One Biotech Park
365 Plantation Street
Worcester, MA 01605-2376

February 18, 2021

VIA EMAIL DPH.DON@State.MA.US
AND MAIL

Lara Szent-Gyorgyi
Director, Determination of Need Program
Massachusetts Department of Public Health
250 Washington Street, 6th Floor
Boston, MA 02108

RE: Determination of Need ("DoN") Application Project #21012113-AS – Proposed $223,724,658 Multi-Site DoN for Three New Ambulatory Sites located in Westborough, Westwood & Woburn, each including a Freestanding Ambulatory Surgery Center with Four Operating Rooms, Physician Services and Imaging Services (CTs and MRIs) -- Registration of UMass Memorial Health Care Ten Taxpayer Group ("TTG")

Dear Ms. Szent-Gyorgyi:

Pursuant to the provisions of 105 CMR. §§ 100.100 and 100.435, please accept the following request for registration of a TTG relative to the above-referenced DoN application (the "Application") for the development of three new ambulatory surgery centers and clinical spaces located in Westborough, Westwood and Woburn (the "proposed projects"). Please note the following:

I. Ten Taxpayer Group ("TTG")

1. The name and resident address of each TTG member is attached as Exhibit A hereto.
2. Each TTG member is a resident of the Commonwealth of Massachusetts and is subject to any Massachusetts state income, excise or property tax during 2021, the year in which the Application was filed.
3. Each TTG member is acting as an agent for UMass Memorial Health Care ("UMass Memorial"), One Biotech Park, 365 Plantation Street, Worcester, MA 01605, the operator of UMass Memorial Medical Center and Marlborough Hospital.
4. The representative of the UMass Memorial TTG designated to be the recipient of all written communications concerning the Application relative to this request is Douglas S. Brown, President of Community Hospitals and Chief Administrative Officer (Ph. 508-334-0424).

II. Request that Application be Withdrawn for Failure to Meet DoN Requirements

The UMass Memorial TTG submits that the Application is defective due to lack of compliance with the following DoN regulatory filing requirement, 105 CMR 100.715(B)(2), which provides:

> " For any Application for Notice of Determination of Need made pursuant to 105 CMR 100.715(B)(2)(a) 1. 2. or 3. which includes a Proposed Project within the Primary Service Area of an existing Hospital that is: 1. designated as an independent community disproportionate share or nondisproportionate share Hospital as defined by HPC's Massachusetts Hospital Cohort Designation and Affiliation Status, and 2. not an existing joint venture or Affiliate of the Applicant: a. The Proposed Project must constitute a joint venture with the independent community disproportionate share or non-disproportionate share Hospital; or b. The Applicant must obtain a letter of support signed by the independent community disproportionate share or non-disproportionate share Hospital's chief executive officer and board chair."

The Department, through the above regulation, has attempted to mitigate the significant risks to designated independent community hospitals of the loss of patients that is raised by the location of freestanding ambulatory surgery centers ("ASCs") in close proximity. This is because ASCs tend to attract the most mobile, commercially insured patients, leaving the less lucrative publicly insured patients to the neighboring hospital, and thus with less of the financial cushion provided by private insurance.[1]

In the Application, the Applicant, Mass General Brigham Incorporated ("MGB" or "Applicant") asserts that "there are no independent community hospitals within the primary service areas of any of the Project Sites."[2] However, Milford Regional Medical Center ("Milford") (located in zip code 01757), is designated as an independent community hospital and is within the primary service area of the Westborough site[3]. Thus, Applicant is obligated to document the manner in which it intends to satisfy the above regulation with respect to Milford (e.g. via formation of a joint venture or a letter of support).

