

BEFORE THE ATTORNEY GENERAL

STATE OF COLORADO

**IN THE MATTER OF THE ASSET PURCHASE AGREEMENT BETWEEN NCMC,
INC. AND BANNER HEALTH**

JURISDICTION OF THE ATTORNEY GENERAL

1. On August 1, 2019, NCMC, Inc. and Banner Health (together the “Parties”) jointly presented notice to the Attorney General regarding the sale of certain assets of North Colorado Medical Center. The Parties later presented a draft Asset Purchase Agreement marked “Draft (LRRC 9-4-19).” On September 23, 2019, the Parties provided the Attorney General with the executed Asset Purchase Agreement, dated September 20, 2019. Under this agreement, Banner Health will purchase real and personal property associated with North Colorado Medical Center (the “Hospital”) from NCMC, Inc. This opinion refers to the subject matter of the Asset Purchase Agreement as the “Transaction.”

2. The Attorney General has reviewed the Transaction under the Hospital Transfer Act (the “Act”), C.R.S. §§ 6-19-101, *et seq.*, and under the Attorney General’s common law authority over charitable trusts. *See*, C.R.S. §§ 24-31-101(5), 6-19-104(1).

3. Under the Act, the Attorney General is required to review “covered transactions,” which include “any transaction that would result in the sale, transfer, lease, exchange, or other disposition of fifty percent or more of the assets of a hospital” as well as the “sale, transfer, or other disposition of control of a parent company, holding company, or other entity controlling a hospital.” C.R.S. § 6-19-102(1).

4. In reviewing a transaction involving a nonprofit hospital and another nonprofit entity, the Attorney General must consider two factors:

- a. whether the transaction will result in a material change in the charitable purposes to which the assets of the hospital have been dedicated, and
- b. whether the transaction will result in a termination of the Attorney General’s jurisdiction over those assets caused by a transfer of a material amount of those assets outside of the state of Colorado.

C.R.S. § 6-19-203(1).

5. If the Attorney General finds that the transaction will not cause a material change in the charitable purposes to which the assets of the hospital have been dedicated and will not result in a termination of jurisdiction over the hospital assets, the Transaction “shall proceed without further review.” C.R.S. § 6-19-203(1).

DECISION

6. Based on a discussion of the Transaction with the Parties, and based on a review of documentation, the Attorney General finds and determines that the Transaction involves a transfer or other disposition of the control of the nonprofit Hospital to a nonprofit entity and is therefore a covered transaction.

7. The Attorney General further finds and determines the following:

- a. The Transaction will not result in a material change to the charitable purposes to which the assets of the Hospital have been dedicated.
- b. The Transaction will not result in a termination of the Attorney General's jurisdiction over those assets caused by a transfer of a material amount of those assets outside of the State of Colorado.
- c. Accordingly, the Transaction may proceed without further review.

BACKGROUND

A. The Parties.

i. *NCMC, Inc.*

8. NCMC, Inc. is a Colorado nonprofit corporation. It was originally incorporated on November 28, 1984 as North Colorado Medical Center, Inc. At that time, Normedco, Inc. was its sole corporate member. On January 13, 1986, the corporation filed Amended and Restated Articles of Incorporation removing the corporate member. On December 30, 1994, the corporation changed its name to NCMC, Inc., and on December 20, 1995, the corporation changed its purpose to reflect its support for the Board of Trustees of North Colorado Medical Center.

9. NCMC, Inc. has tax-exempt status under section 501(c)(3) of the Internal Revenue Code.

10. The current stated purposes of NCMC, Inc. is to operate "exclusively for the benefit of, and to carry out the principles of The Board of Trustees of North Colorado Medical Center, a body corporate created and appointed by the Board of County Commissioners of Weld County, Colorado pursuant to authority vested in Weld County by Part 3, Article 3 of Title 25, Colorado Revised Statutes of 1973. Without in any way limiting the foregoing general purposes, the corporation shall establish, maintain or lease to third parties which are exempt under Section 501(c)(3) of the Internal Revenue Code, for the provision of hospital services, one or more hospitals as institutions with permanent facilities for diagnosis and treatment of both inpatients and outpatients; to develop or lease to third parties which are exempt under Section 501(c)(3) of the Internal Revenue Code related facilities for or arrangements for the provision of urgent care, extended care, home care and other health care services; to foster the teaching and research functions of such hospitals and related facilities in cooperation with other health care and educational institutions; and for any and all other lawful purpose or purposes for which a nonprofit corporation may be organized in the State of Colorado for the benefit of, and to carry out the principles of The Board of Trustees of

North Colorado Medical Center.” 2d Arts. of Am. to the Arts. of Incorporation for NCMC, Inc., art. IV.

ii. Banner Health

11. Banner Health is an Arizona nonprofit corporation. It was incorporated on January 17, 1938. Arizona has limited information available online, but Banner provided its current Banner Health Articles of Domestication to the Attorney General upon request. Banner Health was formerly known as Lutheran Health Systems, and is a successor by merger to Western Health Network, Inc. and Lutheran Hospital and Homes Society of America.

