in the State.” 18 V.S.A. § 9431. The CON requirement also serves to ensure that proposed development aligns with Vermont’s Health Resource Allocation Plan. In view of these policy priorities, it is evident that the CON scheme’s use of “plant” applies to health care facilities and other real property that has a direct impact on the availability of health services in the State. UVMMC’s investment in a residential apartment building developed by an independent, private developer, which will not be used for the delivery of any health care services, would not constitute an expenditure for plant within the meaning of the CON statute.

UVMMC would participate in this project solely as a passive, minority investor. The proposed arrangement does not contemplate that UVMMC will acquire ownership of the building. Thus, UVMMC’s proposed investment in the project still does not fall within the scope of § 9434(b)(1) because that investment would not be made as an “expenditure for plant or equipment.”

### **The developer’s investment would not be “on behalf of” UVMMC.**

An expenditure “on behalf of a hospital” requires “a meaningful link to a health care facility or service.” *District of Columbia Hosp. Ass’n v. Barry* 586 A.2d 686, 691 (D.C. 1991). A developer’s expenditure of funds to construct a residential building that may house hospital staff does not give rise to such a link. For example, in *SSM Health Care v. Missouri Health Facilities Committee*, 894 S.W.2d 674, 677 (Mo. 1995) (en banc), the court held that a developer’s construction expenditures were not “on behalf of” the hospital that planned to lease space for a radiation therapy service where the developer “neither acquired the land nor built the building for [the hospital] or at [the hospital’s] request.” In that case, as here, the hospital “merely lease[d] the space without any prospect of expansion or ownership,” and the court therefore concluded that the developer’s costs were not expenditures on behalf of the hospital. *Id.*

Here, the developer is investing—and has already invested—in the project on its own behalf as a for-profit entity. It will form the company that will own the building and will serve as the managing member with a controlling ownership stake. It will also receive income proportional to its majority ownership share. The developer’s expenditures therefore will not be made “on behalf of” UVMMC; they will be made for the benefit of the developer itself, to facilitate the realization of a return on its investment.

Both the *Barry* and *SSM Health Care* courts noted that the nature of a “meaningful link” triggering CON jurisdiction is tied to the possibility that the hospital will incur costs that will be passed on to health care consumers. This proposed project does not pose such a risk. The developer has already completed the preliminary work for the building and will bear responsibility for managing and operating the apartment building. UVMMC’s financial involvement in the project is for the limited purpose of obtaining access to affordable workforce housing—not to acquire space or facilities for the provision of health services. In addition, UVMMC’s passive investment in a minority stake in the project will permit UVMMC to recapture some of the cost of subsidizing rental rates for members of its workforce, in order to ensure that the housing available to its staff is truly affordable.

## **Conclusion**

This proposed project offers UVMMC a valuable opportunity to build on the momentum from its earlier residential housing investment, which has been very positively received. In exchange for an investment of a proportionally similar amount, UVMMC would gain the ability to offer prospective employees and their families 120 more units of affordable, convenient, high-quality housing with the additional benefit of accessible childcare. The availability of these benefits could be a major step forward in UVMMC’s ongoing struggle to confront its staffing shortages and the associated high costs of temporary and traveling workers.

As UVMMC has previously brought to the Board’s attention, this project and other similar development efforts will not be feasible if subject to the CON requirement. In the current housing and development climate, it is simply untenable to expect for-profit developers to voluntarily submit to regulatory oversight by State health care policy authorities that will inevitably add time and expense to their work. As a result, the collaboration between hospitals and private developers that is essential to innovative projects like this one will become impossible if the Board asserts jurisdiction.

More importantly for the Board’s review, this proposed project, and the nature of the supporting financial arrangements, is not the kind of project intended to be governed by the CON statute. UVMMC’s passive, minority investment in a residential building that will be constructed, owned, managed, and operated by a private developer is not a capital expenditure for a health care facility or for plant or equipment within the meaning of CON statute. Nor does the developer’s separate contribution constitute an expenditure made on the hospital’s behalf.

UVMMC’s efforts to improve the availability of affordable staff housing are not connected with the allocation of health resources in Vermont; this project will not impact the metrics or outcomes regulated through the CON statute, its rules, or the Health Resource Allegation Plan, which are relevant to the construction of health care facilities and other work with a stronger link to the provision of health care services.

Finally, the Board has the authority to regulate UVMMC’s expenditures, including in connection with this project, through its role in reviewing and approving the hospital’s budget. That budget review process is the appropriate forum for the Board to exercise oversight of the hospital’s investments for financial and business purposes unrelated to the delivery of health care.

For these reasons, the proposed project is beyond the Board's CON jurisdiction.

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,

A handwritten signature in blue ink, appearing to read "Eric Miller".

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

cc. Michael Barber  
Donna Jerry