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Ms. Jeannie Mitchell
General Counsel
Illinois Health Facilities and Services Review Board
525 West Jefferson, Second Floor
Springfield, IL 62761

RE: Project No. 17-057
Exemption E-048-17

Dear Ms. Mitchell:

I have reviewed the application and materials from the January 18, 2018, Public Hearing on Project 17-057. Specifically, oral testimony and a substantial written presentation by Mr. John Glennon supported by referenced documentation of the Health Facilities and Services Review Board ("Planning Board") rules authorized by the Health Facilities Planning Act ("Planning Act"), Securities and Exchange Commission filings by Surgery Partners, H.I.G. and Bain Capital. A January 23, 2018 letter from Mr. Daniel Lawler, an attorney for one of the applicants, Surgery Partners, Inc., asserts that Mr. Glennon's remarks and presentation "made numerous false statements of material fact . . .' [that] 'were demonstrably false." This letter addresses Mr. Lawler's January 23, 2018 letter related to Project 17-057.

I. Mr. Lawler's Letter Does Not Dispute Most of Mr. Glennon's Testimony and Submitted Written Testimony with Documentation.

It should be noted that much of Mr. Glennon's testimony and submission dealt with the failure of Project 17-057's application ("CON Application") to address requirements in the Planning Act and Planning Board rules that are unrelated to changes of ownership. First, the CON Application fails to address the safety net impact requirements of the Planning Act and Planning Board rules. The inadequacy of the physician referral letters because they do not identify the volume of surgeries the physicians have performed at other facilities. Further, the physician referral letters do not address Planning Board Rules Section 1110.1540(d)(2)(C) requirement that "[t]he percentage of projected referrals used to justify the proposed establishment cannot exceed the historical percentage of applicant market share within a 24-month period after project completion." Section 1110.1540(d)(2)(C) requirements are clearly limitations on the calculation of physician

referrals. A physician referral letter that does not meet this requirement should be excluded in its entirety.

Secondly, the CON Application fails to address Planning Board Rules Section 1110.230(c) requirement that alternatives to the proposed project be analyzed. It is arguable that a joint venture might ameliorate the proposed facility's adverse safety net impact. The Applicants could have considered operating an ASTC jointly with a community hospital or a charitable organization, or it could have considered a charitable donation to offset the diversion of insured patients resulting from the proposed facility. It would be relatively simple given the physician facility privileges and past patient referrals to project the magnitude of the adverse impact on safety net facilities for purposes of calculating a prorated charitable contribution to each facility. After all, the CON Application VASC Inc. provides in the CON Application that it has $17 million in retained earnings. Further, the CON Application avoids disclosing how the proposed facility's projected 8,300 surgeries would impact the cross subsidization required for paying for charity care and Illinois Medicaid inadequacies.

It is again important to note that Mr. Lawler's January 23, 2018 letter does not dispute the issues Mr. Glennon highlighted in his written testimony related to the safety net impact statement, physician referrals, and alternatives to the proposed Project 17-057. Mr. Lawler restricts his criticism to Mr. Glennon's comments related to the many changes of ownership of Illinois health care facilities that Surgery Partners did not bring before the **Planning Board**.

II. The Planning Act, the Planning Board Rules and Staff Advisory Opinions

A. Request for Advisory Opinions

One must recognize certain distinctions established by the Planning Act. First, the Planning Act establishes the Planning Board and specifies certain duties and certain limitations. *See 20 ILCS 3960/4, 5, 6(d), 8.5, and 11.* Second, the Planning Act assigns certain duties to the staff for purposes of supporting the Planning Board. See *20 ILCS 3960/6(c)(5), 6.2, and 12.2.*

Mr. Lawler asserts in his January 23, 2018 letter that "Mr. Glennon falsely asserts that none of the transactions were reported to the Review Board . . . (then quoting Glennon accurately and referencing pages 12-13 of the public hearing transcript)[1] and re-asserts the substance of that criticism four times on pages 3 - 4. Mr. Lawler also states that the "above transactions did not constitute changes of ownership under the Review Board's regulations and did not require

[1] This quote is taken from page 3 of the Lawler letter.

applications for approval." Mr. Lawler attaches letters from an attorney representing a proposed acquirer of an Illinois health care facility to the staff that services the Planning Board.