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[1] It is important to highlight that the harmful effects of so-called "cherrypicking" of commercial patients are of equal concern in the placement of an ASC (as well as imaging and other ancillary services, such as the proposed projects) within close proximity to a vulnerable community hospital even if it is not included on the current HPC list of specifically protected hospitals. For example, a safety net, high public payer provider such as Marlborough Hospital is worthy of the same consideration to ensure that it can continue to serve a patient panel with a healthy balance in payer mix. The AGO recently stated that as public payers reimburse at lower rates than commercial payers, providers must ensure that they have a high enough share of commercially insured patients for financial survival. Yet studies have consistently shown that it is precisely the providers with the highest share of publicly-insured patients that receive the lowest levels of commercial payment. See AGO 2020 REPORT (pg. 20).

[2] Question 7.3 on the Application is unchecked regarding location of an ASC within the Primary Service Area of and independent community hospital.

[3] https://www.mass.gov/doc/bulletin-hpc-2020-01-independent-community-hospitals/download

Where an Application fails to meet the requirements of the DoN program, it is appropriate for the Application to be withdrawn.[4]

III. Public Hearing

Should the application not be withdrawn for lack of compliance, the UMass Memorial TTG hereby requests that the Department of Public Health (the "Department") schedule one or more public hearings in connection with the Application. In light of the public health emergency, we assume the public hearing(s) would be remote. To the extent there is an in person option, it should be provided in each of the three proposed project locations. We also propose that the Department consider pre-approving a limited number of individuals providing testimony on behalf of each Party of Record to ensure that each hearing is balanced and time limited.

IV. Independent Cost Analysis ("ICA")

Should the application not be withdrawn for lack of compliance, the UMass Memorial TTG hereby requests that the Department require the Applicant to undergo an independent cost-analysis ("ICA") pursuant to See M.G.L. c.111, §25C(h) and 105 CMR 100.405 to determine if the Proposed Project is consistent with the "Commonwealth's efforts to meet the health care cost-containment goals established by the commission" (i.e. the Health Policy Commission ("HPC")".

Authority for and Role of the ICA

Where a DoN application is subject to a separate Cost Market Impact Review ("CMIR") by the HPC, the Department may base its determination of whether an applicant fails to meets one or more of the DoN Factors on the HPC's CMIR, and may rescind or amend an approved DoN

[4] Under the prior DoN Guidelines, in at least one an analogous situation the Department required the Applicant to withdraw its application with prejudice. In that case, MGH initially had filed an application to locate a linear accelerator at Newton Wellesley Hospital without following DoN Guidelines in effect at that time Those DoN guidelines included a similar requirement to the current DoN regulations concerning the siting of ASCs that an applicant for a new megavoltage radiation therapy (MRT) service seek to collaborate with existing local hospital providers, in that case Beth Israel Deaconess Medical Center's former satellite cancer center in Waltham. After withdrawing the first application, MGH later refiled a facially or minimally compliant application, and similar issues were raised by the Beth Israel TTG (2007). MRT services were ultimately reconfigured in the affected service areas thereby addressing various provider concerns.

application on that basis[5]. In the absence of a CMIR, however, the Department has the authority to require that an ICA be conducted for these purposes.[6]

As noted above, the ICA statute contemplates that the Department use the ICA process similarly to a CMIR to ensure a proposed project meets the cost containment goals established by the HPC[7]. The HPC's approach to cost containment, like the Department's, also includes the goal of advancing a more equitable health system for all citizens, reducing the disparities in access to care and treatment that also contribute to increased health care spending. Thus the DoN factors that pertain to both cost containment and health equity, which are the purview of an ICA, may be interpreted consistent with the HPC's approach to cost containment. [8]

With respect to the applicability of the ICA to this Application in particular, there are significant concerns that the proposed projects are inconsistent with the key purpose of the DoN program as set forth in the regulations: "ensuring that "resources will be made reasonably and equitably available to every person within the Commonwealth at the lowest reasonable aggregate cost advancing the Commonwealth's goals for cost containment". More specifically:

- Under DoN Factor 1, the applicant must demonstrate that (a) "the proposed project will compete on the basis of price, total medical expenses, provider costs, and other recognized measures of health care spending" while also (b) "providing reasonable assurances of health equity"; and
- Under Factor 2, the applicant must "sufficiently demonstrate that the proposed project will meaningful contribute to the Commonwealth's goals for cost containment".