12. Banner Health has tax-exempt status under Section 501(c)(3) of the Internal Revenue Code.

13. The stated purposes of Banner Health are to “include, without limitation, the power to own, operate, manage, lease, rent and provide management, fiscal and operating services to hospitals, nursing homes and other related health care, medical or educational facilities and programs, throughout the United States used in caring for the ill, infirm, handicapped and aged persons without regard to race, religion, color or national origin, and to do and perform acts incidental thereto.” Those powers include the “operation, management, administration and maintenance of general hospitals, nursing homes and other facilities used in caring for the ill, infirm, handicapped and aged persons and the management, operation, administration and maintenance of related, affiliated, or other medical and health facilities.” Arts. of Domestication, art. II (June 28, 2001).

14. Banner Health has operated North Colorado Medical Center under an operating agreement since January 1, 1995.

iii. North Colorado Medical Center

15. North Colorado Medical Center is a state licensed and Medicare certified general hospital in Greeley, Colorado.

16. The healthcare operations of North Colorado Medical Center have been conducted by Banner Health under an operating agreement with NCMC, Inc. since January 1, 1995.

17. Some of the assets of North Colorado Medical Center, including real property, are owned by Weld County.

18. Weld County established the Board of Trustees of the North Colorado Medical Center as a public hospital board of trustees pursuant to C.R.S. § 25-3-302(1).

19. Some of the North Colorado Medical Center real property is leased for the operations of the Hospital through a series of agreements including the Colorado Health Facilities Authority, the Board of Trustees of the North Colorado Medical Center, NCMC, Inc., and Banner Health.

B. Transaction Documents

20. The executed Asset Purchase Agreement is entered into between NCMC, Inc. as the seller and Banner Health as the buyer (together the “Parties”). The Transaction is set to close on

October 9, 2019, or on an earlier date as mutually agreed by the parties. Asset Purchase Agreement § 1.4(c). The closing is effective as of 11:59:59 p.m. on the closing date. *Id.*

21. On the closing date, Banner Health shall purchase from NCMC, Inc. the purchased assets, which includes real property, the Weld County Ambulance Service, membership interests in joint ventures, and intellectual property. § 1.1(a).

22. NCMC, Inc. incurred bond debt for the purpose of financing its ownership and operation of the land and health facilities. On behalf of NCMC, Inc., Banner will defease and redeem Colorado Health Facility Authority Hospital Revenue Bonds (NCMC, Inc. Project) Series 2016 Bonds, Series 2012 Bonds, and Series 2013 Bonds in the amounts that are currently due. The amount of the bond defeasance and redemption is part of the purchase price of the Transaction.

23. Banner shall pay to NCMC, Inc. the purchase price for the purchased assets in the amount of \$285,703,938 plus the book value of the personal property. There is approximately \$209 million in debt that will be paid off as part of the Transaction.

24. After paying other obligations associated with the Transaction, approximately \$58 million will be paid to NCMC, Inc. to be maintained for its charitable purposes.

25. NCMC, Inc. will be renamed The Weld Trust after closing. It will include as part of its corporate purpose that “[t]hrough responsible giving, the Corporation will meaningfully and continuously strive to improve the quality of life in Weld County, Colorado by making grants to promote excellence in health and education.”

26. As part of the Transaction, NCMC, Inc. will also receive proceeds from the sale of Weld County property. This amount, and its earnings, will be dedicated to a restricted fund for the Bright Futures program. Bright Futures was created by the Weld County Commissioners to financially assist Weld County students who pursue post-secondary education or training from an accredited higher-education institution or certified training program.

27. NCMC, Inc., as part of the Transaction, agrees that it will “provide ongoing annual support for the provision of indigent care or other clinical programs provided by Banner at North Colorado Medical Center or elsewhere in Weld County, Colorado in the amount of ... \$5,000,000 per year” through September 2027. Support Agreement § 1. If Banner Health “sells, leases, transfers or otherwise disposes of the North Colorado Medical Center to any third party other than” with the prior written consent of NCMC, Inc., or to certain Banner Health subsidiaries, then it will lose the value of these payments.

28. The Transaction then terminates the existing operating agreement between the Parties, except for certain confidentiality and indemnification provisions.

C. Review Process

29. The Attorney General set up an email address to receive public comment regarding the Transaction.

30. The Attorney General also conducted a town hall meeting in Greeley, Colorado, on September 27, 2019. At the town hall, the Attorney General heard from members of the public on a range of issues. Seventeen members of the public addressed the Attorney General regarding the Transaction, including county commissioners, the city manager, the executive director of the local

public health department, the mayors of Greeley and Evans, board members of NCMC, Inc., board members of Bright Futures, and employees and former patients of Banner Health. One commenter was concerned with the way in which the board of NCMC, Inc. is appointed. The remaining comments were uniformly positive and were in support of the Transaction.

