

# HUSCH BLACKWELL

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**BY EMAIL: Dennis.Renaud@mass.gov**

Dennis Renaud, Director  
Determination of Need Program  
Massachusetts Department of Public Health  
67 Forest Street  
Marlborough, MA 01752

Re: Steward Health Care System LLC – Norwood Hospital  
Extension of Emergency Determination of Need No. 20121611

Dear Director Renaud:

Steward Health Care System LLC (“Holder”) respectfully requests that the Massachusetts Department of Public Health (the “Department”) grant an extension of the authorization period for Emergency Determination of Need (“DoN”) No. 20121611 until December 31, 2024. The Holder is making this request for extension in consultation with its landlord, Medical Properties Trust (“MPT”), for the reasons set forth below, as part of the process of identifying a successor operator.

On August 30, 2021, the Department issued a notice of emergency DoN to the Holder for a substantial capital expenditure to rebuild Norwood Hospital (“Hospital”), an acute care community hospital with a main campus at 800 Washington Street, Norwood, MA 02062, that provided emergency care and inpatient and outpatient services to the southern MetroWest region (“Project”). Completion of the Project will provide for the first newly-constructed hospital in that area in over 25 years.

Pursuant to 105 CMR 100.310(A)(2), DoN No. 20121611 is valid for a three-year period that is currently set to expire on August 31, 2024. The Holder requests that this period be extended until December 31, 2024, and offers the Department the following information as grounds for why this extension should be granted.<sup>1</sup>

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<sup>1</sup> The current Hospital license will expire on November 5, 2024, unless it is otherwise extended in accordance with DPH requirements. The Holder does not intend to maintain the Hospital license past its expiration on November 5, 2024, but as DPH has already been informed, MPT is engaged in attempts to identify potential successor operators to which the hospital’s DoN and/or license could be transferred before that date.

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## **Underlying Need for the Project**

The Project became necessary due to an unprecedented storm that occurred on June 28, 2020.<sup>2</sup> Floodwaters from the storm destroyed floors, walls, ceilings, fixtures, finishes, mechanical and electrical systems, and various pieces of diagnostic and treatment equipment throughout the Hospital. The storm itself also caused major damage to the Hospital's roof, upper floors, and exterior. A forced evacuation of patients occurred and all services at the Hospital's main campus ceased. The Hospital soon resumed the provision of services at its satellites located elsewhere in Norwood and in Foxboro, but expert consultations determined the main campus could not be reasonably restored to safe and consistently reliable conditions. As a result, the Holder developed a plan to demolish the damaged main campus structure and rebuild the Hospital in the same location. It filed the Application to obtain approval for the expenditure required in connection with the Project, and the Department granted this approval in DoN No. 20121611 on August 30, 2021.

## **Progress Made on the Project**

Following the Department's approval of DoN No. 20121611 and months of planning, design, and permitting, the Holder commenced demolition and construction on the Project in June 2022. As evidence of substantial and continuing progress made on the Project, the Holder filed for and received plan approval from the Department. In addition, the following components of the Project have been completed: demolition of the old main campus building; removal of the old main campus building debris; underground mechanical, electrical, and plumbing; underground fire protection; underground backfill; fire protection standpipes; roof drains and piping; interior layout and early walls; structural steel; exterior framing, sheathing, and air and vapor barriers; and installation of air handlers. The construction of stairs and the installation of cooling towers and curtain wall units has also begun, and water and pressure testing and the installation of the new building roof are currently in progress.<sup>3</sup>

## **Factors Impeding Further Progress**

Despite the progress described above, the Project remains incomplete due to, among other things, the Holder experiencing unforeseeable financial challenges and its insurers failing to honor

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<sup>2</sup> In addition to the factual background detailed in this letter regarding why the extension should be granted, Holder incorporates by reference the materials from the Application and approval of DoN No. 20121611, which are available online: <https://www.mass.gov/doc/steward-health-care-systems-llc-emergency-don-norwood-hospital-application/download>. These materials offer further details regarding the circumstances that created an emergency situation and the need for substantial capital expenditures at Norwood Hospital.

<sup>3</sup> Further documentation evidencing the progress made on the Project, such as site photographs and a Gantt chart, is available upon request if the Department believes it would be helpful in connection with its review of this extension request.

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obligations under the Holders' applicable policies and provide necessary coverage to address Project related costs. Specifically, the Holder has faced significant industry and operational challenges that impacted its revenue in 2021 (following receipt of the DoN No. 20121611) such that revenue decreased by approximately \$580 million from 2019 to 2021 and EBITDAR decreased by \$221 million. Coupled with materially higher labor costs across the Holder's hospital system, inflationary pressure, reimbursement issues related to payer-mix changes, and declining in-patient visits, the Holder was unable to continue to fund the rebuilding of the Hospital under the DoN.

