



June 25, 2012

Honorable Hector R. Velazquez, J.S.C.
Superior Court of New Jersey
Brennan Courthouse
583 Newark Avenue
Jersey City, New Jersey 07306

Re: In the Matter of the Approval of the Sale of Christ Hospital
Pursuant to N.J.S.A. 26:2H-7.10 et seq.,
Docket No. HUD-C-104-12

Dear Judge Velazquez:

Please accept this letter in lieu of a more formal memorandum with respect to the sale of Christ Hospital, a nonprofit charitable organization, to Hudson Hospital Opco, LLC and Hudson Hospital Propco, LLC, two affiliated limited liability companies, with shared ownership (together, "Hudson Holdco"). New Jersey Appleseed Public Interest Law Center submits these comments on behalf of itself, a nonprofit legal advocacy corporation, and Save Christ Hospital, an unincorporated community coalition. Save Christ Hospital was formed specifically to advocate for the interests of Jersey City residents in the sale of the Hospital, and fourteen neighborhood and civic groups have endorsed and participated in its campaign of public education and advocacy. Paul Bellan-Boyer participated in the public hearings below on behalf of Save Christ Hospital, and was served with the Verified Complaint and supporting papers, and New Jersey Appleseed submitted written comments, dated May 29, 2012, which incorporated its

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comments submitted to the Department of Health and Senior Services (“DHSS”) dated May 23, 2012. New Jersey Appleseed’s written comments are attached to Certification of Renée Steinhagen as Exhibit A.

At this time, neither New Jersey Appleseed nor Save Christ Hospital oppose the sale of substantially all of the assets of Christ Hospital to Hudson Holdco; however, we oppose some of the terms of such sale and specifically assert that the Attorney General’s recommendation to the Court to impose certain conditions upon the a sale (primarily those imposed by DHSS pursuant to its Certificate of Need process controlling the transfer of the Hospital’s operating license) are not sufficient to protect the public’s interest. We seek reform of the proposed Order for Final Judgment in order to ensure that Christ Hospital’s charitable assets are safeguarded, the assets are irrevocably dedicated for charitable health purposes, and the transaction will not deteriorate quality and access to health services in the surrounding community. Community Healthcare Assets Protection Act (“CHAPA”), N.J.S.A. 2H-7.11(b).

Nature of this Proceeding and Standard of Review

Pursuant to N.J.S.A. 2H-7.11(l),

Upon completion by the Attorney General of the review of the application required by this act, the nonprofit hospital shall apply to the Superior Court for approval of the proposed acquisition. In that proceeding, the Attorney General shall advise the court as to whether he supports or opposes the proposed acquisition, with or without any specific modifications, and the basis for that position.

In this way, the Attorney General merely advises the court as to whether he supports or opposes the proposed acquisition, and the Superior Court retains its common law authority (reflected in the New Jersey Constitution) over charitable trusts and corporations. Township of Cinnaminson v. First Camden Nat’l Bank and Trust, 99 N.J. Super. 115, 127-129 (Ch. 1968). That is, this Court hears this matter in its ultimate capacity as supervisor and protector of

charitable trusts and corporations, and its determination does not entail review of a final agency decision based on the record below. Pursuant to its jurisdiction over charitable corporations, the Court must make its own determination of whether the decision of the nonprofit's board of trustees should be approved, and thus it need not afford the Attorney General the "deference" typically afforded to an agency implementing a legislative program or acting in a "quasi-legislative" capacity, as stated by the applicant (Christ Br. at pp.5-8). Even if this court were to give the Attorney General some level of deference, it is certain that the court is not bound by the Attorney General's interpretation of CHAPA or its determination of a strictly legal issue. See In re Amendment to Recreation & Open Space Inventory of City of Plainfield, 353 N.J. Super. 310, 328 (App. Div. 2002)("[a]n appellate tribunal is . . . in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue.")¹

In its silence, the CHAPA statute also permits the court to hear additional testimony to that presented to the Attorney General during his public hearing and comment period, and parties to the application may request discovery from the applicant (though neither New Jersey Appleseed nor Save Christ Hospital seek discovery or the right to present additional testimony in this matter). In fact, there is nothing in the statute requiring that this matter be heard on a summary basis, let alone an expedited one. Contrast Statute governing conversion of a health service corporation. N.J.S.A. 17:48E-67(f)(where Attorney General advises Superior Court as to whether he supports or opposes foundation plan to proceed "in a summary manner"). Although