In substance, each of these attorney letters illustrate that the attorney had a discussion with a staff member describing a proposed acquisition and offered reasons why that acquisition did not require a CON or change of ownership exemption. The January 21, 2011 letter to a staff member letter states that the attorney looks forward to receiving your confirmation that [Planning] Board action is not required. The June 14, 2014 letter to a staff member requests confirmation through an advisory opinion from the staff member that the attorneys' interpretation of the Planning Act and Planning Board rules does not constitute a change of ownership. The May 16, 2017 letter to a staff member requests a determination of reviewability relating to a stock change for up the corporate chain from the facility level.

In each instance, a staff member responded that in the staff person's opinion a CON was not required and that this conclusion is "a staff advisory opinion and does not constitute a determination by the State Board . . . Should you wish to obtain a determination by the State Board, you may request that this declaratory ruling request be put on the State Board agenda in writing to me."

It is therefore clear from Mr. Lawler's January 23, 2018 letter, that in each case the attorney for the acquiring entity was fully put on notice by staff that the staff opinion was "an advisory opinion" and that they could get a Planning Board determination by requesting an advisory opinion, even in some cases citing to the Administrative Code section for Declaratory Rulings. Mr. Lawler submitted no evidence that the transactions were preceded by the Declaratory Ruling process staff identified; he has not suggested that a CON or exemption was applied for; and he has not intimated that the staff advisory opinions were in any fashion reviewed by the Planning Board.

B. Delegation of Authority

Section 5 of the Planning Act provides for the following:

1. "No person shall construct, modify[2] or establish a health care facility or acquire major medical equipment without first obtaining a permit or exemption from the State Board."

2. "The State Board shall not delegate to the staff of the State Board or any other person or entity the authority to grant permits or exemptions whenever the staff

[2] The definition of "construction or modification includes change of ownership.

> or other person or entity would be required to exercise any discretion affecting the decision to grant a permit or exemption."

Section 12.2 of the Planning Act lays out the General Assembly's instructions to the Board and the staff about the staff's duties. It clearly does not convey a power to the staff to grant advisory opinions to applicants or potential applicants. The only language in the section defining the staff review function conveys to staff the power to review applications for permits and exemptions in accordance with the standards, criteria, and plans of need established by the State Board under the Planning Act and certify its finding to the Planning Board. 20 ILCS 3960/12.2(1). By seeking advisory opinions from staff, the attorney for the acquiring entity was requesting an opinion that staff did not have the authority to give. The staff affirmatively advised such attorneys of Declaratory Ruling process. The fact is that the Planning Board rules clearly do not delegate advisory opinions to staff, let alone authorize advisory opinions.

Section 1130 of the Planning Board rules generally define review procedures for a Certificate of exemption. See Sections 1130.240, 1130.500, and 1130.520. There is not a single phrase inviting one to believe that staff has been assigned an independent advisory opinion function on the Planning Board's jurisdiction. While it is surely convenient for everyone involved for staff to state its opinion on the Planning Board's jurisdiction, it is a different matter for an attorney to rely on these letters or to suggest that they have determined jurisdiction, as in fact staff was commendably careful to point out in each letter. This particular conclusion is hammered home by a rule dealing with the responsibility for decisions about Board jurisdiction. The Administrative Procedure Act authorizes the declaratory ruling process. Section 5-150(a) of the Administrative Procedure Act provides that each agency may in its discretion provide by rule for the filing and prompt disposition of petitions or requests for declaratory rulings as to the applicability to the person presenting the petition or request of any statutory provision enforced by the agency or of any rule of the agency. 5 1LCS 100/5-150 (a).

