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August 19, 2011

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RE: Proposed Transaction Involving Saint Joseph's at East Georgia

Dear Mr. Hawk:

This responds to your letter of August 3rd regarding the application of the Hospital Acquisition Act to a proposed transaction involving Saint Joseph's at East Georgia, a hospital located in Greene County, Georgia (the "Hospital") at 1201 Siloam Road. The Hospital is currently owned and operated by Saint Joseph's at East Georgia, Inc. ("SJEG").¹ Saint Joseph's Health System, Inc. ("SJHS") is the sole member of SJEG. SJHS is a subsidiary of Catholic Health East ("CHE") which is a Pennsylvania nonprofit corporation. Under the proposed transaction, SJEG will continue to own and operate the Hospital. However, SJHS will cease to be the sole member of SJEG. Instead, St. Mary's Health Care System, Inc. ("SMHS") will become the sole member of SJEG. SMHS is also a subsidiary of CHE.²

As an initial matter, putting aside the relationship of SJHS and SMHS with CHE, the proposed transaction, as described, looks virtually identical to that addressed in this Office's letter of June 20, 2011 to your firm. However, as you have emphasized in your analysis, the proposed transaction has one fact that is substantially different from the transaction addressed in the letter of June 20, 2011. In the proposed transaction, SJEG will continue to own and operate the Hospital, but will cease to be controlled by SJHS. Instead, SJEG will be controlled by SMHS

¹ The Hospital is commonly known as Minnie G. Boswell Memorial Hospital. SJEG acquired the Hospital in 2008 from Pacer Health Management Corporation, a Georgia business corporation. Pacer Health Management Corporation acquired the Hospital from the Hospital Authority of Greene County in 2005 pursuant to a transaction reviewed under the Hospital Acquisition Act.

² As described in your letter, CHE is the sole member of SMHS and SJHS and SJHS are considered to be "sister" corporations within the CHE system.

going forward. Both SJHS and SMHS are subsidiaries of CHE.³ Thus, under the proposed transaction, control of the Hospital assets is transferring from one subsidiary of CHE to another. Both before and after the transaction, the Hospital will be owned and controlled by a subsidiary of CHE.

The Hospital Acquisition Act, O.C.G.A. §§ 31-7-400 through 31-7-412, was enacted in order to protect the public's interest in the assets of a nonprofit hospital when such assets are transferred. By requiring review of the sale of nonprofit hospitals by the Attorney General under the Act, the General Assembly "clearly intended to provide . . . oversight by the public and Attorney General of disposition of the proceeds collected by the nonprofit corporation; and assurance of continued access to healthcare for the community including the needy." *Turpen v. Rabun Cnty. Bd. of*

³ A review of the Amended and Restated Articles of Incorporation for SMHS filed with the Secretary of State on November 5, 2002, reveals that CHE is the sole member of SMHS and that CHE retains a number of powers. Among the retained powers of CHE related to SMHS are the power to "[a]dopt, amend, modify or restate the Articles of Incorporation of [SMHS] . . .," to "[a]dopt, amend, modify or restate the Key Bylaws Provisions of [SMHS] . . ." and to [a]ppoint and remove Directors of [SMHS] . . ." CHE also has the authority to transfer assets of SMHS to CHE, to require certain transfers of assets by SMHS and SMHS is prohibited from transferring its assets to entities other than CHE or affiliates of CHE without the approval of CHE. The Amended and Restated Articles of Incorporation of SJHS filed with the Secretary of State on November 3, 1997, are very similar to those of SMHS with CHE having the power to "[a]dopt, amend, modify or restate the Articles of Incorporation of [SJHS] . . .," to "[a]dopt, amend, modify or restate the Key Bylaws Provisions of [SJHS] . . ." and to [a]ppoint and remove Directors of [SJHS] . . ." The Articles of Incorporation for SJEG filed with the Secretary of State on January 10, 2008, are similar to those of SJHS and SMHS with SJHS retaining the power to "[a]pprove the amendment or restatement of the Articles of Incorporation" and to approve the amendment or restatement of all bylaw provisions of SJEG. In addition, SJHS retains the power to "[a]ppoint and remove Directors" as well as to "[a]ppoint and remove the President and Chief Executive Officer of [SJEG] . . ." The SJEG Articles of Incorporation also reserve powers to the CHE Board of Directors, including to "[a]dopt, amend, modify or restate the Articles of Incorporation of [SJEG] . . .," to "[a]dopt, amend, modify or restate the Key Bylaws Provisions of [SJEG] . . . and to "[a]pprove and authorize Significant Financial Transactions and significant budget variances of [SJEG] . . ." For SJHS, SJEG and SMHS, CHE also has the power to approve and authorize the establishment and dissolution of organizational relationships, including subsidiary corporations, significant partnerships, joint ventures and mergers. SJHS also has that power for SJEG. You provided the bylaws of SJHS which provide that CHE has the power to transfer the assets of SJHS and to require SJHS to transfer its assets to CHE and to require SJHS to pledge its assets to secure the debts of "CHE and/or of entities controlled by, controlling, or under the common control of CHE."