The proposed projects raise concerns that these cost and health equity related considerations will not be met due to numerous independent factors as well as the confluence of such factors taken

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[5] "… as part of a completed Cost and Market Impact Review, the HPC may provide a written recommendation to the Commissioner that the Notice of Determination of Need should not go into effect on the basis of findings contained within the completed and publicly released Cost and Market Impact Review. Upon receipt, the Commissioner shall determine if the Cost and Market Impact Review contains information sufficient for the Commissioner to conclude <u>that the Holder would fail to meet one or more of the specified Factors</u>. Should the Commissioner determine that the Holder would fail to meet one or more of the specified Factors, he or she shall refer the matter to the Department. The Department may rescind or amend an approved Notice of Determination of Need based upon information in the Cost and Market Impact Review as it relates to compliance with the Determination of Need Factors. If a Notice of Determination of Need is rescinded by the Department and a new Application is filed, such Application must satisfy 105 CMR 100.210 and shall account for the concerns expressed by the Department within their findings. 105 CMR100.310(D)(3).

[6] DPH is not foreclosed from conducting an ICA even in cases where there is a CMIR. The HPC is not foreclosed from conducting an analysis similar to a CMIR even where DPH is conducting an ICA.

[7] "Any action taken by a provider to circumvent the purpose and object of the program is a violation of the DoN Regulations." 105 CMR 100.001.

[8] The ICA, like the CMIR, is also an important backstop for the DoN program in the absence of the State Health Plan that was envisioned as part of Chapter 224. Significantly, the Massachusetts Attorney General's Office ("AGO") recently reiterated the need for regional health planning for the promotion of health equity; planning input on proposed facility expansion and investment plans, including as part of the Determination of Need process, can ensure that changes to the health care delivery system meet the priority needs identified through such assessment process. https://www.mass.gov/doc/building-toward-racial-justice-and-equity-in-health-a-call-to-action/download (p. 50) November 16, 2020, hereinafter "AGO 2020 REPORT").

together. The following is a list of such factors, including specific cost/access related considerations pertaining to the Westborough location:

- The scope and magnitude of the proposed projects.
- Applicant's status as the Commonwealth's largest health care system[9].
- Applicant's dominant market share overall.[10]
- Applicant's disproportionately large number of commercial pay patients, particularly outside of the Boston areas where it is seeking to expand.[11]
- Applicant's disproportionately low percentage of MassHealth enrollees within its patient panel, particularly outside of the Boston area where it is seeking to expand.[12]
- Applicant's status as the highest cost provider in the Commonwealth.[13]
- Applicant's proposed "cost-saving" model in light of available data which demonstrate that the Applicant's ambulatory care services may be higher costs than comparable community hospital and ambulatory services already available in the regions.
- The location of the proposed projects outside the Applicant's service area.
- The local markets where the proposed projects will be sited are already well served by existing low-cost, high quality providers[14].
- Applicant's proposed projects depend on increasing the number of physicians, over and above what is needed to serve any existing patients in these markets, thus intending to further grow its patient base outside of its the service area.[15] Applicant recently stated

[9] According to FY19 CHIA Inpatient Case Mix Data, MGB accounts for 19.6% of inpatient discharges as compared to UMass Memorial's 6.5%. See also https://www.mass.gov/doc/final-cmir-report-phs-mee-0/download for the HPC's most recent CMIR concerning Applicant for a discussion of this and the other factors listed here.

[10] According to FY19 CHIA data, MGB has $7.3B in NPSR, almost three times the amount of each of the next few ranked health systems, accounting for over 30% of total operating revenue of all of the state's health systems and hospitals combined.

