

JOSH STEIN
ATTORNEY GENERAL



REPLY TO:
BLAKE THOMAS
DEPUTY GENERAL COUNSEL
BTTHOMAS@NCDOJ.GOV
(919) 716-6414

January 21, 2021

Via Email and U.S. Mail

Joseph M. Kahn, Esq.
Hall, Render, Killian, Heath & Lyman, LLP
Perimeter Three
3015 Carrington Mill Blvd, Suite 450
Morrisville, NC 27560
JKahn@hallrender.com

Re: Proposed transfer of assets from New Hanover Regional Medical Center and New Hanover County to Novant Health New Hanover Regional Medical Center, LLC, an affiliate of Novant Health, Inc.

Dear Mr. Kahn:

You have notified the Attorney General's Office, pursuant to Chapter 55A of the North Carolina General Statutes, of the proposed sale of substantially all the operating assets of New Hanover Regional Medical Center, a North Carolina nonprofit corporation ("NHRMC"), along with assets of New Hanover County (the "County") and NHRMC subsidiaries and affiliates (collectively, the "Sellers") to Novant Health New Hanover Regional Medical Center, LLC ("Buyer"), an affiliate of Novant Health, Inc. ("Novant"). The proposed transaction would also involve a change of control for the foundation that benefits the hospital, New Hanover Regional Medical Center Foundation, Inc. (the "Hospital Foundation").

In the transaction documents, the County Commissioners have specified that the majority of the net proceeds from the sale — approximately \$1.25 billion — will be transferred under N.C. Gen. Stat. § 153A-449 to a recently formed nonprofit corporation, New Hanover Community Endowment, Inc. (the "Endowment"). The Endowment is required to spend funds only for the benefit of the residents of New Hanover County and the region. Grants from the Endowment must be used for certain types of projects, specified in Exhibit C to the parties' Asset Purchase Agreement ("APA"), and those grants must be consistent with the County's strategic plan at the time of the grant. *See* APA Exhibit C § 3(e)(ii). Other proceeds from the

sale will be transferred to the County (which formed NHRMC and has a contractual right to NHRMC's assets), to two escrow funds, and to a County-managed mental and behavioral health fund. *See* APA § 1.1; APA § 4.12; APA Exhibit C.

We have now completed our review of this transaction under N.C. Gen. Stat. Chapter 55A and N.C. Gen. Stat. § 131E-13. This review involved analysis of hundreds of pages of documents, including the answers provided by NHRMC, the County, Buyer, and Novant to questions issued by this office, as well as conversations with members of the public and review by our office of public comments.

Further, as described below, we engaged in discussions with NHRMC, the County, Buyer, and Novant regarding certain issues identified during our review. As a result of those discussions, changes have been made to the transaction. These changes, which are described below:

- Increase the new Endowment's transparency and public accountability;
- Include on the Endowment's Board of Directors additional members linked to the communities that the Endowment will serve;
- Secure the protections that are required by state law when a county hospital is sold; and
- Buttress the provisions in the transaction documents that will ensure the community continues to have access to medical services.

Based on our review and the changes made to the transaction, the Attorney General does not object to the closing of the proposed transaction in accordance with the documents our office has been provided, upon the following conditions.

- I. **Changes to the Endowment.** The Endowment and the Attorney General's Office will execute a letter agreement (the "Endowment Agreement") consistent with negotiations with our office on or before the Closing Date. The Endowment Agreement will contain the following provisions negotiated by our office. (In each case, the list below serves as a summary only, and the terms listed in the Endowment Agreement shall govern.)

A. More Public Engagement

1. Public Meetings to Hear Input on How the Endowment Should Use Money. Before the Endowment finalizes its criteria for grant selection, the Endowment's Board of Directors must hold at least two public listening-session meetings. At these meetings, the Board will solicit and hear input from the community regarding the criteria the Endowment will use in determining how to distribute funds. *See* Endowment Agreement § 5.
2. Annual Public Meetings. After initial grant criteria are set, the Endowment's Board of Directors will hold at least two public meetings each year. At these listening sessions, the Board will solicit and hear feedback from the community regarding the Endowment's activities. Endowment Agreement § 5.
3. Community Advisory Committee. The Board will create a formal community advisory committee, composed of a reasonable cross-section of the community, that will provide formal feedback and recommendations to the Board of Directors. Endowment Agreement § 5.

B. More Inclusiveness on the Board of Directors

1. Reserved Directors. The Endowment has agreed to add to its Board of Directors two additional people who have experience working on the programs and issues that the Endowment will support.

