

**STATE OF RHODE ISLAND
DEPARTMENT OF ATTORNEY GENERAL**

Date: July 2, 2013

DECISION

In Re: Expedited Review Hospital Conversions Initial Application of Care New England Health System, Southeastern Healthcare System, Inc. and the Memorial Hospital d/b/a Memorial Hospital of Rhode Island.

The Department of Attorney General has considered the above-referenced application pursuant to R.I. Gen. Laws § 23-17.14-12.1, the expedited review process pursuant to the Hospital Conversions Act. In accordance with the reasons outlined herein, the application is **APPROVED WITH CONDITIONS.**

I. BACKGROUND

Recently, the Hospital Conversions Act was modified to allow expedited review for hospital conversions deemed by the Department of Health (“DOH”) to meet certain criteria, including that the acquired hospital is considered a “distressed” hospital. *See* R.I. Gen. Laws § 23-17.14-12.1(a). The move from a full review to an expedited review changed several aspects of the process. First, the review time was reduced from 120 days to 90 days. Second, the information required in the initial application was reduced. And finally, DOH and the Attorney General no longer conduct a joint review. DOH conducts an expedited review based upon the process set forth in R.I. Gen. Laws § 23-17.14-12.1 and the Attorney General performs “a review of the proposed transaction as it deems necessary.” *See* R.I. Gen. Laws § 23-17.14-12.1(h). For efficiency, and as a testament to the cooperative relationship between DOH and the Attorney General, both agencies worked together to draft Expedited Review Hospital Conversions Initial Application forms to be utilized by the respective agencies. The Attorney General’s application

form builds upon the information required in the DOH form, saving the Transacting Parties from duplicative filings. Given the Legislature's intent that the expedited review process be more limited than a full HCA review, the Attorney General's form and subsequent review focused primarily on areas traditionally examined by the Attorney General, such as the disposition of charitable assets and issues with corporate governance and conflict of interests.¹ Accordingly, the first step in traversing the expedited review process through the Department of Attorney General is the filing of an Expedited Review Hospital Conversions Initial Application.

The Transacting Parties filed their Expedited Review Hospital Conversions Initial Application on February 11, 2013 ("AG Initial Application"). The parties (collectively, "Transacting Parties") to the AG Initial Application are identified below:

- Care New England Health System² ("Care New England") is a Rhode Island non-profit corporation incorporated on November 7, 1995. Care New England is the parent corporation to a number of subsidiaries, including:
 - Butler Hospital ("Butler Hospital") is a Rhode Island non-profit corporation incorporated in January 1844. Butler Hospital is located in Providence, Rhode Island and specializes in adult psychiatrics.
 - Kent County Memorial Hospital ("Kent Hospital") is a Rhode Island non-profit corporation that was incorporated on April 25, 1946. Kent County Memorial Hospital is located in Warwick, Rhode Island and operates a general acute care hospital.
 - Women & Infants Hospital of Rhode Island ("Women & Infants Hospital") is a Rhode Island non-profit corporation originally chartered as the "Providence Lying-in Hospital" by an act of the General Assembly at the January Session, 1884. Women & Infants Hospital is located in Providence, Rhode Island and specializes in obstetrics, gynecology and newborn pediatrics.

¹ The Attorney General notes that there may be a situation in the future where a more expansive review may be necessary.

² Care New England was originally incorporated under the corporate name Enterprise Health System.

- Kent County Visiting Nursing Association d/b/a VNA of Care New England (“VNA of Care New England”) is a non-profit corporation incorporated on March 31, 1914. VNA of Care New England is a licensed home care provider.
- Southeastern Healthcare System, Inc. (“Southeastern Healthcare System”) is a Rhode Island non-profit corporation incorporated on September 16, 1996. It is the parent of the Memorial Hospital and other related subsidiaries (collectively, the “Memorial Entities” or “Memorial”).
- The Memorial Hospital d/b/a/ Memorial Hospital of Rhode Island (“Memorial Hospital” or “Hospital”) is a Rhode Island non-profit corporation incorporated on May 25, 1901. Memorial Hospital is located in Pawtucket, Rhode Island and is a general acute care hospital.

See Question 1, Question 2 and Exhibit 2 of the Department of Health Expedited Review Hospital Conversions Initial Application (“DOH Initial Application”).³ See also, Question 1 of the DOH Change in Effective Control Application (originally submitted February 11, 2013) and Response to Question 3 of AG 3rd Supplemental Questions.

In its simplest form, the structure of the transaction outlined in the AG Initial Application (the “Proposed Transaction”) is an affiliation whereby the Memorial Entities become subsidiaries of Care New England pursuant to an affiliation agreement (the “Affiliation Agreement”) between the Transacting Parties dated January 2, 2013. See AG Initial Application, Exhibit 2C. The Affiliation Agreement provides that Care New England will become the sole corporate member of Southeastern Healthcare System, thereby making Care New England the corporate parent of all of the Memorial Entities. See Affiliation Agreement at Article 2.

Although Care New England will become the ultimate parent of Memorial Hospital, the Hospital and its affiliates “will retain their current names, but be identified as a ‘CNE Affiliate’.” See Affiliation Agreement, Section 6.4. The Affiliation Agreement also addresses previous gifts to

³ Certain corporate information was also verified via the Rhode Island Secretary of State website.

Memorial Hospital and other charitable assets as outlined further herein. *See e.g.*, Affiliation Agreement, Section 6.2.

With regard to the financial structure of the Proposed Transaction, the affiliation will not “involve the exchange of cash or similar financial consideration; the merger or consolidation of any existing entities; the sale, purchase or lease of part or all of any hospital; nor the transfer of all or substantially all of the assets of any Party.” *See* Affiliation Agreement, Section 5.1. With regard to financial assistance, the Affiliation Agreement contemplates that Care New England will “either: (i) take such actions as may be necessary to call, discharge or refinance [Memorial Hospital’s bond indebtedness] or (ii) work with MHRI to seek the most effective credit group structure...”. *See* Affiliation Agreement Section 5.3(a). Further, Care New England will “fund any operating shortfall of MHRI or any of the MHRI Affiliates [] for the period commencing on the Closing Date and ending on September 30, 2016....” *See* Affiliation Agreement, Section 5.3(b).

Finally, the Transacting Parties have agreed to changes to the Care New England board structure whereby the Care New England board will be expanded to include four additional members. These additional members will include three (3) “At-Large Directors” nominated by Memorial and approved by Care New England and one (1) “Ex-Officio Director” that will be filled by the President of the Memorial Hospital Medical Staff. *See* Affiliation Agreement, Section 4.1. The original At-Large Directors will serve for three years. *Id.* If during the three year terms, an At-Large Director is no longer able to serve, his or her successor will be appointed by the Care New England board, but must have been a member of the Board of Trustees of Memorial Hospital or its parent, Southeastern Healthcare System, prior to the Proposed Transaction. *Id.*

II. REVIEW CRITERIA

Pursuant to R.I. Gen. Laws § 23-17.14-12.1(h), the Department of Attorney General “shall perform a review of the proposed transaction as it deems necessary, including, at a minimum, its impact upon the charitable assets of the transacting parties.” The Attorney General has reviewed the information provided in the AG Initial Application. Further, the Attorney General sent over sixty-five (65) supplemental follow-up questions to the Transacting Parties to elaborate on information provided in the AG Initial Application. The Attorney General also had access to and reviewed the DOH Initial Application filed by the Transacting Parties, along with the Department’s supplemental follow-up questions and responses.

In addition to reviewing the AG Initial Application submitted by the Transacting Parties and other publically available information, the Attorney General and DOH jointly interviewed the following individuals:

Memorial

1. Arthur DeBlois, President and Chief Executive Officer of Memorial Hospital
2. Michael Ryan, Chief Financial Officer of Memorial Hospital
3. Joanne Medeiros, designated as the person with the most knowledge regarding charitable assets of Memorial Hospital
4. Joseph Diaz, Interim Physician in Chief for the Department of Medicine, Memorial Hospital
5. Catherine Kando, President, Memorial Hospital Auxiliary (Attorney General only)

Care New England

6. Dennis Keefe, President & Chief Executive Officer of Care New England
7. Jack Sutherland, Chief Financial Officer and person with the most knowledge regarding charitable assets at Care New England
8. Raymond Powrie, Chief Medical Quality Officer at Care New England

9. Michael J. Dacey, Chief Clinical Integration Officer

Other

10. Chris Callaci, General Counsel, United Nurses and Allied Professionals

Unlike a full review under the Hospital Conversions Act, the expedited review does not require a public informational meeting. However, it is the Attorney General's position that the public's input is vital to this process. Accordingly, a public notice issued jointly with DOH was published advertising an informational meeting as well as soliciting written comments regarding the Proposed Transaction. The Attorney General and DOH jointly held this meeting at Joseph Jenks Junior High School in Pawtucket.⁴ The meeting was held on June 11, 2013 from 4 p.m. to 6 p.m. At this session, the Transacting Parties were provided an opportunity to give a presentation regarding the Proposed Transaction; afterwards, public comment was taken. While the meeting was well attended, only six (6) speakers provided public comment. All of the public comments were in favor of the Proposed Transaction.