¹ Cf. Finderme Management Co. v. Barrett, 401 N.J. Super. 546 (App. Div. 2008), cert. denied, 199 N.J. 542 (2009)(to the degree that parties challenge the trial court's legal conclusions, its decision is not owed any special deference); Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan, 140 N.J. 366 (1985) (appellate tribunal is neither bound by a trial court's interpretation or construction of a statute nor its determination of a strictly legal issue); Toll Bros., Inc. v. Twp. Of Windsor, 173 N.J. 502, 549 (2002)(issues on appeal that present

all conversions in which New Jersey Appleseed has participated as a party under CHAPA have been resolved through a plenary hearing in a summary action, this is the first instance where we have been given less than two weeks notice to submit our response to the court (potential parties were given in effect two business days to respond). This however, is not the first transaction, where financial exigencies allegedly require approval by a certain date, and the applicant asserts that the hospital will close if this transaction is not approved (although Community Healthcare Associates, in affiliation with Jersey City Medical Center, (“CHA/JCMC” option) informed the Attorney General that were willing to consummate the transaction, if given the opportunity to do so). This letter is attached to the Certification of Renée Steinhagen as Exhibit B.

The Christ Hospital Board has repeatedly used self-created financial crises to threaten closure and demand expedited oversight proceedings. Despite these allegations, the importance of this transaction for the residents of Jersey City cannot be over estimated. The CHAPA process commenced in mid-September 2011, and this Court must take the additional time necessary to carefully review the asset purchase agreement reached between the parties (and any conditions imposed by DHSS and/or modifications thereof suggested by the Attorney General) to ensure that the public is adequately protected. Otherwise, the court’s oversight becomes nothing more than an empty gesture rendering the charitable nonprofit unaccountable to its intended beneficiaries. Furthermore, the submissions before the court do not indicate the urgent public need to consummate this sale by June 30; only that the Board and buyers seek that date in advance of a potential cash flow problem several weeks hence. See Warren J. Martin Certification at ¶¶6-9.

questions of law are thus reviewed *de novo*); and Balsamides v. Protameen Chemical, Inc. 160

Community Interest in the Preservation of Charitable Assets

New Jersey Appleseed and the Save Christ Hospital coalition fundamentally disagree with the Attorney General's legal conclusion that CHAPA alters the trustee's common law duty of obedience to the charitable mission of the hospital prior to considering whether to hand the charitable assets of the nonprofit corporation (including the license of the hospital) to a for-profit entity. See Attorney General's Recommendation at pp. 34-35 (stating that "CHAPA does not indicate a preference for the sale of a nonprofit hospital to another nonprofit entity") (hereinafter "AG Rec.")² We applaud the Attorney General in recognizing the existence of such duty³, but disagree with his factual finding that ,

N.J. 352, 372 (1999)(same).

² The Attorney General offers no case law in support of its legal conclusion. Rather, he simply ignores the established legal precedent offered by New Jersey Appleseed in its comments that supports the notion that CHAPA codifies the Attorney General's and this Court's respective supervisory role over *cy pres* proceedings; which, in turn, requires that this Court must first find that the maintenance of the charitable mission is "impossible or impracticable" before conversion of assets is permitted. That is, CHAPA imposes additional factors on an acquisition that involves fundamental change in mission that are absent when change of control does not involve such change, and one of such factors is whether "the hospital considered the proposed conversion as the only alternative or as the best alternative in carrying out its mission and purposes." N.J.S.A. 26:2H-7.11(d)(4). Even the applicant acknowledges this fundamental principle. See Christ Brief at p 5 (noting that the "*cy pres* doctrine allows the court to modify the terms of charitable corporation for a purpose in the public interest . . . when achieving the original purpose of the charitable corporation becomes impossible or impracticable.")(citations omitted).

³ A trustee's understanding of the duty of obedience is essential to his/her understanding on how to proceed when considering a significant change of control decision like that implicated by CHAPA. Otherwise, common misconceptions as to the nature and extent of a board of trustees' fiduciary duty to the charitable corporation reign. It is fundamentally misleading to tell the public that once this transaction is approved, "Christ Hospital [will] continue to function in much the same way as it has a nonprofit hospital for years to come," and that the sale will continue the "Hospital's mission of providing essential health services to the neediest members of the community." Christ Br. at pp. 23-24. In New Jersey, provision of charity care is a function of licensure, not corporate status; and, no matter what spin is attached, the provision of hospital services by a for-profit entity does not, as a legal matter, constitute a charitable purpose.

