



## COMMONWEALTH of VIRGINIA

Department of Health  
P O BOX 2448  
RICHMOND, VA 23218

TTY 7-1-1 OR  
1-800-828-1120

April 3, 2023

### By Email

Matthew M. Cobb, Esquire  
Williams Mullen  
200 South Tenth Street  
Richmond, Virginia 23219

**RE: Certificate of Public Need (COPN)  
No. VA-04833  
(COPN Request Number VA-8657)  
Medical Facilities of America XI (11)  
Limited Partnership  
Arlington, Virginia  
Planning District 8  
Health Planning Region II  
Addition of Addition of 30 nursing home beds to Cherrydale Health &  
Rehabilitation Center through transfer of 30 nursing home beds from Salem  
Health & Rehabilitation Center (PD 5), pursuant to Va. Code § 32.1-102.3:7**

Dear Mr. Cobb:

In accordance with Article 1.1 of Chapter 4 of Title 32.1 (§ 32.1-102.1 *et seq.*) of the Code of Virginia (the "COPN Law"), I have reviewed the application captioned above. As required by Subsection B of Virginia Code § 32.1-102.3, I have considered all matters, listed therein, in making a determination of public need under the COPN law.

I have reviewed and adopted the enclosed findings, conclusions and recommended decision of the adjudication officer that convened the informal fact-finding conference on this application in accordance with the Virginia Administrative Process Act, Virginia Code § 2.2-4000 *et seq.*

**Based on my review of this application and on the recommended decision of the adjudication officer, I am approving the application. The project proposed in the application should meet a public need.**

The reasons for my decision include the following:

- (i) The project fully complies with the components of the nursing home bed transfer statute;
- (ii) The project is adequately consistent with applicable provisions of the State Medical Facilities Plan;
- (iii) The total capital and financing costs of the project are reasonable, the project is feasible; and
- (iv) Approval of the project would be consistent with administrative precedent, as insisted by the applicant.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Parham Jaber' with a small 'MD' monogram at the end.

Parham Jaber, M.D., M.P.H.  
Acting State Health Commissioner

Encl.: 2

cc:

Reuben Varghese, MD  
Director, Arlington Health District  
Dean Montgomery  
Executive Director  
Health Systems Agency of Northern Virginia  
Deborah K. Waite  
Virginia Health Information, Inc.  
Allyson Tysinger, Esq.  
Senior Assistant Attorney General  
Douglas R. Harris, JD  
Adjudication Officer  
Erik Bodin  
Director, Division of Certificate of Public Need

**COMMONWEALTH OF VIRGINIA**  
**DEPARTMENT OF HEALTH**  
**MEDICAL CARE FACILITIES CERTIFICATE OF PUBLIC NEED**

**THIS CERTIFIES THAT** Medical Facilities of America XI (11) Limited Partnership, is authorized to initiate the proposal described herein.

**NAME OF FACILITY:** Cherrydale Health & Rehabilitation Center

**LOCATION:** 3710 Lee Highway, Arlington, Virginia 22207

**OWNERSHIP AND CONTROL:** Medical Facilities of America XI (11) Limited Partnership will maintain ownership of and control over the approved resources.

**SCOPE OF PROJECT:** Addition of 30 nursing home beds, for a total licensed capacity of 210 nursing home beds, to Cherrydale Health & Rehabilitation Center, an existing nursing facility, through transfer of 30 nursing home beds from the Salem Health & Rehabilitation Center, a nursing facility in Planning District 5 existing or otherwise affiliated with a Medical Facilities of America corporate umbrella, in accordance with specifications and representations made during the course of review. The total authorized capital and financing cost of the project is \$4,360,937. The project is scheduled to be completed by March 30, 2024.