Surprisingly, no written comments were received by the Attorney General. The Transacting Parties, as requested by the Attorney General, provided copies of the twenty-four (24) written comments that were submitted to DOH. These comments expressed unanimous support for the Proposed Transaction and represented a cross-section of the community, including physicians, patients, non-profits, other health care facilities, the local chamber of commerce, and elected officials. Included therein was a Pawtucket City Council Resolution from May 22, 2013 supporting the Proposed Transaction.

The AG Initial Application, along with the supplemental information provided, information gathered from the investigation, including publically available information and

⁴ The Attorney General would like to thank the representatives of the City of Pawtucket and especially the staff of Jenks Junior High School for their hospitality.

information resulting from interviews and public comment, were all considered in rendering this Decision.

III. PROCEDURAL HISTORY

In order to qualify for an expedited review a Request for Expeditious Review pursuant to R.I. Gen. Laws § 23-17.14-12.1 must be filed with DOH. A Request for Expeditious Review was filed with DOH on October 22, 2012.

Pursuant to R.I. Gen. Laws § 23-17.14-12.1(a), parties qualify for expedited review if certain criteria are met. First, both the acquiree and the acquiror must be non-profit corporations that have directly or indirectly continuously operated at least one licensed hospital for at least 3 prior years.⁵ Secondly, “the acquiree must operate a distressed Rhode Island hospital facing significant financial hardship that may impair its ability to continue to operate effectively without the proposed conversion...”⁶ The Director of the Department of Health is charged with determining whether the subject hospital can be defined as distressed based upon whether its circumstances meet one or more of the following criteria:

- (i) Operating loss for the two (2) most recently completed fiscal years;
- (ii) Less than fifty (50) days cash on hand;
- (iii) Current asset to liability ratio of less than one point five (1.5);
- (iv) Long-term debt to capitalization greater than seventy-five percent (75%);
- (v) Inpatient occupancy rate of less than fifty percent (50%);
- (vi) Would be classified as below investment grade by a major rating agency.

See R.I. Gen. Laws § 23-17.14-12.1(a)(2)(i)-(vi). On October 31, 2012, the Director granted the Request for Expeditious Review.

As stated above, the AG’s Initial Application pursuant to the Hospital Conversions Act represents a starting point for the information necessary to address the issues reviewed by the

⁵ R.I. Gen. Laws § 23-17.14-12.1(a)(1).

⁶ R.I. Gen. Laws § 23-17.14-12.1(a)(2).

Department of Attorney General in an expedited review. The information requested represents the minimum amount of information required. Because each hospital conversion transaction is unique, additional follow-up requests are asked in response to information included in the AG Initial Application or information generated during the investigation. The AG Initial Application was filed by the Transacting Parties on February 11, 2013.

On March 5, 2013, the Department of Attorney General deemed the AG Initial Application incomplete as several questions required additional information. It is not unusual for an AG Initial Application to be deemed incomplete given the nature and amount of information requested. On March 22, 2013, the Transacting Parties provided the requested information. On April 4, 2013, the Attorney General notified the Transacting Parties that no additional information was needed to complete the Initial Application except receipt of original certification pages and final executed Escrow and Reimbursement Agreements. However, the Attorney General did not deem the Initial Application complete at that time as the Department of Health's finding of completeness remained pending. The Attorney General awaited a determination from DOH given the overlap of Initial Application questions and considering that a portion of the information used in the Attorney General review is procured through DOH's application. The Department of Health found the DOH Initial Application complete on April 4, 2013. The Attorney General did not receive the last of the outstanding items requested above until Friday, April 12, 2013, over a week after DOH deemed its Initial Application complete. The Attorney General promptly informed the Transacting Parties on Monday, April 15, 2013, that the AG Initial Application was complete.

A first set of follow-up questions was sent to the Transacting Parties on April 26, 2013, consisting of twenty (20) questions. The Transacting Parties responded in writing to this first

request as a supplement to the AG Initial Application. During the pendency of the review, three (3) additional sets of supplemental questions consisting of an additional forty-eight (48) questions were sent and responded to by the Transacting Parties. The Attorney General and DOH also toured Memorial Hospital during this review.

IV. DISCUSSION

Pursuant to the expedited review process outlined in R.I. Gen. Laws § 23-17.14-12.1(h), the Attorney General must perform “a review of the proposed transaction as it deems necessary.” R.I. Gen. Laws § 23-17.14-12.1(h). Although the change to the Hospital Conversions Act regarding expedited review left unclear the intended role of the Attorney General, there was little time to contemplate the parameters of an expedited review as the first contact requesting an expedited review was in August 2012. Therefore, in deciding what constitutes a necessary review by the Attorney General pursuant to the expedited process, the Attorney General first reviewed the criteria necessary for a full review pursuant to the Hospital Conversions Act. Review criteria contained in the Hospital Conversions Act applicable in a full review involving either non-profit or for-profit buyers consists of twenty-one (21) or thirty (30) requirements respectively. *See* R.I. Gen. Laws §§ 23-17.14-10 and 23-17.14-7. The Attorney General also reviewed the criteria used by DOH in both a full and expedited review process as well as the Change in Effective Control process. Thereafter, for efficiency, the Attorney General decided to develop a form to begin its expedited review process. While it is possible that this form may not be appropriate in a particular transaction, the existence of the form helps organize the review and raises the transacting parties’ awareness of what information will be required of them on a preliminary basis for the review. As stated above, the form requests information that is of traditional focus by the Attorney General in a full review pursuant to the Hospital Conversions

Act. The topics below do not reflect all of the information that the Attorney General has reviewed regarding the Proposed Transaction. Further, it is possible that a particular review in the future may include additional topics for Attorney General review. However, for this Proposed Transaction, the Attorney General provides the basis of its review and decision regarding the following general categories: (1) Charitable Assets; (2) Governance; and (3) Conflicts of Interest. The statutory criteria contained in the Hospital Conversions Act have been used, as appropriate, for consistency in reviews. This review is the second review conducted by the Attorney General pursuant to the expedited review standard.

A. CHARITABLE ASSETS

The Department of Attorney General has the statutory and common law duty to protect charitable assets within the State of Rhode Island.⁷ In addition, the expedited review section of the Hospital Conversions Act requires that the Attorney General review at a minimum, the Proposed Transaction’s “impact upon the charitable assets of the transacting parties.” *See* R.I. Gen. Laws §23-17.14-12.1(h). The full review process of the Hospital Conversions Act specifically includes provisions dealing with the disposition of charitable assets in a hospital conversion generally to ensure that the public’s interest in the funds is properly safeguarded.

1. Initial Application

In the Initial Application, the Transacting Parties make several assertions regarding the charitable assets of Memorial Hospital. For example, the Initial Application states that Restricted Endowment Funds will be retained by the Memorial Hospital and used in accordance with donor intent. *See* AG Initial Application Question 1. Any donations subject to what the Transacting Parties characterize as “ethical, but not legally-enforceable, restrictions on use” will

⁷*See e.g.*, R.I. Gen. Laws §§ 18-9-1 to 17.

also be retained by Memorial Hospital and used in accordance with donor intent. *Id.* The Transacting Parties will set up a foundation (described more fully below in Section 3(e)) after the Closing that will receive any Board Designated Funds that exist as of Closing. *Id.* Further, Care New England has stated that they have no plans to change or remove the names associated with the former gifts to the Memorial Hospital. *See* Response to Question 12 of AG 1st Set of Supplemental Questions. Care New England also represents that it has “no plans to sell any land, buildings or equipment presently owned by MHRI or its affiliates following the Affiliation, except for dispositions of equipment in the ordinary course of business due to upgrades or following the end of its useful life.” *See* Response to Question 8 of AG 1st Set of Supplemental Questions.