[a]ny desire which the Board might have had to sell the assets to a non-profit Buyer was, in the final analysis, subsumed by the exigency of selling the hospital to a purchase that the trustees believed conformed with the Board's goal to maintain the hospital as a going concern.

AG Rec. at p. 36. There was nothing submitted in the record to the Attorney General or the Bankruptcy Court that supported the Board of Christ Hospital's belief that the CHA/JCMC option was not viable, and that JCMC would not be able to operate Christ Hospital as a nonprofit hospital for at least the 30 years it committed to doing so. See New Jersey Appleaseed comments, Exhibit B. Furthermore, the willingness of JCMC to state its intention to consolidate services, reduce licensed beds (not those currently in use) by 200, and use only half of the current square footage owned by Christ Hospital for hospital operation purposes in accord with the Navigant Report (AG Rec. at n. 12) does not undercut its intention "to maintain the hospital as a going concern." Accordingly, this goal could not have been the real reason why Christ's Board decided to select Hudson Holdco over CHA/JCMC's equally viable financial bid.

Notwithstanding our disagreement with the Attorney General's interpretation of CHAPA, his understanding of the common law fiduciary duty of obedience,⁴ and his implicit factual finding that the Board had reasonable concerns about the financial viability of the CHA/JCMC to maintain the hospital as a going concern, we do not, at this juncture, oppose approval of the sale of Christ Hospital to Hudson Holdco; rather, we request that this Court exercise its powers of equity to ensure that the future sale of any real estate currently held by Christ Hospital by

⁴ We acknowledge that the factual situation posed herein did not present a clear choice between a nonprofit and for-profit option. Although it is certain that the CHA/JCMC alternative would, like the Hudson Holdco proposal, have been subject to the "heightened scrutiny" imposed by CHAPA, the fact that the license would have remained in the hands of a nonprofit has enormous implications for the delivery of health services in Hudson County, and should have been given, as a matter of law, greater weight by the Board than it was.

Hudson Holdco be restricted, with any increased value (above current assessments) redounding to the benefit of the community.

Despite the Attorney General's conclusion that CHAPA does not authorize him to recommend any conditions on a subsequent sale/leaseback transaction, we believe that general equitable principles do justify this Court in doing so. See AG Rec. at p.40 (noting that although CHAPA does apply to the sale of the assets of a nonprofit hospital through a "single transaction or series of transactions," he does not believe that he has the authority to recommend conditions upon a future transaction, although such transaction is currently contemplated, and given past practice, highly likely).⁵ "Equity regards that as done which ought to be done," see William Drier & Paul Rowe, GUIDEBOOK TO CHANCERY PRACTICE IN NEW JERSEY, at p. 5, and given the factual circumstances, as explained below, New Jersey Appleseed and Save Christ Hospital respectfully request that this Court reform the proposed Final Order to impose reasonable conditions necessary to ensure that community interest in the preservation of charitable assets is secured.

New Jersey Appleseed and Save Christ Hospital believe that the auction process employed in the bankruptcy court did not establish the true fair market value of the Hospital's assets; in particular the fair market value of the Hospital's real estate assets due to the Hospital's location on the Palisades Cliffs in Jersey City and the extensiveness of the amount of land owned by the Hospital. Thus, use of statistical arguments to compare this sale to other hospital sales in the area does not adequately account for the way in which the value of Christ Hospital's unique real estate assets should affect its sale price. Even the Attorney General notes that the

⁵ It should be noted in this regard that the Commissioner has not hesitated to impose conditions on future transfer of the hospital license at this point in time. See CN condition No. 4 incorporated in AG Rec. at p48.

abbreviated sale process employed in the bankruptcy process and the very limited solicitation of bids places doubt as to whether the fair market value was achieved. AG Rec. at p. 12.