These "Reserved Director" seats must have demonstrable, substantive, and reasonably recent experience focusing on matters that are consistent with the Endowment's mission or that are in furtherance of programs or issues generally supported or addressed by the Endowment. These matters, programs, and issues include, but are not limited to, one or more of the following areas:

- (a) Public health;
- (b) Providing support and services to underserved populations; and
- (c) Promotion of racial equity and justice.

See Endowment Agreement § 1.

2. Diversity. The Endowment's foundational documents require that each organization appointing Endowment directors give "serious and deliberate consideration to the balance of gender, race, and ethnicity in each and every one of its appointees." Endowment Bylaws, Art. IV § 3. At the current time, the

Endowment's Board of Directors is disproportionately male, and the composition of the Board is not proportionate to the region's Hispanic community. The Attorney General's Office has raised these issues to underline their importance.

C. More Transparency

1. Grant Details Will Be Public. The Endowment will publicly publish the contract for each grant that it makes. *See* Endowment Agreement § 2(e). For each grant, the Endowment will make available to the public the recipient and purpose. Endowment Agreement § 2(a)-(b).
2. Quarterly Reports. The Endowment will increase the frequency of the reports that it provides to the County from twice a year to four times a year. The reports will summarize the Endowment's grant selection criteria, the purposes for which grants were issued, the recipients and size of each grant, and the degree to which each set of grant funds has been drawn down. *See* Endowment Agreement § 3.
3. Charter Will Be Public. When the Endowment develops its charter (or a similar statement of mission and values), it will make that document available to the public. *See* Asset Purchase Agreement Exhibit C § 3(e)(i) and Endowment Agreement § 2(f).
4. Grant Criteria Will Be Public. The Endowment will make public its criteria for issuing grants. Endowment Agreement § 2(c).

D. Additional Procedural Protections

1. The Endowment has agreed that its Conflict of Interest Policy, required under § 4(f) of Exhibit C to the Asset Purchase Agreement, will be made available to the public. *See* Endowment Agreement § 2(g).
2. The Endowment has enhanced the Conflict of Interest Policy by adding the following provisions:
 - a) A requirement that when a conflict is disclosed, a disinterested person will be appointed to investigate alternatives to the proposed transaction or arrangement.
 - b) A provision establishing that a remedy for an undisclosed conflict of interest is disgorgement of any money or other benefit received as a result of the transaction.
 - c) A definition of family, for purposes of identifying potential conflicts, that clearly includes spouses, parents, and children.

d) A clear materiality limit.

See revised Conflict of Interest Policy, Art. II § 2, Art. II § 3, Art. III § 3(b), and Art. III § 4(b).

3. The Endowment has made a covenant that no grants will result in inurement benefitting any private person or entity. Endowment Agreement § 4.
4. The Endowment has agreed that if NO is ever dissolved, its assets will go only to a nonprofit corporation with the same charitable purpose. *See* Articles of Amendment to Articles of Incorporation.

II. Protections of N.C. Gen. Stat. § 131E-13 — Continuing Services, Charity Care, and Public Reporting

Section 131E-13 of the North Carolina General Statutes establishes important customer protections that the buyer must maintain when a county sells a hospital that it owns. On July 29, 2020, after the County posted the Letter of Intent among it, NHRMC, and Novant, the Attorney General’s Office wrote the County and NHRMC to raise concerns. We were uneasy that some features of the Letter of Intent could be read as suggesting limits on the parties’ obligations to comply with the requirements of section 131E-13 in state law. Specifically, the Letter of Intent suggested that (i) the commitments required by state law could be waived by the Local Board of Trustees, (ii) the commitments were subject to a materiality limitation, and (iii) the commitments could be waived by a *force majeure* event (for example, a pandemic). *See* Letter of Intent § 4, introductory paragraph and subsection (k).

The County, NHRMC, and Novant responded to the concerns raised in our July 29 letter by expressly recognizing that section 131E-13 does not include these sorts of limitations. Section 5.23 of the Asset Purchase Agreement reads:

5.23 **Statutory Requirements.** At all times following the Effective Time, Buyer shall comply in all material respects with all Laws applicable to Buyer in connection with the Transactions, including the terms of N.C. Gen. Stat. § 131E-13(a), as amended, restated or revised from time to time, the language of which as of the Effective Date is set forth in Schedule 5.23. For purposes of this Agreement, all references to “corporation” in N.C. Gen. Stat. § 131E-13(a) shall be read and interpreted to include Buyer, notwithstanding any other statutory definitions. **Notwithstanding that the parties have agreed to the foregoing sentence as a contractual matter between them, Buyer acknowledges that the**

North Carolina Attorney General is empowered to require Buyer to comply with N.C. Gen. Stat. § 131E-13(a) in all respects regardless of the parties' agreement among themselves to allocate no contractual Liability to Buyer for immaterial noncompliance with such Law.

(Emphasis added.)