2. Affiliation Agreement

The Affiliation Agreement governs the parameters of the relationship between the Transacting Parties. While the powers of Care New England over the assets, including the charitable assets of the Memorial Hospital, will be determined by the resulting corporate structure, the Affiliation Agreement specifically includes a provision regarding charitable assets.

The relevant section states as follows:

6.2 Charitable Assets. Following the Closing Date, subject to the terms and conditions set forth in this Agreement, to the extent any property was given, devised, or bequeathed to MHRI for charitable, educational or religious purposes (“Gifts”):

- (i) All ethical and legal considerations regarding Gifts to MHRI will be strictly honored;
- (ii) All Gifts to MHRI will be used in accordance with documented donor intent; and
- (iii) All Gifts to MHRI will be used solely to support the program specified by the donor(s).

Notwithstanding the foregoing, any funds which are held by MHRI on the Closing Date and designated as “Board Designated Funds” as indicated on

Schedule 6.2 hereof shall, to the extent permitted by applicable laws, and to the extent not otherwise needed to provide for any operating budget shortfall of MHRI, be transferred to the MHRI Foundation (as defined in Article 12) after the MHRI Foundation has been formed and recognized as exempt pursuant to Section 501(c)(3) of the Code.

Therefore, it appears that it is the intention of the Transacting Parties that the charitable assets of the Memorial Hospital will stay with Memorial Hospital and donor intent will be honored.

3. The Memorial Hospital⁸

Memorial Hospital has long been the beneficiary of a very generous community. Indeed, much of the land and the buildings that make up the modern-day Memorial Hospital were donated by residents of Pawtucket scores of years ago. The current Memorial Hospital website provides a detailed history of the evolution of the Hospital, including the Hospital's beginnings from a \$200,000 bequest from the will of William F. Sayles.⁹ The Memorial Hospital was incorporated in the year 1901, opening its doors to patients in 1910. *Id.*

In addition to the original charitable donations to establish Memorial Hospital, throughout the years the Hospital has enjoyed the continued generosity of the community which it services. The Unaudited Consolidated Financials of the Southeastern Healthcare System, Inc., parent to the Memorial Hospital show that as of September 30, 2012, there was \$7,761,816 in Board Designated Funds;¹⁰ \$1,562,926 of Funds by Donor for Specific Purposes; \$3,124,216 in

⁸The Transacting Parties have stated that the only Memorial entity that holds charitable donations is the Memorial Hospital itself. *See* Response to Questions 6 and 9 of AG 1st Set of Supplemental Questions. Accordingly, this Charitable Assets Section will largely be limited to the Memorial Hospital.

⁹ *See* the History Section of the Memorial Hospital website at: http://www.mhri.org/ss_plugins/content/content.php?content.1005. (Last accessed June 26, 2013). This information has not been independently verified by the Attorney General and is used for context only.

¹⁰ Not all Board Designated Funds are necessarily donations or limited to a restricted charitable purpose.

Funds by Donors for Permanent Endowment; and \$7,115,306 in Funds from Externally Administered Trusts. *See* DOH Initial Application, Exhibit 9 at RIDOH0611.

Voluminous detailed information regarding the Memorial Hospital's charitable assets was provided in response to questions posed by the AG Initial Application and resulting follow-up questions. It will not be outlined in detail herein, but was thoroughly reviewed. Certain information regarding these assets is outlined below.

a. Endowment

One critical source of charitable assets for the Hospital is its endowment (the "Endowment"). The Hospital considers the Endowment to consist of two separate types, the restricted endowment ("Restricted Endowment") which is reflected on the balance sheet as "Funds by Donors for Permanent Endowment" (the amount of \$3,124,216 in the Unaudited Consolidated Financials of the Southeastern Healthcare System, Inc.) and the unrestricted endowment ("Unrestricted Endowment")(together with the Restricted Endowment, the "Endowments") that consists of unrestricted donations plus the gains on the Restricted Endowment (such amount is reflected within Board Designated Funds on the Unaudited Consolidated Financials). Both the Restricted Endowment and the Unrestricted Endowment have an amount that is considered principal, or, in other words, the amount of money set aside to remain in perpetuity. This principal is comprised of past donations made over the years of operation of the Hospital that the Hospital sets aside to produce earnings. The Restricted Endowment principal must remain intact due to the donor intent to provide a long-term gift. In addition to the principal, the Restricted Endowment and the Unrestricted Endowment both produce earnings upon the investment of the principal of each endowment. These earnings can

be significant as endowment funds are typically invested to realize gains that can be used by a hospital for general hospital purposes barring any donor restriction.

For several years, the principal of the Restricted Endowment at Memorial Hospital has remained at around Three Million Dollars (\$3,000,000). *See* DOH Initial Application, Consolidated Balance Sheets of the Southeastern Healthcare System, (2009-2012) Exhibit 9A. The Unrestricted Endowment has had principal of around Thirteen Million Dollars (\$13,000,000). *See* AG Initial Application, Exhibit 1, RIAGC0008, RIAGC0014 and RIAG0020.¹¹ The existence of the Endowments has been critical to the continued survival of the Hospital. From information provided with the Initial Application, it is evident that Memorial Hospital has been suffering significant operating losses for the past several years.¹² In order to continue operations, Memorial Hospital, through its Board of Trustees, was forced to draw from the gains on both Endowments and even had to invade the principal in the Unrestricted Endowment¹³ beginning in September of 2008. *See* Response to Question 11 of AG 1st Set of Supplemental Questions. Over the years from 2008 – May 2013, the Hospital has used over Forty-One Million Dollars (\$41,000,000) from the Endowments. *See* Response to Question 1 of

¹¹ The pages cited were deemed confidential, but the Transacting Parties have agreed that these amounts may be made public.

¹² *See e.g.*, Minutes of Memorial Hospital from 2009-present, submitted as AG Initial Application Confidential Supplemental Exhibit S-3. This Exhibit was deemed confidential. *See also*, Presentation by John J. Schibler, Ph.D., CPA, to the Department of Health, Project Review Committee whereby he concluded based upon the audited financial statements of Southeastern Healthcare Systems, Inc., that there was an operating loss of \$5.1 Million in 2009; \$4.1 Million in 2010; \$8.7 Million in 2011, and \$15.5 Million Dollars in 2012. (June 13, 2013).

¹³ Memorial asserts that there was no restriction on the use of the principal or the income on the funds that were utilized. *See* Response to Question 11 of AG 1st Set of Supplemental Questions. Further, Memorial asserts that no draws were made from the principal of the Restricted Endowment. *Id.*

AG 4th Set of Supplemental Questions.¹⁴ It is uncertain what the fate of the Hospital would have been without access to these funds. At the last reported value, the balance of the Restricted Endowment remained at Three Million Dollars (\$3,000,000) and the balance of the Unrestricted Endowment was depleted to under One Million Dollars (\$1,000,000). See AG Initial Application, Exhibit 1, RIAGC0008, RIAGC0014 and RIAG0020.¹⁵

b. Trusts

Another significant portion of the charitable assets of the Memorial Hospital consists of externally administered trusts. The AG Initial Application identified five (5) external trusts of which Memorial Hospital is the beneficiary, namely: (1) the Rev. Marion Law Fund (“Law Trust”), (2) the Trust under the Will of John F. Preston (“Preston Trust”), (3) the Trust under the Will of E. Russell Richardson (“Richardson Trust”), (4) the William F. Sayles Hospital Endowment Fund (“Sayles Trust”), and the Trust of Harold W. and Gertrude B. Wood (“Wood Trust”) (collectively, the “Trusts”). See AG Initial Application, Question 1. Memorial Hospital’s share of the Trusts total approximately Seven Million Dollars (\$7,000,000).¹⁶

c. Goff

Among the founding supporters of the Memorial Hospital was Daisy B. Goff. In 1910, Mrs. Goff signed an indenture (the “Indenture”)¹⁷ donating a portion of the land where the

¹⁴ See Exhibit S-2 to the AG 4th Set of Supplemental Questions. The following amounts were used in the fiscal years indicated: FY2008 - \$5,500,000; FY2009 - \$3,700,000; FY2010 - \$2,500,000; FY2011 - \$10,000,000, FY2012 - \$13,260,000; and 2013YTD (5/13) \$6,400,000.

¹⁵ The pages cited were deemed confidential, but the Transacting Parties have agreed that these amounts may be made public.

¹⁶ See Response to Question 2 of AG 2nd Set of Supplemental Questions. Total amounts dated as of September 30, 2012.