Given the Holder's liquidity constraints and the need to, among other things, progress the Project, Holder assigned its architect and construction vendor contracts for the Hospital to its landlord, MPT in February 2024. The assignment was intended to enable MPT to stabilize and continue progressing the Project, protect the existing structure from the elements, and preserve the Project such that it would be suitable for a successor operator. It is the Holder's understanding that MPT has continued to pay all outstanding invoices related to the Project, but the Project is nevertheless behind schedule.

## **Litigation Impedes Access to Insurance Funds**

The Holder's financial issues are system-wide, but they have been exacerbated with regard to this particular Project by the refusal of the Hospital's insurer to make prompt and complete payment on claims stemming from the June 28, 2020, storm. Following the storm, the Holder promptly notified its insurer, American Guarantee and Liability Insurance Company ("AGLIC") of the damage the Hospital sustained, and MPT did the same with its insurer, Zurich American Insurance Company ("Zurich"). MPT notably submitted a claim to Zurich in the amount of approximately \$200 million based on the protections described in its policy, but Zurich has so far paid only \$36,093,766.95 in connection this claim. MPT has represented to Holder that it intends to utilize the insurance payments under its policy to help cover the costs of and advance the Project, and the wait for these funds is compounding the ongoing construction delays.

MPT's efforts to obtain full payment from Zurich have been zealous and have recently started to yield results. In October 2021, Zurich unexpectedly filed a lawsuit against MPT in the U.S. District Court for the District of Massachusetts to determine its rights and obligations under the Zurich Policy. Count I of Zurich's Complaint sought a declaration that "MPT's recovery under the Policy cannot exceed the Policy's \$100 million sublimit applicable to Flood." MPT and Zurich agreed that judicial resolution of the proper application of the Flood sublimit was necessary before they could proceed with efforts to resolve the overall coverage dispute. In October 2022, the District Court granted Zurich's motion for summary judgment with respect to this declaration, but also certified an Order for interlocutory appeal to the First Circuit Court of Appeals.

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As the interlocutory appeal proceeded, the First Circuit certified its own question to the Massachusetts Supreme Judicial Court (“SJC”) on the definition of the term “surface waters.” The First Circuit deemed this definition to be critical as the term “surface waters” is itself used in the policy’s description of a “Flood.” In July 2024, the SJC responded that “surface waters” do not unambiguously include accumulated rainwater on a roof.<sup>4</sup> This ruling favored MPT, as it supported a conclusion that the \$100 million Flood sublimit was inapplicable to losses stemming from rainwater that infiltrated the Hospital through its roof, upper stories, and a second-floor courtyard. The First Circuit subsequently reversed the District Court’s ruling on Zurich’s motion for summary judgment in August 2024 and remanded the coverage dispute to the District Court for further proceedings consistent with the SJC’s response.<sup>5</sup> However, the schedule for future proceedings before the District Court in this coverage dispute remains uncertain. In the meantime, neither MPT nor the Holder is receiving the insurance payments that are sorely-needed to advance the Project.

### **Request for an Extension**

Under 105 CMR 100.310(A)(2), a Notice of DoN constitutes a “valid authorization” for an applicant to proceed with its project over “a period of not more than three years” following the Department’s approval of the Notice of DoN. Before the end of those three years, 105 CMR 100.310(A)(5) provides that the applicant may file a request for an extension within this three-year “period of authorization.” The regulations provide that the Department should grant the extension where “Substantial and Continuing Progress” is being made on the Proposed Project and “Good Cause Related to Project Implementation” exists.

The definitions listed at 105 CMR 100.100 state that for a project involving construction or renovation, “Substantial and Continuing Progress” means “commencement of demolition and the physical assembly of the foundation of the project,” “commencement of the physical assembly of the additional structure,” or “progress beyond the removal and demolition of an existing facility, or the component structured of an existing facility.” Further, “Good Cause Related to Project Implementation” exists where the applicant has been unable to complete the project due to factors such as the “[f]ailure to obtain a financing commitment” or any “other condition that may be specified by” the Department so long as the applicant is able to demonstrate that the project is “diligently proceeding with the completion of all prerequisites to making Substantial and Continuing Progress.”

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<sup>4</sup> The SJC decision in *Zurich American Insurance Company v. Medical Properties Trust, Inc.* is available at <https://caselaw.findlaw.com/court/ma-supreme-judicial-court/116397418.html>.