Pursuant to Chapter 4, Article 1:1 of Title 32.1, Sections 32.1-102.1 through 32.1-102.11, Code of Virginia (1950), as amended and the policies and procedures promulgated thereunder, this Medical Care Facilities Certificate of Public Need is issued contingent upon substantial and continuing progress towards implementation of the proposal within twelve (12) months from the date of issuance. A progress report shall be submitted to the State Health Commissioner within twelve (12) months from the date of issuance along with adequate assurance of completion within a reasonable time period. The Commissioner reserves the right to renew this Certificate in the event the applicant fails to fulfill these conditions. This Certificate is non-transferable and is limited to the location, ownership, control and scope of the project shown herein.

**Certificate Number:** VA-04833

**Date of Issuance:** April 3, 2023

**Expiration Date:** April 2, 2024

  
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Parham Jaber, M.D., M.P.H., Acting State Health Commissioner



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**Recommended Case Decision  
Certificate of Public Need (COPN)  
Request Number VA-8657  
Medical Facilities of America XI (11) LP  
Arlington, Virginia  
Planning District (PD) 8  
Health Planning Region II  
Addition of 30 Nursing Home Beds to  
Cherrydale Health and Rehabilitation Center**

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This document is a recommended case decision submitted to the State Health Commissioner ( hereinafter “Commissioner”) for consideration and adoption. It follows full review of the application captioned above and the convening of an informal fact-finding conference (IFFC)<sup>1</sup> conducted in accordance with the Virginia Administrative Process Act (VAPA)<sup>2</sup> and Title 32.1 of the Code of Virginia.

**Authority**

Article 1 of Chapter 4 of Title 32.1 (§ 32.1-102.1 *et seq.*) of the Code of Virginia (the “COPN Law”) addresses medical care services and provides that “[n]o person shall undertake a project described in [this Article] or regulations of the [State] Board [of Health] at or on behalf of a medical care facility . . . without first obtaining a certificate [of public need] from the Commissioner.”<sup>3</sup> The endeavor described and proposed in the application falls within the statutory definition of “project” contained in the COPN Law, and, thereby, requires a certificate of public need (COPN, or “Certificate”) to be issued before the project may be undertaken.<sup>4</sup>

In addition, Section 32.1-102.3:7 (the nursing home “bed transfer statute,”) applies with specificity to proposed relocations of nursing home beds when the transfer would occur between two PDs. The bed transfer statute reads:

A. Notwithstanding the provisions of [an existing section in the COPN law requiring a request for applications (RFAs) for nursing home beds], the Commissioner shall accept and may approve applications for the transfer of nursing facility beds from one planning district to another planning district when no [RFA] has been issued in cases in which the applicant can demonstrate (i) that there is a shortage of nursing facility beds in the planning district to which beds

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<sup>1</sup> The IFFC was held on December 5, 2022. The certified reporter’s transcript of the IFFC is in the administrative record.

<sup>2</sup> Va. Code § 2.2-4000 *et seq.*

<sup>3</sup> Va. Code § 32.1-102.1:2 (A); (a “Certificate” or COPN).

<sup>4</sup> Va. Code § 32.1-102.1.

are proposed to be transferred, (ii) the number of nursing facility beds in the planning district from which beds are proposed to be moved exceeds the need for such beds, (iii) the proposed transfer of nursing facility beds would not result in creation of a need for additional beds in the planning district from which the beds are proposed to be transferred, and (iv) the nursing facility beds proposed to be transferred will be made available to individuals in need of nursing facility services in the planning district to which they are proposed to be transferred without regard to the source of payment for such services.

B. Applications received pursuant to this section shall be subject to the provisions of this article governing review of applications for certificate of public need.

According to the patron of the 2013 legislation<sup>5</sup> that enacted the bed transfer statute, subsection B, directly above, was included to provide that “the remainder of the administrative procedures and process for review of applications remain in effect.”<sup>6</sup>

### **Statement of Facts**

1. Medical Facilities of America XI (11) LP (MFA), d/b/a Cherrydale Health and Rehabilitation Center (MFA) operates a 180-bed nursing home in Arlington. MFA also operates the Salem Health and Rehabilitation Center, located in PD 5.
2. In its application, MFA proposes to transfer 30 nursing home beds from Salem Health and Rehabilitation Center to Cherrydale Health and Rehabilitation Center (“Cherrydale”) pursuant to the bed transfer statute. The project would involve construction. Total capital and financing costs of the project are \$4,360,937.