The protections of section 131E-13, now recognized by the Asset Purchase Agreement, serve New Hanover Regional Medical Center's customers in six important ways:

1. Protections for the services that are provided to customers. Under section 131E-13(a)(1), Buyer must "continue to provide the same or similar clinical hospital services" in surgery, obstetrics, pediatrics, outpatient, and emergency treatment. (Building on this statutory requirement, the parties have agreed to protect a broader set of services for at least 25 years following the transaction, as described below in section IV.A of this letter.)
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." (The parties have also agreed to further charity care protections, as described below in section IV.B of this letter.)
3. No denial of essential medical services for inability to pay. Under section 131E-13(a)(3), the Buyer will provide "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 will provide to the public "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.”

Because of the change the parties have made to the Letter of Intent — now part of section 5.23 in the Asset Purchase Agreement — all of these customer protections are now safeguarded not only by state law, but also in the contract among Buyer, the County, and NHRMC.

III. Additional Changes to the Transaction. The County, NHRMC, and the Attorney General’s Office will execute a letter agreement (the “Additional Letter Agreement”) consistent with negotiations with our office on or before the Closing Date. The Additional Letter Agreement will contain the following provisions negotiated by our office. (In each case, the list below serves as a summary only, and the terms listed in the Additional Letter Agreement shall govern.)

A. Continuing Protections for Nonprofit Assets

1. Buyer has agreed with the Attorney General’s Office that the protections of N.C. Gen. Stat. §§ 55A-11-02 and 55A-12-02 will apply to the assets of Buyer, even though those assets will be held in a limited liability company. *See* Additional Letter Agreement § 1.
2. The Asset Purchase Agreement provides a right of first refusal, exercisable by the County and NHRMC, if Novant wishes to re-sell the assets that it is purchasing in this transaction. Buyer has now agreed that the County and NHRMC can each individually exercise this right. Additional Letter Agreement § 5.

B. Continuing Hospital Services to Their Communities

1. The approval of the new Local Board of Trustees will now be required if Buyer chooses not to extend the agreement with Pender County. The new Local Board, appointed almost entirely by the Sellers, is designed to serve as a bulwark to protect customers. Under the structure negotiated by NHRMC and the County, many fundamental decisions about the hospital system require prior approval from the Local Board. *See* APA § 5.20(a) and (c)(xv). After our request, the parties agreed that non-renewal of the Pender County operating agreement should be added to that list. *See* Additional Letter Agreement § 4.
2. Buyer has agreed to make clear that the Asset Purchase Agreement does not prevent the County from providing vaccinations, direct care out of the new Mental and Behavioral Health and Substance Use Disorder Treatment Fund, or

care from any fund created under a national opioid settlement. Additional Letter Agreement § 6.

C. Clarifying Charity Care Provisions

1. The parties have agreed that the Buyer's duty to maintain the healthcare businesses' policies on charity and indigent care is not limited to "reasonable best efforts." That "reasonable best efforts" clause applies only to the clause in the Agreement that contemplates Buyer expanding existing charity and indigent care. *See* Additional Letter Agreement § 3, clarifying APA § 5.12(a).

D. Hospital Foundation

1. If the Hospital Foundation is dissolved, its assets will go only to a nonprofit corporation with the same charitable purpose. *See* Amended & Restated Articles of Incorporation § 8.
2. The Hospital Foundation will continue to have members on its Board of Directors who are not part of the governance structure for NHRMC. *See* Amended & Restated Hospital Foundation Bylaws Article IV, § 2.
3. The parties have agreed that the Hospital Foundation will receive any amounts that ultimately remain in the Transition Stabilization Escrow fund after that escrow fund pays out the expenses listed in the Asset Purchase Agreement. Additional Letter Agreement § 2.

IV. Protections Already Present in the Transaction Documents. Finally, I note several provisions of the transaction documents that have not changed, but were important in our office's consideration of the transaction.

A. Commitments to Continue Services

The parties have gone beyond the protections required in N.C. Gen. Stat. § 131E-13 to provide that Buyer, for 25 years, will not discontinue the following services at the healthcare businesses without first obtaining approval from the Local Board:

- Cardiovascular health;
- Orthopedics;
- Oncology;
- Trauma care;
- Women's health;

- Behavioral health;
- Primary care;
- Neonatal intensive care; and
- Neurosciences, inclusive of neurology, neurosurgery, neuroinvasive care and stroke care.

See APA § 5.10(a); APA p. 103 (defining “Core Clinical Service Lines”); and APA § 5.24 (stating 25-year limit on commitments).