The Planning Board has adopted a rule for declaratory rulings. Section 1130.810 provides in pertinent part:

> HFSRB shall render determinations on various matters relating to permits and the applicability of the statute and regulations. Requests for determinations shall be made in writing. Pursuant to Section 5-150 of the Illinois Administrative Procedure Act, these determinations are declaratory rulings and are not subject to appeal. Matters subject to declaratory rulings by HFSRB include, but are not limited to:
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> (a) whether a proposed project requires a permit or exemption;

The Planning Board has clearly decided how it will determine its jurisdiction. Each acquirer attorney cited by Mr. Lawler in his letter's attachments was informed of the Declaratory Ruling process.

III. **The Act, the Rules and Change of Ownership**

For Project 17-057, the change of ownership matter is relevant in two different ways. First, there can be no legal question that the Planning Act requires a permit or exemption for a change of ownership of a health care facility. 20 ILCS 3960/5. Second, the definition of construction or modification of a health care facility includes changes of ownership. 20 ILCS 3960/3.

If there has been a change of ownership relating to VASC property without a permit or exemption, the Act has been violated. That would trigger a prohibition on licensure. 20 ILCS 3960/13.1. Further, the entity undertaking a change of ownership could be subject to fine under the Planning Act. Section 14.1(b)(4) of the Planning Act provides that a person who constructs, modifies, establishes or changes ownership of a health care facility without first obtaining a permit or exemption shall be fined an amount not to exceed $25,000 plus an additional $25,000 for each 30-day period, or fraction thereof, that the violation continues. 20 ILCS 3960/14.1(b)(4). A fine might become substantial in the case of a failure to apply for a change of ownership exemption dating back several years.

The Planning Act does not use the adjective "operational" in order to define and limit the kinds of "ownership or control" involved in a "change of ownership." It does not get tied up in operations at all. The Planning Act defines change of ownership as follows:

> "Change of ownership of a health care facility" means a change in the person who has ownership or control of a health care facility's physical plant and capital assets. A change in ownership is indicated by the following transactions: sale, transfer, acquisition, lease, change of sponsorship, or other means of transferring control. 20 ILCS 3960/3.

We note and take no position currently on the question of whether the Planning Board has jurisdiction over a person in "operational control" of a health care facility subject to the Planning Act. We simply point out that the Planning Board is obligated by the Planning Act to treat a change in the ownership of a "facility's physical plant and capital assets" as a change of ownership.

It is clear the Planning Board has decided to do precisely that in its rules. The Planning Board rule for definition on change of ownership states that in crystal clear language in four different places as follows:

"Change of Ownership" means a change in the person who has operational control of an existing health care facility or a change in the person who has ownership ***or control of a health care facility's physical plant and capital assets***. A change of ownership is indicated by, but not limited to, the following transactions: sale, transfer, acquisition, leases, change of sponsorship or other means of transferring control. [20 ILCS 3960/3] Examples of change of ownership include:

- a transfer of stock or assets resulting in a person obtaining majority interest (i.e., over 50%) in the person who is licensed or certified (if the facility is not subject to licensure), ***or in the person who owns or controls the health care facility's physical plant and capital assets***; or
- the issuance of a license by IDPH to a person different from the current licensee; or for facilities not subject to licensing, the issuance of a provider number to a different person by certification agencies that administer Titles XVIII and XIX of the Social Security Act; or
- a change in the membership or sponsorship of a not-for-profit corporation; or
- a change of 50% or more of the voting members of a not-for-profit corporation's board of directors, during any consecutive 12-month period, that controls a health care facility's operations, license, certification (when the facility is not subject to licensing) ***or physical plant and capital assets***; or
- a change in the sponsorship or control of the person who is licensed or certified (when the facility is not subject to licensing) to operate, or who owns the physical plant and capital assets of a governmental health care facility; ***or any other transaction that results in a person obtaining control of a health care facility's operations or physical plant and capital assets, including leases***. Section 1130.140