The community also wants to point to the practical inequities that flow from the sale of nonprofit hospitals to for-profit entities through the bankruptcy process. That is, for-profit investors are able to walk away with valuable physical assets, free from the debts incurred by the Hospital due to historical operational deficiencies, with the ability to transfer those assets at significant private gain immediately or several years after acquisition. The community, at first relieved when Bayonne Hospital emerged from bankruptcy, was equally outraged when the investors (the same investors involved in this transaction) transferred the physical assets of the Bayonne Hospital for \$58 million (in a sale/leaseback transaction, as contemplated herein), which they had purchased for a mere \$18 million approximately two years earlier.

In this way, New Jersey Appleseed and Save Christ Hospital disagree with claims of the applicant that the proposed sale “would preserve Christ Hospital’s charitable assets...” (Christ Br. at 2) The proposed transaction preserves the assets of the Hospital, but not its *charitable* assets. It proposes a conversion of charitable assets to assets which accrue to the balance sheet of Hudson Holdco. As community members, we fear that the sale is a fig leaf to cover this process, in essence a laundering of charitable assets to achieve quick financial gain. Several other non-profit hospital sales in New Jersey and elsewhere have illustrated this process. (Recently, Mountainside Hospital, which was purchased by an investment group for \$30 million dollars announced the sale of the Hospital for \$120 million; the Bayonne Hospital sale/leaseback transaction was replicated in the case of Hoboken University Medical Center, though in that case due the initial sale price --- a function of the seller’s demand that taxpayer bonds be extinguished -- the gain was significantly less). The Christ Hospital Board in its initial agreement with Prime

Healthcare contemplated just such an immediate asset conversion by the new owners; that is, the new buyer stated explicitly its intent to sell the real property of the Hospital to a Real Estate Investment Trust (REIT). In this case, such a generic “sale/leaseback” transaction is permitted in the Asset Purchase Agreement; and, as noted above, the principals of Hudson Holdco have already done this with two previous hospital conversions in Hudson County. It is easy to imagine a sale of assets shortly after the present sale is complete which realizes a significant profit over the bankruptcy value of the property, just as has occurred in other non-profit hospital sales.

We assert that in order to protect the full and fair market value of the charitable assets that have accrued to Christ Hospital during its 140 year existence, this Court must impose restrictions on the current sale that would result in any profits from the post-sale disposition of Christ Hospital’s real estate assets to be reclaimed for charitable purposes. It is our position that the proceeds of such sale should then be placed in a conversion foundation whose mission would be consistent with the Hospital’s charitable health care mission. In addition to supporting other non-profit health care institutions and activities serving the Hudson County area, the proceeds of such sale would enable the community to hold a right of first refusal in the event that Hudson Holdco seeks to close the hospital as an acute care facility. As the applicant has stated, one way to ensure that the proceeds from the conversion of charitable assets are appropriately used is to endow a nonprofit foundation with the right of first refusal. Christ Br. at p.23; see also AG Rec. at 45. The Court must exercise its jurisdiction over charitable corporations to ensure that trustees take all the standards set forth in CHAPA seriously.

There is little doubt that since the first conversion of a nonprofit hospital in New Jersey under CHAPA, where the Board of Salem Memorial Hospital strictly followed both the letter

and spirit of CHAPA, the Attorney General has consistently recommended approval of such conversions even if significant criteria set forth in CHAPA have not been satisfied. In this instance, the Court must put an end to such practice. Nonprofit boards cannot close their eyes to their fiduciary duties and must diligently act to protect the public interest. A restriction on any future disposition of the real estate assets of Christ Hospital, and the placement of such proceeds in a foundation that has a right of first refusal is necessary herein to protect the community's interest in charitable assets.

Health-Care Monitor and Community Advisory Board

Pursuant to CHAPA, the Attorney General is to implement his “common law responsibilities as protector, supervisor, and enforcer of charitable trusts and charitable corporations” in consultation with the Commissioner of DHSS. AG Rec. at p. 18 (citing N.J.S.A. 26:2H-7.11) To date, the Attorney General has accepted DHSS's findings pursuant to its CN process in lieu of a more formal health impact analysis that concludes that the “proposed transaction is likely to result in the deterioration of the quality, availability or accessibility of healthcare services in the affected communities.” N.J.S.A. 26:2H-7.11(b). The failure of DHSS to undertake such analysis is clear in this case based on the comments submitted by New Jersey Appleseed and other commentators (in particular, the comments of Ward Sanders, representing the New Jersey Association of Health Plans, attached to the Certification of Renée Steinhagen as Exhibit C.), which set forth the potential harm caused by the business model employed by Hudson Holdco in the two other hospitals that it currently controls. See New Jersey comments dated May 29, 2012 and May 23, 2012.