B. Charity Care and Health Equity Commitments

1. Buyer has promised to form a health equity department, expand and enhance community outreach efforts, and seek partnerships focused on expanding health equity. APA § 5.12(c),(d),(h).
2. In addition to providing at least NHRMC’s current level of charity care (as required by N.C. Gen. Stat. § 131E-13 and APA § 5.12(a) and clarified by Additional Letter Agreement § 3), Buyer has promised to use reasonable best efforts to expand those policies. *See* APA § 5.12(a).
3. Buyer has also agreed to avoid several consumer-unfriendly collection practices, such as placing liens on individuals’ primary residences or seizing bank accounts. APA § 5.12(b).

C. Fair Market Value

NHRMC and the County conducted an open bidding process for the NHRMC assets, as required by N.C. Gen. Stat. § 131E-13. This open process produced a purchase price that, based on the analysis of financial experts, appears to be at or above NHRMC’s apparent fair market value.

The purchase price is \$1.5 billion. APA § 1.1(a).¹ Ponder & Co.’s public work papers indicate a core valuation range from approximately \$0.9 billion to approximately \$1.3 billion. *See* page 855 of the materials provided in the parties’ October 9, 2020 transaction notice sent to our office.

¹ Cash in NHRMC’s bank accounts will carry over to Sellers, but an equivalent amount will be added to the purchase price. *See* APA §§ 1.1(a)(vii) and 1.4(r).

Moreover, we are not aware of any features that would have caused the bidding process, which was public and available to all health care companies across North Carolina and the nation, to produce something other than a fair market valuation of NHRMC's price.

D. Commitments to Expand Facilities

Buyer has agreed to benefit the community through several large commitments of its resources to the system.

1. Buyer will spend more than \$2.5 billion on capital expenditures to invest in healthcare businesses in the region. APA § 5.9(c)(ii). Any modification of these commitments requires consent of the Local Board, which was appointed almost entirely by the Sellers.
2. Buyer has also committed to spend \$600 million on routine capital expenditures. APA § 5.9(c)(i).
3. \$50 million of the purchase price will fund a new County-managed mental and behavioral health fund. *See* APA Exhibit C § 2. This effort is particularly needed during the ongoing opioid epidemic.
4. Novant will contribute to the system its Brunswick Medical Center assets. *See* APA § 5.9(b). The Brunswick assets are much smaller than the NHRMC system — with 74 licensed beds at Brunswick, compared to 800 at NHRMC — but will continue to provide an accessible resource to the customers in the surrounding area.

E. Quality of Care Commitments

We noted that the County and NHRMC secured several important promises from Buyer about the NHRMC system continuing to provide services at a high level of quality.

1. The Local Board will receive reports on quality at least annually. APA § 5.16(e). Buyer has made a reasonable-best-efforts commitment to position and maintain the healthcare businesses in the top 10% nationally in patient satisfaction and for each quality metric adopted for the healthcare businesses. APA §§ 5.11(g) and 5.16(e). Further, Buyer has committed to make commercially reasonable efforts to recruit physicians and fully staff the call center. APA §§ 5.15(c) and 5.17(a).
2. Buyer must continue the current graduate medical education program, providing at least \$30.5 million per year in financial support for that program. *See* APA

§ 5.15(d) and APA Exhibit D. Buyer shall expand the medical education program as reasonably requested by the Local Board and as funded by the Healthcare Businesses. APA § 5.15(d)(ii). The parties envision expanding from 18 to 30 students per class for the 2026 academic year. *See* APA Exhibit D.

3. Finally, consistent with the expansion of the graduate medical education program, Buyer has committed to use commercially reasonable efforts to further develop and expand NHRMC's clinical research capabilities. APA § 5.17(c).

We appreciate your time answering our questions about this transaction and supplying materials at our request, as well as your agreement to modify the transaction to include important protections for the public.

This letter is based on the proposed transaction documents that we have reviewed as they exist at this time. This letter assumes, and is conditioned upon, those documents being finalized and fully executed in the form that they were last provided to this office. We are aware that ministerial changes may be required before the documents are finalized. For this nonobjection letter to continue to be effective, our office's written consent (including but not limited to consent transmitted by electronic mail) must be provided concerning any changes to the transaction documents before Closing that both (1) would affect the issues identified and resolved with this office and (2) would make the documents, in those respects, inconsistent with the last draft documents provided to this office before issuance of this nonobjection letter.

Sincerely,



Blake Thomas
Deputy General Counsel

cc: Lynn Gordon, Chief Legal Officer & General Counsel, New Hanover Regional
Medical Center
Robert Hamill, Hall, Render, Killian, Heath & Lyman, LLP
Bart Walker, McGuireWoods
Swain Wood, General Counsel, N.C. Department of Justice
Kevin Anderson, Head of the Consumer Protection Division, N.C. Department of Justice
Llogan Walters, Assistant Attorney General, Consumer Protection Division, N.C.
Department of Justice