The Planning Board Rules provides who must be parties to applications. Section 1130.220(a) provides that "[t]he following persons shall be the applicants for permit or exemption, as applicable:

a) For construction or modification projects (including projects to establish or change the ownership of health care facilities and including projects to acquire major medical equipment by or on behalf of health care facilities) of one or more existing or proposed health care facilities:

1) the person who will hold and who currently (as applicable) holds the license (or Medicare and/or Medicaid certification if licensing is not applicable) for each facility;

2) the person who has final control of the person who will hold or who currently holds (as applicable) the license (or Medicare and/or Medicaid certification if applicable) for each facility;

3) any related person who is or will be financially responsible for guaranteeing or making payments on any debt related to the project; and

4) any other person who actively will be involved in the operation or provision of care and who controls the use of equipment or other capital assets that are components of the project, such as, but not limited to, fixed equipment, mobile equipment, buildings or portions of buildings, structures such as parking garages, etc.

The Planning Board Rule for exemption related to change of ownership, Section 1130.520(b)(1), contains items within the transactions that must be disclosed in an exemption application. For Project 17-057, some of the Section 1130.520(b)(1) were disclosed to staff in the letters seeking advisory opinions; other required items were not disclosed. For example, subsection 520(b)(1)(E) requires that the applicant list the ownership or membership interests in such licensed or certified entity both prior to and after the transaction, including a description of the applicant's organizational structure with a listing of controlling or subsidiary persons. Further, Section 1130.520(d) provides an opportunity for a public hearing announced with a newspaper notice revealing much of the information in the exemption application.

The acquirer attorney's June 13, 2014, letter states:

1. "It [VASC LP] is owned by both physicians who each own directly in the Surgery Center ("physicians") and VASC Inc., a subsidiary of Symbion Holdings Corporation a Delaware Corporation (the latter through various subsidiaries per the attached organization chart)."

2. "Physicians own a sixty percent (60%) interest in the Surgery Center and Symbion holds a minority interest."

3. ". . . but the ownership will not impact in any way the current percentage ownership interest in the Surgery Center. The physicians will continue to own sixty percent (60%) of the Surgery Center."

4. Finally, the third paragraph asserts that there are decisions (listing them) that "cannot occur without the physicians' consent."

The acquirer attorney could conceivably state that the current percentage ownership interest in the Surgery Center would not be impacted. According to the CON Application, VASC, Inc. has ownership interest of 49.5%, which is greater than the 40% listed in this letter.

While there is a reference to an "attached organization chart" in paragraph two, there is no reference to or submission of a copy of the VASC, L.P. Partnership Agreement. Nor is there reference to or submission of a copy to the bylaws of VASC, Inc. to the Illinois Uniform Limited Partnership Act.

It is important to note that in August 2007, Symbion completed an Agreement and Plan of Merger where a subsidiary of Crestview Partners L.P., a New York based private equity firm, acquired Symbion. Likewise, there is no reference to H.I.G. Capital's significant equity interest in surgery partners.

And it appears that VASC, Inc., the general partner may be 100% owned by Symbion, Surgery Centers, and a private equity firm.

More importantly, Section 406 of the Illinois Uniform Limited Partnership Act provides that "[e]ach general partner has equal rights in the management and conduct of the limited partnership's activities. Except as expressly provided in this Act, **any matter relating** to the activities of the limited partnership **may be exclusively decided by the general partner** or, if there is more than one general partner, by a majority of the general partners. (emphasis added). 805 ILCS 215/406.

The CON Application includes a United States Securities and Exchange Commission ("SEC") filing of Surgery Partners, December 31, 2016. Exhibit A1 of the CON Application. The December 31, 2016, SEC filing of Surgery Partners provides the following:

> "We own and operate our surgical facilities through limited partnerships and limited liability companies. Local physicians, physician groups and healthcare systems also own an interest in all but three of these partnerships and limited liability companies. **In the partnerships in which we are the general partners, we are liable for 100% of the debts** and other obligations of the partnership, even if we do not own all the partnership interests. For some of our surgical facilities, indebtedness at the partnership level is funded through intercompany loans that we provide." Page 298 of the CON Application.
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> "On November 3, 2014, we completed the acquisition of Symbion Holdings Corporation ("Symbion") ("the Merger), which added 55 surgical facilities,

including 49 ASCs and six surgical hospitals, to our network of existing facilities." Page 318 of the CON Application.