¹⁷ This Indenture was included within the documentation on charitable assets provided in the AG Initial Application. At the request of the Attorney General, the parties consented to the Goff documents at RIAGC0240-245 being made public in order for the issue with this particular asset to be addressed in this Decision.

Memorial Hospital sits along with the building now known as the “Goff Building.” *See* AG Initial Application, Exhibit 4C, RIAGC0240 – 245.¹⁸ Clearly, the magnitude of such a gift is significant. One of the conditions in this Indenture was that “the premises...shall be forever occupied and used by [the Hospital] as a Dormitory or Home for the use of the nurses connected with and in the employ of [the Hospital] as well as all persons connected with any Training School for Nurses which may be carried on by [the Hospital].” *See* Indenture at First Paragraph. Another condition was that the building was to be known as the “Isabella Goff Dormitory for Nurses.” *See* Indenture at Second Paragraph. The Indenture contains a process whereby the premises could be used for another charitable purpose where there is a breach of the condition or if “by change of circumstances said premises shall cause [not] to be useful for the purposes specified” or “for any reason it shall at any time become impossible or impracticable for [the Hospital] to maintain said granted premises for the hereinbefore set forth” *See* Indenture at Sixth Paragraph. However, in order to deviate from the original conditions, a party must seek relief from the Rhode Island Superior Court. *Id.*

In response to follow-up questions, the Memorial Hospital stated that the “old Lyman T. Goff house... is currently used for the Nurse’s Library.” *See* Response to Question 13 of AG 1st Set of Supplemental Questions. They also stated that the Goff Building is used for “providing educational programs for nurses (MHRI’s School for Nurse Anesthesia)” and “other hospital purposes and purposes incidental to or connected with the work of MHRI, such as Joint Conference committee meetings; the Women’s Library; MHRI’s research administrative office; and the office of the IRB (Institutional Review Board) coordinator.” *Id.*

¹⁸ Darius L. Goff donated a parcel of land on the corner of Pond and Prospect Streets to the Memorial Hospital pursuant to a similar indenture in 1913. The restriction on the use of this land was only that it “be forever occupied and used by ...for the benefit of the said The Memorial Hospital.” *See*, AG Initial Application, Exhibit 4C, RIAGC0243-245.

In response to additional follow-up questions, Counsel for Memorial Hospital provided a confidential memorandum (the “Memorandum”) from counsel regarding the restrictions in the Indenture and the current uses of the Goff Building. *See* Confidential Exhibit S-13 to AG 3rd Set of Supplemental Questions. The Memorandum outlined the history of the Goff Building. It asserts that the Goff Building was used in conjunction with a School of Nursing that was operated on the Memorial Hospital campus beginning in 1911. The School reportedly closed in 1970. Accordingly, it appears that the change from use of the Goff Building for a nurses’ dorm or nurse training likely happened over forty (40) years ago.

A representative of the Attorney General was provided with a tour of the Goff Building in order to determine its current use. The tour revealed that the portion of the structure encompassing the original three-story building contains a large boardroom area on the first floor, a medical library on the second floor and various administrative office space on the third floor.¹⁹ It did not appear that any of the space was specific to nurse training. A brief tour of the space currently used for nurse training in another building was requested and provided. This space was in a more remote portion of the Hospital, not typically used by the public. The space was utilitarian and much of the furnishings were out-dated.

Given the restrictions in the Indenture, an application to Superior Court should have been made at the time that the use of the Goff Building was no longer in accordance with the restriction contained in the Indenture. Accordingly, as a Condition of this Decision, the Attorney General will require a cy pres petition to be filed with regard to the Goff Building. While the Attorney General understands that the Memorial Hospital likely changed the use of the Goff Building to fill a need within the Hospital, donees of gifts with specific restrictions are not

¹⁹ Distinct separate buildings including an ambulatory care center and a primary care center have been added to the original Goff Building over the years.

allowed to unilaterally decide that restrictions on a gift are outdated or that they need to use the gift for some other purpose. In accepting a gift, the institution obligates itself to implement the donor's intent. (See e.g., People's Sav. Bank v. Webb et al. 21 R.I. 218, 218 (1899) "[w]here one appears to have made a purely gratuitous disposition of his funds for the benefit of another, free from any legal or moral obligation to the donee, the act should be construed with liberality, rather than with strictness, towards the original owner. If he has completed a trust or gift, a court must execute it. If it is inchoate, there is nothing for a court to carry out. The underlying question, both in trusts and gifts, is the intention and act of the donor.") Further, the contribution of nurses to our health care system is often overlooked, even though nurses typically represent the frontline of care, especially within the in-patient hospital setting. See Ann Kutney-Lee, et. al., *Nursing: A Key to Patient Satisfaction*, Health Affairs, Vol. 28, No. 4 (2009).²⁰ Therefore, the intent that the gift benefit nurses should be continued.

As with other hospital conversions approved by the Attorney General, the cy pres process may take place after this Decision. While on its face, it appears that the use of the Goff Building within the original restrictions may not be reasonably possible, the Attorney General does not intend to simply allow the retroactive change in use of the Goff Building through the cy pres process. The Attorney General will make a recommendation to the Superior Court regarding the Goff Building. The Attorney General intends to include in the recommendation items that will directly benefit the training of the nurses at Memorial Hospital.²¹

²⁰ Available at: <http://content.healthaffairs.org/content/28/4/w669.full.pdf+html>. (last accessed, June 25, 2013).

²¹ Through the cy pres process, the recommendation of the Attorney General will ultimately be decided upon by the Superior Court. The Attorney General and the Transacting Parties have already begun to discuss the Attorney General's recommendation to the Superior Court and the Transacting Parties have indicated a willingness to include items that will benefit the nurse training program at Memorial Hospital in the cy pres petition.

d. Free Beds

Memorial Hospital had a so-called “Free Bed” Program in the early 1900s. *See* AG Initial Application Question 1. The current reported amount of such program is \$401,427 (“Free Bed Donations”).²² These types of programs were popular during that timeframe, whereby a “free bed” was established to provide care for people who could not afford it. Over the years, some of the original documentation, to the extent such documentation existed, has been misplaced. *See* Response to Question 9 of AG 1st Set of Supplemental Questions.

Documentation regarding certain free bed donations is available, specifically where there is also another restricted gift given at the same time. *Id.* In a response to a follow-up question, the Transacting Parties explained that the free bed program was previously administered by designating one day a year at the Memorial Hospital where patients were invited to stand in line to have their bills forgiven. *See* Response to Question 8 of AG 2nd Set of Supplemental Questions. Now, Memorial Hospital utilizes the Free Bed Donations to offset its free care as they assert that “free care expenditures now outstrip the earnings on free bed donations several times over.” *Id.* For the fiscal years 2010 – 2012, over \$180,000 has been used from the Free Bed Donations to cover free care provided at the Hospital. *See* Response to Question 8 of AG 3rd Set of Supplemental Questions.

Even though many of the Free Bed Donations date back several years, it is not acceptable to the Attorney General that no documentation exists to verify these amounts. This is not the first hospital transaction that the Attorney General has reviewed where the issue of lack of documentation has appeared. It is the duty of entities that received charitable donations to take

²² *See*, AG Initial Application, Exhibit 1, RIAGC00046, this Exhibit was deemed confidential, but the Transacting Parties have agreed that this amount may be made public.

proper care with regard to the distribution and safe-keeping of documentation governing the donations they receive.

On a going forward basis, Care New England should institute procedures at the Memorial Hospital to hold and manage charitable assets appropriately, including that assets are used in accordance with any applicable restrictions and documentation regarding restrictions is retained.

e. The Foundation

The Transacting Parties have indicated in the Initial Application that post-conversion a Rhode Island non-profit corporation will be formed called Memorial Hospital Foundation²³ (“MHRI Foundation”). *See* Response to Question 2 of the AG Initial Application and Affiliation Agreement Sections 6.2 and 12. Proposed Articles of Incorporation and Bylaws for the MHRI Foundation were provided. *See* AG Initial Application, Exhibit 2A and 2B. MHRI Foundation will be utilized primarily as a fundraising entity for MHRI. *Id.* The Board of Directors of MHRI Foundation “will be elected by MHRI upon recommendation of the CNE Governance and Nominating Committee.” *Id.* For the first three years after the MHRI Foundation is formed, at least fifty-one percent (51%) of its directors must have been Memorial Hospital trustees prior to the Closing of the proposed conversion. *Id.* *See also*, Section 4.2 of the MHRI Foundation By-laws. This structure is also required by the Affiliation Agreement. *See* Affiliation Agreement Sections 6.2 and 12.

