

April 11, 2019

Via Email

Michael K. Dexter
Chief, Center for Health Systems Policy & Regulation
Rhode Island Department of Health
3 Capitol Hill
Cannon Building - Room 410
Providence, RI 02908

Re: *Brigham Health, Inc. (“BHI”) - Change In Effective Control (“CEC”) Application (the “Application”)*

Dear Mike:

I am writing in response to the claim by Care New England and its affiliate, Women & Infants Hospital of Rhode Island (“W&I”), that “Site control does not bear on an application’s completeness” as set forth in Mr. Petros’ April 5, 2019 letter to you. For the reasons set forth below, and as the Department is aware, W&I is wrong.

First, question 24 of the CEC Application expressly requires that an applicant “provide legally binding evidence of site control (e.g. deed, lease, option, etc.) sufficient to enable the applicant to have use and possession of the subject property, if applicable.” (Emphases in original.) Here, the applicant—BHI—has failed to do so. It currently enjoys no rights under the lease in question, and W&I lacks the necessary consent required under the plain language of the lease for BHI to own, control or operate W&I should BHI consummate its acquisition of W&I.

Second, I am not aware of any application that has been accepted as complete by the Department without legally binding evidence of site control. In fact, in July, 2012, the Department rejected an application and found that it was ineligible for review due to, among other things, failure to satisfy requirements of site control:

Deficiency 34, Appendix D #6 Failure to provide enforceable and binding option agreement for a ground lease binding the parties to ensure use, occupancy and construction of the facility on the site. Failure to provide details concerning “third party” to assure use and operation of facility by applicant. Failure to provide option to sublease between East Bay Holdings, LLC and East Bay Comprehensive Cancer Center, LLC to lease the Premises.¹

¹ As the Department will recall, the underlying application was ultimately accepted but only *after* the applicant reviewed the legally binding documents evidencing site control with the Department. As discussed further herein, the ground lease between Rhode Island Hospital (“RIH”), as Landlord, and W&I, as Tenant, (the “W&I Ground Lease”) is not, and cannot, be legally binding evidence of site control absent prior written consent of RIH.

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Third, courts and administrative agencies in Rhode Island (and in other jurisdictions) have consistently confirmed the right of a state agency to reject an application for review due to lack of site control.

Indeed, the Rhode Island Supreme Court has reversed an administrative decision to deem an application substantially complete where there was no evidence of site control. *See Town of Burrillville v. Pascoag Apartment Assocs., LLC*, 950 A.2d 435, 458-460 (RI 2008) (the Rhode Island Supreme Court held that the State Housing Appeals Board acted arbitrarily and capriciously when it deemed an application substantially complete where the application lacked legally competent evidence that supported the existence of site control). *Signature Healthcare Servs., LLC v. Washington State Department of Health, No. 50109-1-II, 2018 WL 2215462, at *1 (Wash. Ct. App. May 15, 2018), review denied sub nom. Signature Healthcare Servs., LLC v. State Dep't of Health*, 191 Wash. 2d 1015, 426 P.3d 742 (2018) (the Court of Appeals of Washington affirmed the Department of Health's decision that an application for a Certificate of Need was *incomplete* because it did not sufficiently document site control. It was not sufficient for the applicant to show that the owner of the proposed hospital site also owned the applicant); *FAA Seattle Venture, Ltd.*, B-234998 (Aug. 9, 1989) (the Controller General agreed that an offer should be rejected on "site control" grounds where the evidence of site control was an "agreement" that did not in fact show the consent of the "two necessary parties, the seller and the buyer," and instead was "conditioned on the possibility of prior sale of the land and the successful outcome of contract negotiations."); *Investigation into Programmatic Adjustments to the Standard-Offer Program*, No. 8817, 2017 WL 4841502, at *3, *7 (Oct. 20, 2017) (the Vermont Public Utilities Commission rejected applications for failure to comply with RFP requirements to adequately demonstrate site control; the presented evidence did not show that the application had an "unconditionally exercisable" option for the site in one case, and in another case, the applicant's site control depended on further negotiation with the site owner); *Programmatic Changes to the Standard-Offer Program. Investigation into the Establishment of Standard-Offer Prices Under the Sustainably Priced Energy Enter. Dev. (Speed) Program.*, No. 7873, 2016 WL 3165498, at *5 (May 27, 2016) (the Vermont Public Service Board rejected a proposal because the applicant provided only a "letter of intent," which was not acceptable because "it does not include an option price or option term, and is not unconditionally exercisable by the proponent ..."); *W.D.C. Realty Corp.*, 66 Comp Gen. 302, 306 (March 4, 1987) (the Comptroller General sustained a bid protest on the grounds that the Army wrongfully accepted, as evidence of site ownership/site control, a mere Letter of Intent to purchase the property.); *Integrated Energy Development v. Southern California Edison Company*, 25 CPUC 2d 463, 1987 WL 1497692 (Cal.P.U.C.) (The California Public Utilities Commission held that an Applicant could not demonstrate site control because it had not obtained exclusive development rights as it still needed to firm up the terms of the oral option to obtain site control).

Finally, we agree with W&I that the Department should follow its established procedures and precedents in determining whether the Application is complete. Those established procedures and precedents mandate that site control must be evidenced in order for DOH to deem an

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application complete. Unless and until W&I can demonstrate legally binding evidence of site control, continuation of the review process would waste the time and resources of the Department, the Health Services Council and the involved parties.

As set forth in my March 20, 2019 letter and as conceded by W&I, Section 18.5 of the W&I Ground Lease governs site control. The clear and unambiguous language requires that W&I obtain prior written consent from RIH for the proposed transfer of ownership and control of W&I to BHI and its parent, Partners Healthcare System, Inc., as more fully described in the CEC Application and set forth in the Post-Conversion chart at Tab 15. The only exception to the requirement that W&I obtain prior written consent of RIH is a transfer of the operating assets of W&I to a "Person controlled by, or under common control with, Tenant [W&I] *as it is now constituted.*" (Emphasis added.) Here, the proposed transfer of ownership and control is not to an entity controlled by, or under common control with W&I at the time the Lease was entered into ("as it is now constituted"), but rather would be to a new and unrelated party, namely, BHI and Partners HealthCare System, Inc. Here, the proposed change in ownership and control to a new party is conceded by BHI's filing of the CEC Application.²

Unless and until W&I receives RIH's prior written consent to BHI's proposed acquisition of W&I, legally binding evidence of site control is lacking. For this reason, contrary to the claim in response to Question 24, the applicant, BHI, does not currently have site control, nor will either W&I or BHI have site control for the remaining term of the W&I Ground Lease should the Department approve the acquisition absent written consent from RIH. Accordingly, we respectfully submit that the Department should not and may not accept the CEC Application as complete given the lack of site control.

If you have any questions, please contact me. As always, thank you for your consideration.

Sincerely,



PATRICIA K. ROCHA

cc: Timothy J. Babineau, M.D.
Paul Adler, Esq.
John A. Tarantino, Esq.
Richard R. Beretta, Jr., Esq.
Gerald J. Petros, Esq.

² As set forth in response to Question 1 in the CEC Application, BHI, a subsidiary of Partners Healthcare System, Inc., filed the CEC Application so that it may acquire Care New England Health System, the ultimate parent of W&I. At the closing of the transaction described in the Affiliation and Integration Agreement attached at Tab 14, BHI will be the sole corporate member of Care New England Health System.