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ATTORNEY GENERAL



REPLY TO:
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July 29, 2020

Via E-Mail

Ms. Lynn Gordon, Esq.
Chief Legal Officer and General Counsel
New Hanover Regional Medical Center
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Ms. Wanda Copley, Esq.
County Attorney
New Hanover County
Legal & Risk Management
230 Government Center Drive, Suite 125
Wilmington, NC 28403
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Re: Proposed Sale of Assets to Novant Health, Inc.

Dear Ms. Gordon and Ms. Copley:

As you know, our office has been following the public process for soliciting bids and evaluating potential affiliations carried out by New Hanover County and New Hanover Regional Medical Center ("NHRMC"). Thank you for your July 16 letter providing a copy of the July 13 Letter of Intent among the County, NHRMC, and Novant Health, Inc. ("Novant").

When the definitive transaction documents are complete, we look forward to review by the Department of Justice under N.C. Gen. Stat. §§ 131E-13, 55A-12-02(g), and any other applicable laws. We have reviewed the letter sent to our office on June 29 detailing NHRMC and the County's view that formal notice under N.C. Gen. Stat. § 55A-12-02 is not required for any sale of NHRMC assets. We do not adopt that conclusion, and we appreciate the statement in that letter indicating that—despite any view NHRMC may have about whether the notice statute is applicable—NHRMC nonetheless intends to provide notice to the Attorney General for any proposed transaction. At the appropriate time, please send the notice documents to me (bthomas@ncdoj.gov) along with Jennifer Harrod (jharrod@ncdoj.gov). Please also send a copy of any antitrust or other governmental filings to these addresses. We will be ready to begin our review process. At any time, please do not hesitate to reach out with questions.

Under the Attorney General's *parens patriae* authority, we also expect to review the sale of County hospital assets under N.C. Gen. Stat. § 131E-13. We noted that the text of section 131E-13(a) has been made part of the Letter of Intent, where it appears in Schedule 4(k).

N.C. Gen. Stat. § 131E-13 establishes six important customer protections that the buyer must maintain when a county-owned hospital is sold:

1. Protections for the services that are provided to customers. Under section 131E-13(a)(1), the buyer must “continue to provide the same or similar clinical hospital services” in surgery, obstetrics, pediatrics, outpatient, and emergency treatment.
2. The contract must promise continued charity care. Under sections 131E-13(a)(1) and (2), the buyer must provide the same “emergency services for the indigent” as the hospital provided before the sale, and the buyer and seller must agree on mutually acceptable charity-care provisions that provide assistance “at levels related to need.”
3. No denial of essential medical services for inability to pay. Under section 131E-13(a)(3), the buyer “shall not enact financial admission policies that have the effect of denying essential medical services or treatment” because of a patient’s immediate inability to pay.
4. No discrimination against Medicaid/Medicare patients. Under section 131E-13(a)(4), the buyer must not discriminate against Medicaid or Medicare patients.
5. Annual report on compliance with the contract. Under section 131E-13(a)(5), the buyer must provide “an annual report that shows compliance with the requirements” of the sale.
6. No discrimination based on race, creed, color, sex, or national origin. Finally, under the second paragraph of section 131E-13, the buyer must operate the hospital “as a community general hospital open to the general public free of discrimination based on race, creed, color, sex, or national origin.”

We note, and would like further information regarding, certain features of the Letter of Intent that could be read as suggesting limits on the parties’ obligations to comply with these requirements of state law. These include:

- Section 4(k) of the Letter of Intent states that Novant shall “comply in all material respects” with N.C. Gen. Stat. § 131E-13. (Emphasis added.) Do the parties plan to place a materiality limitation on Novant’s duty to comply with these statutory conditions?
- Additional limiting language appears in the first paragraph of Section 4, before the promise in Section 4(k) to comply with the requirements of state law. This paragraph

provides that “the commitments” in Section 4 shall “be subject to modification with the advance consent of the Board.” Any modification of the parties’ duty to follow statutory requirements would raise concerns for our office.¹

- The first paragraph of Section 4 also states that “some of the commitments” in Section 4, potentially including statutory compliance in Section 4(k), “may be subject to force majeure provisions.” Do the parties intend to limit the statutory conditions by making them subject to a force majeure clause? This issue is particularly important in light of the current COVID-19 pandemic. Some commercial contracts’ force majeure provisions would be triggered by a pandemic. If present here, that sort of force majeure clause would relieve Novant of its statutory obligations.

We recognize that the provisions of the Letter of Intent that we discuss above are preliminary and nonbinding. They represent only the first draft of the definitive legal documents that the parties will later produce. We think it is worthwhile to raise these points early in the process so that NHRMC, the County, and Novant can avoid any problems associated with these issues while drafting the definitive legal documents. Please note that the observations above are not meant to list all the issues that may be part of our review once NHRMC provides formal notice of the proposed transaction to our office.

As the transaction documents are further developed, we will appreciate copies of any updates or modifications. For example, there is a broken cross-reference in the section on continuation of services, Schedule 4(a) § 1, which leaves the intent of that provision unclear. That provision is particularly important because continuation of services is the subject of N.C. Gen. Stat. § 131E-13(a)(1).

Finally, we ask that you let us know what plans exist at this time for providing our office with review of the sales of assets by the other charitable entities in the proposed transaction. We noted that in the Letter of Intent, the listed Sellers include several additional entities, such as Pender Memorial Hospital, Incorporated and New Hanover Regional Medical Center Foundation, Inc. Please let us know if the parties intend to have review of those asset transfers take place at the same time as review of the asset transfers from the County and NHRMC.

¹ In Section 4(k) and several other provisions of the Letter of Intent, the document appears to envision board approval as a check-and-balance to protect customers in the New Hanover region. The board also would appoint a majority of trustees for the new \$1.25 billion foundation. *See* Exhibit D to the Letter of Intent. However, under the Letter of Intent, the board would also manage Novant’s New Hanover regional business unit, developing “major operational plans” and “annual operating and capital budgets.” Schedule 4(j) § 4(b),(f). It seems difficult for the same board of trustees to (1) manage the regional business, (2) serve as a check-and-balance that protects customers against business pressures, and (3) oversee how the foundation makes investments for the good of the entire New Hanover community. The first role is inherently in tension with the second and third roles. We look forward to discussing this issue in more detail.

Ms. Lynn Gordon and Ms. Wanda Copley

July 29, 2020

Page 4

Again, please do not hesitate to reach out if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Blake W. Thomas". The signature is written in a cursive style with a large, stylized initial "B".

Blake Thomas
Deputy General Counsel

cc: Swain Wood, General Counsel, N.C. Department of Justice
Kevin Anderson, Director, Consumer Protection Division, N.C. Department of Justice
Kim D'Arruda, Section Chief, Consumer Protection Division, N.C. Department of Justice
Jennifer Harrod, Special Deputy Attorney General, N.C. Department of Justice
Joseph M. Kahn, Hall, Render, Killian, Heath & Lyman, LLP