²³ The Transacting Parties recently indicated that the MHRI Foundation has not been formed yet, however, the Articles of Incorporation and By-laws provided for the MHRI Foundation “will not differ in any substantial or material way from the drafts provided in the previous submission [with the Initial Application].” *See* Response to Question 2 of AG 2nd Set of Supplemental Questions. The Transacting Parties also assert that the MHRI Foundation By-laws are substantially similar to those of Butler Hospital Foundation. *See* Response to Question 5 of AG 2nd Set of Supplemental Questions.

The MHRI Foundation will be a non-profit Rhode Island corporation. Its stated purpose²⁴ is:

To serve the health care needs and improve the health status of individuals and to engage in activities in furtherance of the mission of The Memorial Hospital d/b/a Memorial Hospital of Rhode Island. Such activities shall specifically include, without limitation, raising funds for the benefit of the Hospital, and other activities, which if not performed by the Corporation would be performed by said Hospital.

The intent of the Transacting Parties is that any funds left after Closing that are designated as “Board Designated Funds” be transferred to the MHRI Foundation. *See* AG Initial Application Question 2. Care New England uses a foundation system for its other affiliate hospitals. *See* Response to Question 2 of AG 1st Set of Supplemental Questions.

f. The Auxiliary

The Memorial Hospital Auxiliary, Inc. (“Memorial Hospital Auxiliary”) is described as “an unincorporated club.” *See* Response to Question 10 of AG 1st Set of Supplemental Questions. It was formed in 1911 and currently has 103 members. *Id.* The Memorial Hospital Auxiliary “provides financial and direct assistance to MHRI, including raising funds for specific needs and projects at MHRI.” *Id.* Auxiliary members also provide numerous volunteer services to the hospital, including, staffing the gift shop, serving as registrars and telephone coordinators for the annual Kenney Research Day and distributing craft kits. *Id.* It has been asserted that no donations are made to the Auxiliary, but that funds are contributed to Memorial Hospital through the Auxiliary and used for the specific purpose as required or added to the general unrestricted endowment fund. *Id.* Recognizing the immense value of volunteers to a hospital and in

²⁴ *See* the draft MHRI Foundation Articles of Incorporation, Para. 3 and AG Initial Application Exhibit 2A.

recognition of the important service that volunteers provide, the Attorney General finds that continuation of the Memorial Hospital Auxiliary is in the best interests of Memorial Hospital.

4. Care New England

As stated above, the proposed acquirer, Care New England is a non-profit Rhode Island corporation that has been in existence for almost 20 years. *See* DOH Initial Application Question 2. It is the parent corporation of three hospitals in Rhode Island, two of which have each been in existence since the 1800's and the other since the 1940's. *Id.* Care New England and its entities have an established track record in Rhode Island.

Care New England has chosen to operate its fundraising efforts at the hospital level, through separate foundations for each of its hospitals as well as the Visiting Nurses Association. *See* Response to Question 2 of AG 1st Set of Supplemental Questions. The same will be true for Memorial Hospital. *See* Response to Question 2 of the AG Initial Application. According to Care New England, “[c]hartable assets for the CNE [entities] are held under the tax ID of the individual entity receiving the asset...” *See* Response to Question 2 of AG 1st Set of Supplemental Questions. Thereafter, “[t]he funds are pooled for investment purposes with oversight of the investment decisions by the CNE Investment Committee, with input from an external investment advisor, New England Pension Consultants.” *Id.*

With regard to hospital auxiliaries, Care New England states that it has auxiliaries associated with Women & Infants Hospital and Kent Hospital.²⁵ *See* Response to Question 1 of AG 3rd Set of Supplemental Questions. Regarding Women & Infants, the auxiliary is a committee of the board of directors. *Id.* It has no formal membership and fills similar roles to the Memorial Auxiliary, namely, assists in operating gift shops, provides a photo service and

²⁵ Butler Hospital does not have an auxiliary. *See* Response to Question 1 of AG 3rd Set of Supplemental Questions.

fundraising to support hospital programs/services and purchase of equipment. *Id.* Regarding Kent Hospital, the auxiliary is an unincorporated organization although it has bylaws approved by the Kent Hospital board of trustees. *Id.* It has 240 members and also fills similar roles to the Memorial Auxiliary, namely, assists in operating the gift shop and fundraising to support hospital services/programs and purchase of equipment. *Id.* Care New England has promised that it “values and will work with all stakeholders who want to help and support MHRI, including the dedicated volunteers who comprise the Memorial Hospital Auxiliary.” *See* Response to Question 2 of AG 3rd Set of Supplemental Questions. Accordingly, Care New England has experience interacting with hospital auxiliaries and likely understands the value of such organizations.

No adverse action against Care New England has been reported to the Attorney General through the Initial Application process or otherwise through this review process. Further, independent research did not reveal any such information. In addition, regarding its handling of charitable assets, Care New England has certified that “it has never been subject to or threatened with any legal action regarding use of charitable or restricted assets.” *See* Response to Question 14 of AG 1st Set of Supplemental Questions.

5. Documents Governing Proposed Disposition

a. Initial Application

It has been represented in the AG Initial Application that the charitable assets of the Memorial Hospital will be not be transferred to another entity after the proposed conversion. *See* AG Initial Application, Response to Question 3. Further, it has been asserted that “the proposed conversion will not result in an abandonment of the original purpose of the MHRI (or its exempt affiliates and no resulting entity will depart from the traditional purposes and mission of MHRI

(or existing affiliates).” *Id.* However, Care New England will become the ultimate parent of Memorial Hospital and will have significant control over Memorial Hospital.

b. Affiliation Agreement Provisions

As stated above, the Affiliation Agreement governs the expectations regarding the disposition of the charitable assets in the Proposed Transaction. *See e.g.*, Affiliation Agreement, Section 6.2 and Article 12.

6. Cy Pres

The Transacting Parties have indicated that they do not believe that a cy pres petition is necessary as “no charitable entity will be terminated, no for-profit organization is involved, and there will be no transfer between the Transacting Parties or their affiliates of any charitable assets that are dedicated to a specific party or purpose.” *See* AG Initial Application Questions 3. They also assert that there will not be “an abandonment of the original purposes of MHRI (or its exempt affiliates) and no resulting entity will depart from the traditional purposes and mission of MHRI (or existing affiliates).” *Id.*

The doctrine of cy pres is used in situations where “a gift for a charitable purpose which, cannot, for one reason or another, be carried out as directed by the donor, to be applied ‘as nearly as may be’ to the fulfillment of the underlying charitable intent.” 15 Am. Jur. 2d *Charities* §149 (2000). Because a cy pres is already required with regard to the Goff House and due to precedent in hospital conversions, the significant change in ownership and governance and this transaction’s impact on the people of the State of Rhode Island, a cy pres petition will be required.

7. Disposition of Charitable Assets

Care New England is an established non-profit entity in existence in Rhode Island for a number of years. It has a current program in place to manage charitable assets held by its hospitals. See Response to Question 1 of AG 1st Set of Supplemental Questions. There were no red flags uncovered regarding its management or use of charitable assets through the Initial Application process. The disposition of the charitable assets will be governed by the provisions of the corporate documents, Affiliation Agreement and the Conditions outlined in this Decision, including certain oversight by the Attorney General. They will also be subject to a cy pres petition process that will take place after this Decision is rendered. All of these mechanisms together are designed to ensure that charitable assets are used for their intended purpose and will continue to be utilized to benefit the Memorial Hospital.

8. Maintenance of the Mission, Agenda and Purpose of the Memorial Hospital

The full review contained in the Hospital Conversions Act at R.I. Gen. Laws §§ 23-17.14-7(c)(16) and 23-17.14-7(c)(25)(iii) requires consideration of the following:

- Whether the proposed conversion results in an abandonment of the original purposes of the existing hospital or whether a resulting entity will depart from the traditional purposes and mission of the existing hospital such that a cy pres proceeding would be necessary; and
- Whether the mission statement and program agenda will be or should be closely related with the purposes of the mission of the existing hospital.

As with other factors contained within the full review, the Attorney General has chosen to apply these standards in review of the Proposed Transaction.