[11] According to FY19 CHIA IP Case Mix Data, MGB has a disproportionate market share (26%) of commercial patients. UMass Memorial has 6.7% share of commercial patients. Significantly, MGB captures a higher proportion of commercial patients at its community locations outside of Greater Boston (39.9% statewide v. 53.7% in Central Massachusetts).

[12] According to FY19 CHIA Inpatient Case Mix Data, Medicaid represents a disproportionately low portion (12.3%) of MGB patients statewide. MGB's Boston area hospital percentage is lower (11%). This is compared with UMass Memorial at 24.5%. MGB's payer mix in Central Massachusetts is even more skewed at 53.7% commercial pay compared with only 9% Medicaid. UMass Memorial Central Massachusetts payer mix is evenly distributed at 29.9% commercial and 25.4% Medicaid, capturing 51% of Central Massachusetts Medicaid Market.

[13] MGB physician pricing is 19% higher than UMass Memorial's medical group, based on the CHIA 2018 Cost Trend Report Chartpack. MGB ranks #1 in both total revenue and total margin compared to all other physician groups with $2.78B in revenues and a positive 2.7% margin ($73.9M) based on CHIA FY19 data. UMass Memorial Medical Group has a negative 8.3% total margin ($46.3M). MGB's hospital pricing is 20% higher and also ranks first in terms of total revenue and total margin. MGB's Boston hospitals also have the highest FY18 Inpatient Net Patient Service Revenue per Case Mix Adjusted Discharge ("NPSR per CMAD") of the Commonwealth's six academic medical centers (January 2020 CHIA Acute Hospital Profile Report). UMass Memorial has the lowest; it would earn between $155M and $207M more annually if paid at MGB's rates.

[14] There are approximately 24 facilities within a ten minute drive of the proposed Westborough location, which provide the same services as the proposed projects, fourteen of which are specialty care facilities. Nearly 200 facilities are within twenty minute drive of the proposed Westborough location, including three hospitals and an ambulatory surgery center.

[15] The Application states (p. 10; p. 26 of electronic document) that "By providing the Physician services at the Westborough and Woburn Sites, the Applicant will increase access to primary care and specialty care and behavioral

that "[t]he growth comes despite a decline in systemwide inpatient discharges and lower volumes for some outpatient services".[16]

- The proposed projects are (i) sited in higher income areas with high percentages of commercial insurance coverage and low percentages of residents who are Black and Latino or living in poverty, and (ii) are designed to attract more mobile, higher income, commercial pay patients.[17]
    - If existing local safety net providers, such as Marlborough Hospital and other UMass Memorial Health Care affiliates lose additional commercial pay volume to the Applicant, it will make it more difficult for them to continue vital services for MassHealth and uncompensated care patients which generate significant financial losses.[18]

  Primary care and specialty physicians at the proposed project locations are likely to refer patients for follow-up and inpatient treatment to higher cost Boston area hospitals and providers within the MGB system rather than to lower cost providers in the surrounding community.
- The proposed project facilities will rely on the local hospitals, the same entities from which they are hoping to attract patients, for access to their emergency rooms when patients need to be transferred emergently in the event of complications.[19]

Each of these factors alone, and more so in their totality raise, serious concerns as to whether the proposed projects will increase health disparities and increase costs overall for the Commonwealth and for patients, particularly through the strong likelihood that care will be shifted for the more lucrative commercially insured patients who otherwise would receive lower cost, high quality care in their communities to a new higher cost provider.

Proposed Scope of ICA

The purpose and scope of the ICA is to ensure that the Department is able to evaluate appropriately whether the proposed projects run counter to the Commonwealth's goal of reducing health care disparities and advancing better health and better care – at a lower cost-for all

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health Physician Services in convenient, community-based settings not only for the applicable members of the Patient Panel **but also for other individuals who live in the primary services areas of the Westborough and Woburn Sites**." (Emphasis added.)

[16] https://www.beckershospitalreview.com/finance/mass-general-brigham-records-1-1b-net-income-in-q1.html.