"H.I.G. has significant Influence over us, including control over decisions that require the approval of stockholders, which could limit our stockholders' ability to influence the outcome of key transactions, Including a change of control.

As of December 31, 2016, we were controlled by H.I.G. As of that time, H.I.G. beneficially owned 55% of our outstanding common stock. For as long as H.I.G. continue to beneficially own shares of common stock representing more than a majority of the voting power of our common stock it will be able to direct the election of all of the members of our board of directors and could exercise a controlling influence over our business and affairs, including any determinations with respect to mergers or other business combinations, the acquisition or disposition of assets, the incurrence of indebtedness, the issuance of any additional common stock or other equity securities, the repurchase or redemption of common stock and the payment of dividends. Similarly. H.1.G. will have the power to determine matters submitted to a vote of our stockholders without the consent of our other stockholders, will have the power to prevent a change in our control and could take other actions that might be favorable to it." Page 308 of the CON Application.

Another SEC filing made part of the record in the public hearing demonstrates that well before the Project 17-057 CON Application was filed, Bain Capital bought H.I.G.'s shares in Surgery Partners. Mr. Lawler's letter includes a query to staff about that acquisition.

And so today the following points can be made:

1. From the all the documents submitted it appears that staff nor the Planning Board has reviewed the VASC, L.P. Partnership Agreement to determine what powers VASC, Inc., the general partner, has. The attorney letter of June 13, 2014, did not reference nor submit the Partnership Agreement and incorrectly described the transaction in stating that the physicians would retain 60% control of the partnership when this very CON Application states that Surgery Partners now has 49.5% ownership. Further, Symbion had full ownership of the general partner, VASC, Inc. If Symbion, acquired by Surgery Partners, has all the ownership characteristics permitted a general partner under the Illinois Uniform Partnership Act, then Symbion could mortgage, sell, or in certain circumstances even give away the VASC facility, if directed by Surgery Partners. There is eminent possibility

that the VASC, L.P. Partnership Agreement grants control of the VASC physical facility to VASC, Inc.

2. Surgery Partners, the owner of VASC, Inc., plainly and clearly has admitted in this Project 17-057 CON Application its total control by H.I.G. As noted in Mr. Glennon's testimony and submitted documents, before the CON Application was filed, H.I.G. sold their equity interest/control in Surgery Partners to Bain Capital. Bain Capital bought the right to entirely replace Surgery Partners Board of Directors and to exercise a controlling influence over Surgery Partners business. If VASC Inc. has control over the VASC building under the VASC L.P. Partnership Agreement, then it is a person who owns or controls the health care facility's physical plant. And that would make Bain Capital, with plenary control over Surgery Partners, a person who owns **or** controls the health care facility's physical plant. Under both the Planning Act and Planning Board rules, a change of ownership or control of the physical plant is a change of ownership.
3. As noted in the Surgery Partner SEC filing of December 31, 2016, Surgery Partners "owns and operates its facilities" and for "100% of debts and other obligations". Page 298 of the CON Application.

Consequently, Surgery Partners own descriptions of its structure state that it is operationally involved in its facilities. Undoubtedly, an examination of the Partnership Agreement will demonstrate that VASC, Inc., as general partner, is deeply involved in the operations of VASC LP. Therefore, under Sections 1130. 220(a)(3) and 1130.220(a)(4), Bain Capital must be an applicant and should have filed for a Certificate of Exemption Need as should have H.I.G. Capital, Surgery Partners, and Crestview Partners filed for a Certificate of Need for the change of ownership.

Unless the Partnership Agreement, real estate documents, and financing documents relevant to health care facility transaction have been submitted to the Planning Board and approved accordingly, there is no authority for reliance on staff advisory opinions.

Sincerely,

Sam Vinson