As we stated therein, residents have grave concerns about this sale based on the track record of the principals of Hudson Holdco, and they need to be protected. DHSS cannot rely

solely on potential whistle-blowers to advise them of violations of CN conditions or other business practices and policies that will have an adverse impact on patients; rather DHSS must have its own eyes and ears at the hospital to monitor activities that will impact on community health care access. Such activities include levels of uncompensated care for indigent person, avoidance of service to Medicaid patients, emergency room admissions, termination of insurance contracts, waiver of cost sharing, excessive average daily charges, and nurse/patient ratios to maintain hospital quality and safety standards.

Accordingly, we assert that this Court, as the ultimate enforcer of charitable trusts, must condition this transaction on the appointment of an independent health care monitor for a period of three years in order to ensure the public that there will be no adverse health consequences to this sale. The monitor would be paid by Hudson Holdco and supervised by DHSS. N.J.S.A. 26:2H-7.11(i)(1).

In addition, New Jersey Appleseed and Save Christ Hospital do not believe that the conditions regarding the creation of a Community Advisory Group (“CAG”) that DHSS has currently imposed upon this transaction sufficiently guarantee community accountability. Residents in communities where such CAGs have been created as a result of a hospital closing or conversion have experienced serious frustration due, in part, to the composition of such groups as currently constituted. Specifically, there is a clear tendency for the CAGs to be dominated by hospital personnel, often in alliance with a local politician, to the detriment of genuine citizen participation.

Accordingly, we request that CAG conditions be amended to preclude persons who hold a close, interested relationship with Hudson Holdco or any of its affiliates from serving as a member of the CAG, with the exception of the hospital Board member appointed by Hudson

Holdco as the CAG's co-chair. The CAG should elect the co-chair not appointed by the for-profit hospital board, and should elect one of its members to sit on the hospital's board. Moreover, that representative must be explicitly permitted to disclose information to the CAG that is essential to its advisory function, and persons should be appointed to the advisory board who both live in the community, hold certain competencies related to the functions of the advisory board, and who are willing to undertake their responsibilities as community, health care or social service or other stakeholder representative.

Specifically, the CAG of Christ Hospital, Bayonne Medical Center, and Hoboken University Medical Center Hospital, Bayonne Medical Center, and Hoboken University Medical Center should be given the opportunity to participate in an open, deliberative and public process with respect to the implementation of the Navigant Report. Such bodies must affirm by vote any changes to reduce and/or consolidate services among these and other area hospitals. All parties are agreed upon the importance of the Navigant Report in guiding the restructuring of regional hospital services, and the role of all three CAGs that will be operating or will be operating in Hudson County must be explicit and sufficiently strong to protect the public interest.⁶

⁶ Despite Hudson Holdco's inconsistent commitments to maintain the hospital as an acute care facility for 10 or 7 years, and to maintain all existing "essential" services for five years, it is clear that compliance with the Navigant report will require reduction of services, loss of jobs and consolidation of services among all the Hudson County hospitals. Contrast APA (10 years) with Christ Br. at p.24 ("7 years after the acquisition"); see also Failure to include continuity of psychiatric services in any of the governing documents. The public must be part of this process; at minimum, to ensure that the State plays its essential and appropriate role in the health care planning process of the County.

Standing in Future *Cy Pres* Hearings

The Attorney General's Recommendation and the proposed Final Order contemplate that further *cy pres* hearings will be held to redirect the assets of donor designated funds held by Christ Hospital and the charitable assets held by Christ Hospital Foundation. At this time, New Jersey Appleaseed respectfully requests that Save Christ Hospital and New Jersey Appleaseed be specifically designated as interested parties in order to enable the community's participation in such hearings. New Jersey Appleaseed has been granted such status with respect to previous transactions governed by CHAPA (e.g, conversion of Mountainside Hospital, and the sale and ultimate closing of St. James Hospital).

Respectfully submitted,

Renée Steinhagen, Esq.

On Behalf of New Jersey Appleaseed and
Save Christ Hospital

Cc: Celia S. Bosco, Esq.
Jay Ganzman, DAG