According to the original Articles of Association for the Memorial Hospital, the organization's purpose states:

The purpose or purposes for which the corporation is organized are as follows: to erect, establish and maintain a Hospital for the medical and surgical treatment of the sick and those who may be suffering from accidents or injuries; to be staffed,

equipped and ready to serve the hospital needs of all people so far as its resources permit; to provide quality educational programs for doctors, nurses and other health personnel; to develop and maintain programs and facilities for the promotion of human health in such location or locations as shall be determined by the Board of Trustees from time to time; to promote medical research and make contributions to scientific medicine; to work cooperatively with other hospitals, community health agencies, educational institutions, and other public and private entities to improve standards of health in the communities served by the Hospital; to conduct its services in modern facilities and with appropriate equipment; to sponsor housing and related facilities and health services for elderly persons and others in need of health services; and for any other lawful purposes for which a corporation may be formed under Title 7, Chapter 6 of the Rhode Island General Laws (1956), as amended which relate to the foregoing.

See DOH Initial Application Exhibit 2. More generally included in the information provided in the AG Initial Application, the current mission statement of the Memorial Hospital is stated as follows:

Our Mission is that of a not-for-profit health, teaching and research center serving the Blackstone Valley and East Bay region of Rhode Island, as well as the Bristol County region of Massachusetts.

The primary thrust of the institution is that of Primary Care and Preventative Medicine, providing advanced diagnosis and treatment for medical problems with the clinical, teaching and research roles a focus in the milieu.

Medical expertise provided by our competent and caring professional staff in a timely manner is an essential resource in achieving our mission.

A compassionate atmosphere coupled with professional expertise exemplifies our mission.

The Transacting Parties state that Southeastern Healthcare System does not have a mission statement separate from that of Memorial Hospital and that Southeastern Healthcare System's articles of organization provide that the entity's mission is "to develop and maintain an integrated healthcare system."²⁶ The full purpose as stated on the copy of the Articles of Organization for Southeastern Healthcare System filed with DOH states as follows:

²⁶ *See* Response to Question 1 of AG 1st Set of Supplemental Questions.

To develop, operate, and maintain an integrated health system for the delivery of medical and surgical treatment and related health services;

To promote medical research and make contributions to scientific medicine;

To engage in research and the teaching, instruction and education of medical students and other health care professionals;

To provide primary and family care medical facilities on a regional basis;

To work cooperatively with other hospitals, community health agencies, educational institutions and other public and private entities to promote standards of health in the community service by the corporation;

To operate for the benefit of and to support the operations of The Memorial Hospital and its affiliated corporations and entities and such other charitable scientific or educational corporations as may be affiliated with this corporation, directly or indirectly from time to time, and to carry on such other lawful activities for which a corporation may be formed under Title 7, Chapter 6 of the Rhode Island General Laws (1956) as amended (“The Rhode Island Non-Profit Corporation Act”) as the same may be amended from time to time.

See DOH Initial Application Exhibit 2A.

Technically, the Memorial Hospital will become a subsidiary of Care New England. Its corporate purpose is stated, in part,²⁷ as:

The purpose or purposes for which the corporation is organized are: To plan and coordinate the delivery of high quality health services; to operate for the benefit of and to support Women & Infants Hospital, Kent County Memorial Hospital, and Butler Hospital, and such other charitable, scientific or educational public charities, described in Sections 501 (c) (3) and 509 (a) (1) or 509 (a) (2) of the Internal Revenue Code of 1986, as amended (the “Code”) or in a corresponding provision of any further statute, as may be affiliated with the corporation from time to time; and to carry on any other activity that may be lawfully carried on by a corporation formed under the Rhode Island Nonprofit Corporation Act as may be in effect from time to time.

²⁷ The paragraph stating the corporate purpose also includes additional standard language allowing operation for any lawful purpose. *See* DOH Initial Application, Exhibit 2C.

See, DOH Initial Application, Exhibit 2C.²⁸ The current mission statement of Care New England is: “Care New England is dedicated to building an exemplary health care system.”²⁹

Accordingly, the Memorial Hospital in its entirety, along with its affiliated entities, will come under the control of a Rhode Island non-profit corporation, who is the parent of three (3) non-profit hospitals and a non-profit home care business. The Memorial Hospital, its parent, and Care New England all have similar corporate purposes. Further, we have heard throughout this process the value of Memorial Hospital to Care New England’s vision as an integrated health care system. *See e.g.*, Affiliation Agreement Recitals and Section 1.2. Pursuant to the Affiliation Agreement the Memorial Entities “will retain their current names, and will be identified as ‘a CNE Affiliate.’” *See* Affiliation Agreement, Section 6.4. Further, Care New England has asserted that it “has no plans to sell any land, buildings or equipment presently owned by MHRI or its affiliates following the Affiliation, except for dispositions of equipment in the ordinary course of business due to upgrades or following the end of its useful life.” *See* Response to Question 8 of AG 1st Set of Supplemental Questions.

Given the information outlined above, the Proposed Transaction is in keeping with the original purposes of the existing hospital.

B. GOVERNANCE

1. Board Decision to Affiliate

A full review pursuant to the Hospital Conversions Act requires a review of the actions of the board of directors of the existing hospital.³⁰ In addition, the expedited review requires DOH

²⁸ This information is derived from the Enterprise Health System Certificate of Incorporation, the predecessor to Care New England. *See* DOH Initial Application Exhibit 2D. No change to such purpose was located in any amendments to those Articles.

²⁹ *See* Response to Question 1 of AG 1st Set of Supplemental Questions.

to review information regarding the Transacting Parties' board of directors and their decision to propose conversion.³¹ In a full review, the Act requires review of the decisions leading up to a conversion to ascertain whether the directors fulfilled their fiduciary duties to the hospital. Similarly, in an expedited review the Transacting Parties are required to submit an application to DOH that provides "all documents, reports, meeting minutes and presentations relevant to the transacting parties' board of directors' decision to propose the conversion."³² Although DOH is charged with the full review of the Proposed Transaction in this expedited review process, the Attorney General has decided, at a minimum, to review the board action leading up to the Proposed Transaction in an expedited review.

Limited board minutes are required by statute and were requested by the DOH Initial Application. *See* R. I. Gen. Laws § 23-17.14-12.1(b)(5); and *See also*, DOH Initial Application Question 7 and Confidential Exhibit 7.³³ These minutes were limited and redacted to include only the information requested in the DOH Initial Application question, i.e., information relevant to the board's decision to propose the conversion. In addition to the limited, redacted minutes that the Transacting Parties provided in response to the DOH Initial Application, the Attorney General requested and reviewed copies of the full board minutes of the Memorial Hospital for the time period beginning in January 2009.³⁴

³⁰ *See e.g.*, R. I. Gen. Laws §§ 23-17.14-7(c) (3), (4), (5), (8), (9), (10), (11), (13), (14), (15), and (23).

³¹ *See* R. I. Gen. Laws § 23-17.14-12.1(b)(5).

³² *Id.*

³³ These minutes were determined to be confidential in accordance with R.I. Gen. Law §23-17.14-32.

³⁴ *See* Response to Question 3 of AG 1st Set of Supplemental Questions and Confidential Exhibit S-3 to AG 1st Set of Supplemental Questions. These minutes were determined to be confidential in accordance with R.I. Gen. Law §23-17.14-32.

Reports analyzing the Proposed Transaction are also required by statute and the DOH Initial Application. *See* R. I. Gen. Laws § 23-17.14-12.1(b)(8), and DOH Initial Application Question 10. In response to Question 10, numerous reports were provided outlining the Proposed Transaction, including the process that the Memorial Hospital Board went through in order to identify Care New England as the most promising strategic partner to Memorial Hospital. *See* DOH Initial Application, Exhibit 10 and Confidential Exhibit 10.³⁵

After review of the board minutes and other documents provided in the Initial Application, the Attorney General is satisfied that the board fulfilled its fiduciary duties to the hospital in seeking an affiliation with Care New England. Further, the Attorney General determines that the boards and leadership of the hospitals found an alliance with another hospital or hospital system to be the only reasonable alternative for the hospital's continued survival.

2. Affiliation and the New Entity

As a result of the Board's decision, the Affiliation Agreement was executed. Pursuant to the Affiliation Agreement, Care New England will become the sole corporate member of Southeastern Healthcare System, thereby making Care New England the ultimate corporate parent of all of the entities within the Memorial system. *See* AG Initial Application Response to Question 14 and Articles 2 and 3 of the Affiliation Agreement. Post conversion, Care New England has stated that efforts will be made to ensure that Care New England holds reserved powers over the Memorial Hospital Entities just as Care New England does with its other affiliates. *Id.* To consummate the Proposed Transaction, Care New England and the Memorial

³⁵ Two of the reports were included in the public version of the DOH Initial Application. The remaining six reports were determined to be confidential in accordance with R.I. Gen. Law §23-17.14-32.