[17] The proposed Westborough facility would expand MGB's service area to many new communities which are in the top quintile of income in the Commonwealth ($139,428 - $373,970), and thus with high rates of commercial insurance. All but three of the thirteen towns in Westborough area exceeds the Median household income level at more than 130% of the statewide average. In addition, poverty levels within each town are well below the statewide, Boston, Worcester and two neighboring counties, and have a lower 65+ population than the statewide and Worcester County average. According to US census 2019 information results:

- Median Income: MA ($81,215) v. Westborough ($112,153)
- Persons in Poverty: MA & Worcester County (9.4%) v. Westborough (4.6%)

[18] See note 1 above regarding the detrimental impact of "cherrypicking".

[19] See 105 CMR 140.305: "Emergency Transfer (A) Each clinic shall have a written agreement with a nearby hospital providing emergency services for the transfer there of patients for emergency treatment beyond that provided by the clinic." Typically, the ASC will call 911 and the patient is transported to the nearest hospital. Clinics have not traditionally compensated the local hospital for such support either directly or through community benefits or health initiatives.

residents. The ICA would address the proposed projects' effects on the Commonwealth's cost containment goals looking at both the cost to the affected communities and the Commonwealth as a whole.

We propose that the ICA address, at a minimum, the following items with respect to each location individually, as well as collectively, as the analysis may vary by location:

1. An analysis of and comparison among: (a) MGB's projected patient panel growth in each of the proposed projects' service areas, including an analysis of anticipated patient panel growth by individual facility; (b) the number of MGB's existing hospital patients which it projects will be decanted to the proposed project locations; (c) lack of reduction of hospital campus capacity as a result of this proposed shift; and (d) apparent projected backfilling and/or expansion of hospital capacity as a result of the proposed shifting of patients to ambulatory care.
2. The reasonableness of the size of the proposed projects in proportion to MGB's current patient panel need in each of the affected service areas, not accounting for a potential shifting of market share to MGB, including:
    a. Sufficiency of existing access to the proposed projects' services (e.g. outpatient surgery, radiology) and services lines (e.g. cardiology, orthopedics) in the affected areas,including an analysis of current wait times, accounting for the pandemic[20].
    b. The amount of current outmigration for such services from the proposed projects' areas to MGB and MGB affiliate inpatient and outpatient locations.
    c. Whether MGB considered the full range of alternate options for its actual need and evaluated them appropriately from an access, equity and cost perspective.
3. A comparison of the expected pricing for clinic-based services at the proposed projects' locations with comparable hospital–based and clinic–based outpatient, physician and ancillary services already serving the affected areas.
4. The likely impact of the proposed projects on health care costs overall, including based on both a comparison among and the net effect of (1) any cost savings or increases resulting from relocating hospital-based services from local community hospitals to MGB clinic locations, (2) any cost increases resulting from shifting patients from lower cost community providers of all types other than hospitals to MGB's services at the proposed new locations; and (3) the impact of providers at the proposed projects' locations making referrals for follow-up specialty and inpatient services to MGB providers, including MGB's teaching hospitals.
5. The net staffing impact of the proposed projects looking at: (a) projected staffing needs at the proposed projects in light of existing and projected patient panel growth, including whether and what type of additional staff Applicant will need to recruit to operate the services; (b) the availability of the needed staff in the area; (c) the potential reduction of staffing at existing providers in the service area due to becoming employed at the new proposed projects; and (d) a comparison of Applicant's compensation structures to that of affected providers in impacted service areas.
6. The impact on health equity locally and statewide as a result of MGB locating the proposed projects in the wealthiest communities, including considering that Medicaid

[20] Average wait times in the Westborough area are shorter than in other UMass Memorial communities.

represents a smaller percentage of MGB's patient panel than that of existing area providers.