<sup>5</sup> The First Circuit’s decision in *Zurich American Insurance Company v. Medical Properties Trust, Inc.* is available at <https://caselaw.findlaw.com/court/us-1st-circuit/116433558.html>.

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The Holder requests the Department to conclude that the authorization period of DoN No. 20121611 can be extended until December 31, 2024, because “Substantial and Continuing Progress” is being made on the Proposed Project. Not only has the Holder completed demolition of the Hospital’s old main campus building and removed all such debris, but it has made significant progress with respect to the physical assembly of the new main campus building. The underground mechanical, electrical, plumbing, fire protection components, and backfill, fire protection standpipes, roof drains and piping, interior layout and early walls, structural steel, exterior framing, sheathing, air and vapor barriers, and air handlers have each been completed. Stairs are partially completed, cooling towers and curtain wall units are partially installed, and work on the new building roof is in progress. Each of these items evidences the “Substantial and Continuing Progress” that is being made on the Project.<sup>6</sup>

In addition, even if the Department were to conclude that substantial and continuing progress has not been made, significant financial challenges that Holder has faced and the litigation delaying access to insurance funds constitute “Good Cause Related to Project Implementation.” At the time DoN No. 20121611 was issued, the Holder could not have foreseen the extent to which factors outside its control, unprecedented inflation rates would impact health care providers. Nor did the Holder anticipate in 2021 that a Chapter 11 bankruptcy filing would forestall the Project. The Holder could not have foreseen the lengths to which Zurich has gone to avoid paying the balance of funds owed under MPT’s policy. Taken together, these factors meet the standard of “Good Cause Related to Project Implementation,” especially in light of the construction progress already made to date and the efforts to move the bankruptcy and insurance litigation forward.<sup>7</sup>

Beyond the facts that Substantial and Continuing Progress” continues to be made and “Good Cause Related to Project Implementation” exists, public policy considerations also favor an extension of the DoN. The Department noted at the time DoN No. 20121611 was issued that there is an “urgent need to have the Hospital rebuilt” so patients in the southern MetroWest region can continue to receive emergency care and inpatient and outpatient services.<sup>8</sup> In particular:

*Norwood Hospital has served the Norwood area and surrounding community (including Walpole, Canton, Foxborough, Wrentham and Sharon) for 100 years ... Since June 28, 2020, the Hospital has been unable to provide to its Patient Panel in Norwood, Walpole, Canton,*

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<sup>6</sup> With regard to the DoN condition for “licensing and operationalizing at least 61 new inpatient psychiatric beds at another hospital facility or campus in Massachusetts no later than December 31, 2022,” The Holder acknowledges this condition has not yet been satisfied and will remain an obligation of the DoN for any successor operator if the DoN is extended.

<sup>8</sup> See Memorandum to Commissioner at 4 (July 30, 2021), available online: <https://www.mass.gov/doc/steward-health-care-systems-llc-emergency-don-norwood-hospital-application/download>.

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*Foxborough, Wrentham. and Sharon with emergency or inpatient, services including stroke and cardiac care, endoscopy procedures, and surgery, as well as outpatient surgery.*

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*More broadly, residents of the Hospital's service area in need of emergency services must seek care further from home. While the Hospital's ED remains closed, patients must seek emergency services at other hospitals, the closest of which is approximately 18 minutes away (Beth Israel Deaconess Needham), resulting in delayed access to emergent care.*

*Department staff note that there is an urgent need for the services to be available and accessible to the Norwood community, particularly access to Emergency Department services. While some services are being offered at the Hospital's satellite sites, many patients are required to travel longer distance to access them. The Hospital's Patient Panel is negatively impacted by the reduction of types of services, and the ability to access them within their community.<sup>9</sup>*

The Administration and the Massachusetts Hospital Association have recently acknowledged that Massachusetts is experiencing a hospital capacity crisis,<sup>10</sup> and the similar conditions that the Department noted with respect to the Hospital at the time DoN No. 20121611 was issued continue to exist. This crisis, which the southern MetroWest region feels acutely, will not be fully remedied until the Project is complete and the hospital reopens.

Granting the extension will allow construction on the Project to continue in the near term, and bring the date of reopening closer to reality and is unlikely to impact the cost of the Project. These considerations further support the Department in using its discretion under 105 CMR 100.100 to approve the extension. For this and all the other reasons set out above, Holder respectfully requests that the Department extend the authorization period for DoN No. 20121611 until December 31, 2024.

Sincerely,



Crystal M. Bloom

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<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., <https://www.boston25news.com/news/local/several-area-hospitals-facing-capacity-issues-moved-high-risk/WGDU3UYL5RHKLE7UHZ5TN7WFQQ/>

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