Commr's, 245 Ga. App. 190, 197 (2000) (Hospital Acquisition Act applies to Rabun County's purchase of a nonprofit hospital's assets). In light of this remedial purpose, exceptions to the law should be narrowly construed. See *Dalton Brick & Tile Co. v. Huiet*, 102 Ga. App. 221 (1960).

The remedial purpose of the Act must be considered in analyzing the relevant provisions of the Act related to the proposed transaction that you have described. The Act specifically defines the terms "acquisition" and "disposition." The term "acquisition" is defined as follows in O.C.G.A. § 31-7-400(2):

(2) "Acquisition" means a *purchase or lease* by an acquiring entity of the assets of a hospital which is owned, controlled, or operated by a nonprofit corporation and which meets one or more of the following conditions:

(A) Constitutes a *purchase or lease of 50 percent or more of the assets of a hospital* having a permit under this chapter; or

(B) Constitutes a *purchase or lease which, when combined with one or more transfers between the same or related parties occurring within a five-year period, constitutes a purchase or lease of 50 percent or more of the assets of a hospital* having a permit under this chapter;

provided, however, *that an acquisition does not include the restructuring of a hospital owned by a hospital authority involving a lease of assets to any not for profit or for profit entity which has a principal place of business located in the same county where the main campus of the hospital in question is located and which is not owned, in whole or in part, or controlled by any other for profit or not for profit entity whose principal place of business is located outside such county*; provided, further, that an acquisition does not include a restructuring of a nonprofit health system involving the purchase or lease of the assets of a hospital controlled as of March 1, 1999, by the health system's nonprofit parent corporation by another nonprofit entity which is both exempt from federal income taxation and

controlled by the same nonprofit parent corporation.

(Emphasis added). O.C.G.A. § 31-7-400(5) provides a corresponding definition of “disposition” that mirrors the definition of “acquisition.”⁴

As discussed in the letter of June 20, 2011, in light of the lack of definition of the terms “purchase” and “lease” and the broad goal of protecting the public’s interest in charitable assets, consideration of whether the Act applies to a particular transaction has to extend beyond the question of whether the transaction involves consideration or is specifically styled as a sale or lease. The General Assembly created a remedial Act which is to be broadly construed and provided an express exception to its applicability. In this case, however, the resulting structure is essentially the same as the existing structure. SJEG will still control the Hospital after the transaction and will itself be controlled by a subsidiary of CHE of which CHE is the sole member both before and after the transaction. The specific subsidiary that will be the sole member of SJEG is the only entity that is changing under the transaction.

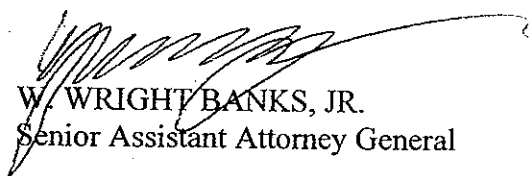
O.C.G.A. § 31-7-406 provides that “[t]he purpose of the public hearing shall be to ensure that the public’s interest is protected when the assets of a non-profit hospital are acquired by an acquiring entity by requiring full disclosure of the purpose and terms of the transaction and providing an opportunity for local public input.” Here, the transaction does not involve the transfer of control of the assets of the Hospital outside of CHE. Both SMHS, the proposed new member of SJEG and SJHS, the current member of SJEG, are subsidiaries of CHE and CHE is the sole member of both SMHS and SJHS. Thus, while control of the assets is transferring between subsidiaries of CHE, overall control is not transferring outside of CHE. Therefore, the transaction described does not involve a transfer of control that would trigger review and approval by the Attorney General under the Hospital Acquisition Act.

Please note that in reaching this conclusion, we relied solely on the facts you presented; we did not perform a separate factual investigation. In addition, we have considered only whether the Act applies under the particular facts and circumstances you presented. We have not addressed other issues that may exist or the application of any other laws, rules or regulations to the transaction and have not anticipated any possible factual changes.

⁴ The Act applies to the sale or lease of nonprofit hospitals and hospitals owned by hospital authorities. O.C.G.A. § 31-7-400 (2) & (5). The purpose of the Act is to “protect the public’s interest in the charitable assets of nonprofit hospitals by rigorously enforcing charitable trust laws.” Kevin F. Donohue, *Crossroads in Hospital Conversions—A Survey of Nonprofit Hospital Conversion Legislation*, 8 Ann. Health L. 39, *51 (1999).

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Sincerely,



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Senior Assistant Attorney General

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