7. The impact on health equity locally and statewide as a result of MGB locating the proposed projects (i) in communities with relatively low percentages of residents living in poverty and of Black and Latino residents compared to the Commonwealth as a whole, and (ii) not in other areas where there is less access to services than in the areas Applicant has selected for its proposed project locations.
8. The particular impact of the proposed projects on the fiscal stability of the safety net and high public payer hospitals already serving the proposed project areas, including with respect to projected losses of commercially insured patients from local providers to MGB in general and with respect to the key services and service lines to be provided at the proposed projects' locations including via referrals to other MGB affiliates for follow-up specialty and inpatient care.[21]
9. The impact of the proposed projects on payers and consumers generally and to what extent purported savings will be reflected in lower prices for payers and consumers.
10. The impact of the proposed projects on MGB's operations and cost position in the Commonwealth overall including the ability of the proposed projects to lower TME, and to the extent there is such a reduction, whether it is due largely to the reduction in Medicare reimbursement due to site of service or whether it will impact commercial rates.
11. The relevance of the two other applications that MGB simultaneously submitted for Brigham and Women's Faulkner Hospital and Massachusetts General Hospital's main campus, as well as of the applications and current operations of relevant examples from the 13[22] approved applications that MGB has submitted since 2017 as they pertain to MGB's ambulatory care strategy, which may shed further light on the potential impact of the proposed projects.[23]

<u>ICA Consultant</u>

In conducting the ICA, DPH shall ensure that the independent consultant has expertise in two areas. First, in evaluating the impact of the proposed projects on (a) payer and consumer costs and (b) health equity, including disparities in access to care and treatment. Second, experience similar to that of the HPC and/or its consultants in analyzing the cost market-impact of similar

[21] A high proportion of UMass Memorial's commercially insured patients reside in proximity to the proposed Westborough facility (68% within 30 minutes) and 75% of the patients seeking primary care in the UMass Memorial Westborough area are commercially insured. As stated in the AGO 2020 Report: "Loss of existing commercial market share places additional financial pressure on this High Public Payer system…the challenges may have a particularly destabilizing impact for hospitals and doctors who disproportionately care for low-income communities and communities of color. These communities rely on the continued operation of their trusted health care providers, particularly where transportation or language barriers make getting care at other sites difficult, and rely heavily on MassHealth, which pays providers less than commercial plans. These providers often receive the lowest commercial payment rates for their service… Persistent reliance on cross-subsidization between commercially insured and publicly insured patients to fund the health care delivery system has prevented providers who serve low-income communities and communities of color from thriving for years." (p. 22-23).

[22] These includes transfer of site.

[23] MGB's Foxborough location is comparable to the proposed projects but was constructed in a manner that largely avoided the DoN process, and has been expanding over the past few years. The impact of that ambulatory location on local community hospitals and other providers is worthy of inclusion within this scope.

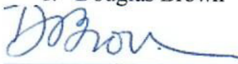
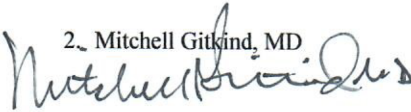
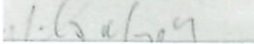
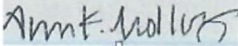
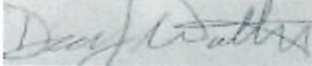
projects, including in particular experience with the types of analyses that are conducted for the purposes of antitrust review. If an individual consultant does not have requisite experience in these areas, perhaps separate consultants working in tandem could be engaged.

Thank you for the opportunity to participate in this process. We are happy to discuss these preliminary comments to provide clarification should the Department have any questions. We look forward to providing further testimony and comments later in the process after we have had an opportunity to carefully study the Application.

[Signature page follows]

Exhibit A

Respectfully submitted:

Name (signature & printed)	Home Address
1. Douglas Brown 	
2. Mitchell Gitkind, MD 	
3. Steven Roach	
4. Daniel Carlucci, MD	
5. William Fischer	
6. Michael Murphy 	
7. Ann Molloy 	
8. Vibha Sharma, MD	
9. David Walton 	

10. Charles Cavagnaro, MD

11. Joseph Leandres

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