Entities will amend and restate their governing documents as contemplated in Article 2 of the Affiliation Agreement:³⁶

Affiliation Implementation. In order to consummate the Affiliation... the Parties agree that, on the Closing Date (as such term is defined in Section 9.1), subject to the terms and conditions set forth in this Agreement, the Parties shall take the following actions: (i) MHRI Parent shall amend its organizational documents and shall cause the MHRI Affiliates to amend their respective organizational documents to reflect the changes described in Article 3; (ii) CNE shall amend its organizational documents to reflect the changes described in Article 3; and (iii) the Parties each shall cause their respective affiliates to appoint board members to the appropriate boards, as described in Article 3.

Proposed changes to the Bylaws and Articles of Incorporation of Southeastern Healthcare System, Memorial Hospital and Care New England have been submitted and reviewed by the Attorney General. *See* AG Initial Application, Exhibit 14.

3. Board Composition

The Hospital Conversions Act includes several provisions requiring analysis of the composition of the new board.³⁷ Article 4 of the Affiliation Agreement provides that adjustments will be made to the governing bodies of Care New England and Memorial Hospital post conversion.³⁸ The governance structure of Care New England functions with so-called “mirror boards” where the same individuals that serve on the Care New England Board, are the same members that serve on the boards of the respective affiliate hospitals.³⁹ Although the current members of the governing board of Care New England will remain as members after the

³⁶ *See also*, AG Initial Application Response to Question 14.

³⁷ *See e.g.*, R. I. Gen. Laws §§ 23-17.14-7(c)(25)(vi), (vii), (viii) and (ix).

³⁸ *See also*, AG Initial Application Response to Question 14.

³⁹ *See* Response to Question 14 of the AG Initial Application and Affiliation Agreement Articles 3.1 (b)(iii) and 3.2 (b)(iii) stating that the board officers for the Memorial Entities shall be identical to those of Care New England. *See also* Section 5.01 of the Revised Memorial Bylaws at AG Initial Application Exhibit 14 with amended language that reads as follows: “The directors of the Board [] shall be those individuals then-serving as directors of the board of directors of Care New England Health System, the sole member of the Member.”

conversion,⁴⁰ the Care New England Board of Directors will expand to accommodate the new entity and will include four (4) additional members.⁴¹

Three (3) of the four (4) new members will be At-Large Directors nominated by Memorial Hospital and elected by Care New England.⁴² The three (3) new At-Large Directors will serve on the Care New England Board for three (3) year terms commencing on the date of the Closing and ending on the date of the first annual meeting of the Care New England Board following the third anniversary of the Closing.⁴³ During the specified time frame should an At-Large Director die, resign or be removed from the Board, his or her successor will be appointed by the Care New England Board from the remaining individuals who served on the Memorial Hospital or Southeastern Healthcare System Board of Trustees prior to the closing.⁴⁴ The appointed successor would then serve the unexpired portion of his predecessor's term.⁴⁵

On May 29, 2013, the following people were nominated by ballot of the Memorial Hospital Board of Trustees to serve as the three (3) At-Large Directors on the Care New England Board: (1) Gary E. Furtado; (2) William M. Kapos and (3) Patrick J. Murray, Jr. *See* Response to Question 31 of AG 2nd Set of Supplemental Questions.

The fourth new member of the Care New England Board will be the President of Memorial Hospital's medical staff who will become an Ex-Officio member of the Care New

⁴⁰ *See* AG Initial Application, Exhibit 13.

⁴¹ *See* AG Initial Application Appendix A-1 and Affiliation Agreement Articles 4.1 (a)-(b).

⁴² *See* Affiliation Agreement Articles 4.1 (a) and (b). Given Care New England's "mirror board" structure, the election of At-Large Directors to the Care New England Board includes those individuals in the governance bodies for Care New England itself, as well as all affiliate hospitals, including Memorial Hospital.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

England Board of Directors.⁴⁶ The Ex-Officio Director and the At-Large Directors will be subject to the same standards of conduct and board policies as all of the other directors that serve on the Care New England Board.⁴⁷

In addition to selection of board members, the method for selecting individuals to serve on Care New England committees is formulated in Section 4.2 of the Affiliation Agreement. Eligible appointees to certain Care New England committees include individuals who formerly served on the Southeastern Healthcare System and/or Memorial Hospital Board of Trustees.⁴⁸ The appointees are subject to the approval of the Care New England Board and will have the same terms as other members serving on Care New England committees.⁴⁹

The Attorney General is satisfied with the proposed changes to the corporate documents and board composition to be instituted post-conversion. The Attorney General is also assured that as described in the Affiliation Agreement at least initially there will be adequate representation of the Memorial Hospital on the new Memorial Hospital parent board, Care New England and thereafter, that the Memorial Hospital will be subject to the same governance structure as the other Care New England hospitals.

C. CONFLICTS OF INTEREST

Several provisions of the Hospital Conversions Act governing a full review deal with conflicts of interest that are applicable in an expedited review.⁵⁰ The expedited review also requires information regarding conflicts of interest.⁵¹ The Attorney General has reviewed the

⁴⁶ See Affiliation Agreement, Section 4.2, AG Initial Application Exhibit 12 and AG Initial Application Appendix A-1.

⁴⁷ *Id.*

⁴⁸ See AG Initial Application Appendix A-1 and Affiliation Agreement.

⁴⁹ *Id.*

⁵⁰ See e.g., R.I. Gen. Laws §§ 23-17.14-7(c)(6), (7), (12), (22) and (25)(iv).

⁵¹ See R.I. Gen. Laws §§ 23-17.14-12.1(b)(6) and (9).

criteria in the Act to determine whether the Transacting Parties and their consultants have avoided conflicts of interest.

1. Conflict Policies and Conflict of Interest Statements

Both the Memorial Hospital and Care New England provided their corporate conflict of interest policies along with the filing of the DOH Initial Application.⁵² Additionally, certain individuals associated with the Transacting Parties were required to submit conflict of interest statements. *See* AG Initial Application Question 11. These included officers, directors and senior management for Memorial and Care New England. Individuals completing the conflict of interest statements were asked to supply information to determine conflicts of interest such as their affiliation with the Transacting Parties, their relationships with vendors and their future involvement with the Transacting Parties. Memorial submitted thirty-four (34) executed conflict of interest statements and Care New England submitted forty-two (42) statements. *See* AG Initial Application Confidential Exhibit 11 and supplemental responses thereto.⁵³ All statements submitted were signed and notarized. After reviewing all statements, the Attorney General determines that none of the submitted materials revealed any conflict of interest.

2. Consultants

In reviewing the Hospital Conversation Act filings of both agencies, the Attorney General reviewed information regarding use of consultants. On behalf of Care New England, several entities were engaged for consultation and advice including PricewaterhouseCoopers LLP, a health industry advisory company; Kaufman, Hall & Associates, Inc., a healthcare strategic and financial consulting services company; Alix Partners LLP, a financial advisory

⁵² *See* DOH Initial Application Exhibits 8(A)-(C) for Care New England's Conflict of Interest and Confidentiality Policy, Compliance Program and Code of Conduct and DOH Supplemental Exhibit S-25 for the Memorial Hospital's Corporate Compliance Program and Code of Conduct.

⁵³ This Exhibit was determined to be confidential in accordance with R.I. Gen. §23-17.14-32.

services expert and Economists Incorporated, economic counselors. *See* Response to Question 28 of AG Set of 2nd Supplemental Questions. These companies were all engaged by Care New England to assist in the performance of due diligence and to provide advisory services related to the acquisition of the Memorial Entities. *Id.* Likewise Memorial Entities engaged the services of Navigant Consulting, Inc. to advise its board in connection with the evaluation of affiliation proposals and the selection of a strategic partner. *Id.* No conflict related issues concerning the consultants arose over the course of the Attorney General's review and none of the conflict of interest statements submitted to the Attorney General disclosed any areas of concern.

3. Retainer Agreements

Citing the difficulty in maintaining key personnel facing a transition, Memorial Hospital offered retention agreements (the "Retention Agreements") to eight (8) of its employees following the execution of the Affiliation Agreement. *See* Response to Question 28 of AG 2nd Set of Supplemental Questions. Copies of the Retention Agreements were provided. *See* AG Initial Application Exhibit 7F.⁵⁴ The Retention Agreements are described as follows by the Transacting Parties:

These retention agreements are designed to provide incentive to executive-level employees whose continued service is critical to the current operations of MHRI to stay with MHRI through the completion of the Affiliation, even though MHRI cannot guarantee them employment after the Affiliation is completed.