31. The Attorney General considered each of the public comments submitted to his office through the public comment email address and received at the town hall in evaluating the Transaction.

ANALYSIS

A. The Transaction will not result in a material change in the charitable purposes to which the assets of the Hospital have been dedicated.

32. The Attorney General finds and determines that the Transaction will not result in a material change in the charitable purposes to which the assets of North Colorado Medical Center have been dedicated.

33. The stated charitable purposes of the Parties, as described in their governing documents and explained above, are consistent with one another.

34. Banner Health has represented that following the Transaction, the assets of North Colorado Medical Center will continue to be operated by Banner in a manner dedicated to the charitable, health care services provided to the citizens of northern Colorado." Banner Hospital Transfer Act Notice at 2 (Aug. 1, 2019). NCMC, Inc. similarly notes that "[a]s in the past, substantially all of the Medical Center's assets will be dedicated to providing health care services to the citizens of northern Colorado." NCMC, Inc. Hospital Transfer Act Notice at 2 (Aug. 1, 2019).

35. Banner Health has also agreed for itself and any successors that it will continue to operate North Colorado Medical Center for at least three years following closing of the Transaction as a nonprofit general acute care hospital, consistent with the requirements for continued exemption under § 501(c)(3) of the Internal Revenue Code, will continue to offer substantially the same mix of services as is provided today, and that the Hospital will continue to be accredited by the Joint Commission, will continue to be licensed by the Colorado Department of Public Health and Environment as a general acute care hospital, and will continue to participate, and be certified for participation, in Medicare and Medicaid.

36. The proceeds of the sale will be managed by NCMC, Inc., as the renamed Weld Trust, to "meaningfully and continuously strive to improve the quality of life in Weld County, Colorado by making grants to promote excellence in health and education."

37. These facts satisfy the Attorney General that the Hospital assets will continue to be used as a hospital, and that the proceeds will continue to be used in a manner consistent with the original purposes of the organization.

38. The Attorney General considered whether there will be reduction in the availability or accessibility of health care services as a result of the Transaction and, based on the foregoing analysis, the representations of the Parties, and a review of the provided documentation, and a review of public comments, finds and determines that there will not.

B. The Transaction will not result in a termination of the Attorney General's jurisdiction over the Hospital assets caused by a transfer of a material amount of those assets outside of the State of Colorado.

39. The Attorney General finds and determines that the Transaction will not result in a termination of the Attorney General's jurisdiction over the North Colorado Medical Center assets caused by a transfer of a material amount of those assets outside of the State of Colorado.

40. The terms of the Transaction provide for a change in ownership of real property, the Weld County Ambulance Service, hospital personal property, intellectual property, and certain LLC memberships.

41. Those assets will remain in Colorado, and North Colorado Medical Center will continue to be operated as a hospital.

42. Thus, the terms of the Transaction provide for the continuation of North Colorado Medical Center as a Colorado nonprofit hospital. Nothing in the terms of the Transaction suggests that a material amount of North Colorado Medical Center's assets will be transferred outside of Colorado.

43. Accordingly, the North Colorado Medical Center's assets will remain in the State of Colorado and will remain subject to the Attorney General's continuing jurisdiction.

44. The proceeds of the sale will similarly remain in Colorado, dedicated to improving the lives of Weld County citizens. As proceeds held by a charitable Colorado nonprofit, those assets will also remain subject to the Attorney General's continuing jurisdiction.

45. These facts satisfy the Attorney General that the Transaction will not result in the termination of jurisdiction over the Hospital assets involved in the Transaction at the present time. The Attorney General retains the right to exercise his common law and statutory authority over the North Colorado Medical Center's assets in the future should doing so become necessary due to a change in circumstances, including reopening the subject matter of this opinion if necessary.

CONCLUSION

46. In reaching this decision, the Attorney General considered the specific charitable purposes of the nonprofit Hospital and the other nonprofit purchasing entities as set forth in articles of incorporation and other organic documents. The Attorney General also considered whether any evidence suggests that, as a result of this Transaction, the availability or accessibility of health care services in the communities served by the Hospital will be reduced. The Attorney General considered each public comment, whether received electronically or in person.

47. Based on the foregoing, and pursuant to the discretion granted to the Attorney General under the Act for review of transactions involving a nonprofit hospital and another nonprofit entity, the Attorney General determines that the Transaction may proceed without further review.

Issued this 1st day of October, 2019.



PHILIP J. WEISER
Colorado Attorney General

CERTIFICATE OF DELIVERY

This is to certify that I have duly served the within IN THE MATTER OF THE ASSET PURCHASE AGREEMENT BETWEEN NCMC, INC. AND BANNER HEALTH upon all parties herein by mailing copies of same to their office this 1st day of October, 2019 addressed as follows:

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