See Response to Question 9 of DOH 1st Set of Supplemental Questions.

The eight (8) executives that signed Retention Agreements were provided financial incentives for the successful consummation of the affiliation with Care New England. The terms of the Retainer Agreements were negotiated by an attorney hired jointly by the eight (8)

⁵⁴ This Exhibit was determined to be confidential in accordance with R.I. Gen. §23-17.14-32.

Memorial Hospital executives. *See* Response to Question 28 of AG Set of 2nd Supplemental Questions and Response to Question 9 of DOH 1st Set of Supplemental Questions. The Agreements were reviewed by the Memorial Hospital Board and received unanimous support. *See* DOH Confidential Exhibit 7-B.⁵⁵ Each of these individuals disclosed their Retention Agreement in their Conflict of Interest Statement.⁵⁶

The Attorney General has reviewed the Retention Agreements provided by the Transacting Parties and has considered the provision of the Hospital Conversions Act addressing awarding contracts with fiscal benefits. *See* R.I. Gen Laws § 23-17.14.7(c)(7). In reviewing an application in a full hospital conversion review, the Attorney General must consider:

(7) Whether individual described in (c)(6) were provided with contracts or consulting agreements or arrangements which includes pecuniary rewards based in whole, or in part on the contingency of the completion of the conversion.

See R.I. Gen. Laws § 23-17.14-7(c) (7).

Retention agreements are commonly used in merger situations in order to retain key personnel through the uncertainty of whether there will be continued employment after consummation of a transaction.⁵⁷ *See e.g., In re Foothills Texas, Inc., et al., Debtors*, 408 B.R. 573, 576 (Bankr. D.Del. 2009) (“At the time the Debtors entered into the retention agreements, the Debtors were undergoing significant financial difficulties...The Debtors entered into the retention agreements in an attempt to ensure that certain key employees of the Debtors’ remained

⁵⁵ This Exhibit was deemed confidential, but the Transacting Parties have agreed that the board’s unanimous approval of the Retention Agreements may be made public.

⁵⁶ The conflict of interest statements can be located at AG Initial Application Exhibit 11. This exhibit was deemed confidential, but the Transacting Parties have agreed that disclosure of the Retention Agreements in the conflict statements may be made public.

⁵⁷ The Attorney General has conferred with its experts, Krokidas and Bluestein, LLP regarding the appropriateness of the Retention Agreements.

with the Debtors despite the uncertainty. These employees were critical to maintaining the Debtors' business...").

Given the circumstances, the Attorney General finds the Retention Agreements do not violate the Hospital Conversions Act.

V. CONCLUSION

As stated above, this is the second expedited review pursuant to the Hospital Conversions Act. It is the second proposed transaction to be approved pursuant to the expedited process. The first expedited review was performed during the pendency of this review. During the same time, the Attorney General was also conducting an extended completeness review pursuant to the full review process and holding preliminary meetings for a fourth review, also a full review. The recent reviews performed by the Attorney General pursuant to the Hospital Conversions Act demonstrate the continued importance of this type of review to the people of the State of Rhode Island and the communities that are served by the hospitals involved. The decisions resulting from these reviews are not taken lightly and significant work goes into rendering a decision in these matters.

This Decision impacts four (4) hospitals in Rhode Island, nearly one-third (1/3) of all hospitals licensed in Rhode Island. It brings together a system of two acute care general hospitals serving different communities, an adult psychiatric hospital and a hospital specializing in women's and newborn health. The impact of this proposed transaction will be felt well into the future, hopefully with positive results for all the communities that Care New England now serves. Increasingly, it continues to be seen that community hospitals are no longer to survive on their own. While there have been no affirmative long-term promises regarding the continuation of the Memorial Hospital in its present form, with Memorial Hospital now underneath the Care

New England umbrella, it becomes the responsibility of Care New England to make Memorial Hospital fiscally successful and to continue to care for the people of Pawtucket and its surrounding communities.

Wherefore, based upon the information provided above in this Decision, the Proposed Transaction is **APPROVED WITH CONDITIONS**. The conditions are outlined below.


VI. CONDITIONS

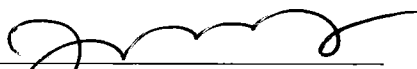
1. That the Proposed Transaction be implemented as outlined in the AG Initial Application.
2. That all costs and expenses due from the Transacting Parties pursuant to the Reimbursement Agreement be paid in full prior to Closing of the Proposed Transaction.
3. The Closing of the Proposed Transaction shall take place by September 16, 2013.
4. A cy pres petition be filed and granted prior to closing of the Proposed Transaction. The filing of such cy pres petition shall be coordinated with the Attorney General and shall be in accordance with the Conditions outlined in this Decision. Such petition shall specifically address the Goff Building and include a remedial plan that includes compensation or other remuneration to the nurse education and development program at Memorial Hospital.
5. The Memorial Entities will retain their current names, but may be identified as a Care New England Affiliate.
6. The MHRI Foundation By-laws shall be amended to provide that at least 51% of the Directors shall be members or former members of the Memorial Hospital Board for 3 years after the Closing.⁵⁸

⁵⁸ The current version of the MHRI Foundation By-laws provides for such requirement for any Directors elected prior to 2016. As the current Closing date is anticipated at the end of 2013, the current language will not provide for 3 years of service by the former Memorial Hospital Directors.

7. Regarding the Free Bed Donations, such donations shall continue to be treated as amounts restricted to free care. They may be used to reduce the overall amount of free care provided by the Hospital if such amount is in excess of any applicable charity care requirements.
8. Regarding the Memorial Auxiliary, Care New England shall use its best efforts to work with the Memorial Hospital Auxiliary to continue the Memorial Hospital Auxiliary and the relationship between the Memorial Hospital and the Memorial Hospital Auxiliary. Care New England shall designate a representative at the Memorial Hospital and a representative at Care New England to be the contact person for the Memorial Hospital Auxiliary.
9. On a going forward basis Care New England should institute procedures at the Memorial Hospital to hold and manage charitable assets appropriately, including that assets are used in accordance with any applicable restrictions and documentation regarding restrictions is retained.
10. All charitable assets currently owned by the Memorial Hospital shall be utilized for the benefit of Memorial Hospital after the implementation of the Proposed Transaction.
11. The At-Large Directors elected by the Memorial Hospital, as outlined herein and in the Affiliation Agreement shall (i) be independent of and not employed by or affiliated with Care New England or its affiliates; and (ii) not be an elected official or an individual that is subject to the Rhode Island Code of Ethics.
12. For the next three (3) years, the Transacting Parties shall identify any contracts between any of the Transacting Parties and any of the current officers, directors, board members or senior management other than employment agreements.
13. For a period of five (5) years, Care New England shall provide corporate documents requested by the Department of Attorney General to evidence the changes to the boards of such entities required by the Affiliation Agreement, the AG Initial Application and this Decision. In addition, Care New England shall provide any proposed amendments to their corporate documents 30 days prior to amendment.
14. Care New England shall provide information requested by the Department of Attorney General to determine its compliance with the Conditions contained in this Decision.

All of the above Conditions are directed related to the proposed conversion. The Attorney General's APPROVAL WITH CONDITIONS is contingent upon the satisfaction of the Conditions. The Closing of the Proposed Transaction shall not take place until Conditions 2, 3, 4 and 6 have been satisfied. The Attorney General shall enforce compliance with these Conditions pursuant to the Hospital Conversions Act including R.I. Gen. Laws § 23-17.14-30.


Peter F. Kilmartin
Attorney General
State of Rhode Island


Jodi Bourque
Assistant Attorney General

NOTICE OF APPELLATE RIGHTS

Under the Hospital Conversions Act, this decision constitutes a final order of the Department of Attorney General. Pursuant to R.I. Gen. Laws § 23-17.14-34, any transacting party aggrieved by a final order of the Attorney General under this chapter may seek judicial review by original action filed in the Superior Court.

CERTIFICATION

I hereby certify that on this 2nd day of July, 2013, a true copy of this Decision was sent via electronic and first class mail to counsel for the Transacting Parties:

Michael G. Tauber, Esq.
Hinckley, Allen & Snyder LLP
50 Kennedy Plaza, Suite 1500
Providence, RI 02903

Kimberly I. McCarthy, Esq.
Partridge Snow & Hahn LLP
180 South Main Street
Providence, RI 02903