### **The Proposed Project in Relation to the Four Criteria in the Nursing Home Bed Transfer Statute.**

1. **A Shortage of Beds Exists in PD 8.** DCOPN recently determined that a numerical need for 284 nursing home beds currently exists in PD 8. The application meets this standard.
2. **The Number of Beds in PD 5 Exceeds the Need for Such Beds.** DCOPN recently determined that a numerical surplus of 224 beds exists in PD 5. Reducing that figure by the number of beds since transferred from PD 5, MFA represents that a current numerical surplus of 147 beds exists in PD 5. The application meets this standard.
3. **The Proposed Transfer of Beds would not Result in Creation of a Need for Additional Beds in PD 2.** Transferring the proposed nursing home beds would not create a current need for beds in PD 5, as PD 5 would continue to have a numerical surplus of 117 beds if the project were approved. The application meets this standard.

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<sup>5</sup> House Bill 2292 (2013).

<sup>6</sup> Letter, Del. R. Orrock to D. Harris, May 21, 2019 (MFA IFFC Exhibit 4).

**4. The Beds to be Transferred will be Made Available to Individuals in Need of Services without Regard to the Source of Payment.** MFA assures the Commissioner that the beds to be transferred will be certified for both Medicare and Medicaid services reimbursement. The application meets this standard.

#### **Applications of Criteria of Public Need**

The eight statutory considerations customarily applied to applications for a Certificate appear below, with discussion:

**1. The extent to which the proposed service or facility will provide or increase access to needed services for residents of the area to be served, and the effects that the proposed service or facility will have on access to needed services in areas having distinct and unique geographic, socioeconomic, cultural, transportation, and other barriers to access to care.**

MFA assures the Commissioner that, if the project were approved, Cherrydale will become a nursing facility of 210 skilled nursing home beds, all “open to the public.”<sup>7</sup>

MFA states that approval of the project would increase access to needed services by, for example, “provid[ing] much needed relief” to nearby Virginia Hospital Center, which relies on Cherrydale to receive patients discharged from VHC who are able to receive care in a lower-acuity setting.<sup>8</sup>

**2. The extent to which the project will meet the needs of the residents of the area to be served, as demonstrated by each of the following: (i) The level of community support for the project demonstrated by citizens, businesses, and governmental leaders representing the area to be served; (ii) The availability of reasonable alternatives to the proposed service or facility that would meet the needs of the population in a less costly, more efficient, or more effective manner; (iii) Any recommendation or report of the regional health planning agency regarding an application for a certificate that is required to be submitted to the Commissioner pursuant to subsection B of § 32.1-102.6; (iv) Any costs and benefits of the project; (v) The financial accessibility of the project to the residents of the area to be served, including indigent residents; (vi) At the discretion of the Commissioner, any other factors as may be relevant to the determination of public need for a project.**

Virginia Hospital Center, located on a single nearby campus, supports the project. DCOPN is not aware of any opposition to the project. MFA argues that no alternative to the project exists.

MFA assures the Commissioner the project is the least costly and most effective way to achieve the purposes identified and touted, which is a recognizably apparent

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<sup>7</sup> MFA Proposed Findings and Conclusions at 16.

<sup>8</sup> *Id.*

conclusion perhaps reachable only if the specific need the project has been designed to meet (including certain benefits touted by the applicant at the IFFC and in pleadings that are incidental or circumstantial to the regulated core of the applicant's overall project) has supplanted public need in case decisions involving the bed transfer statute. MFA assures the Commissioner of Medicare and Medicaid availability to these additional 30 beds, subject to federal review and reimbursement approval.

Serving the role afforded it in the COPN Law, HSANV reviewed the project in detail and recommends denial of the project. HSANV's opposition to nursing home bed relocations to PD 8 is long-standing, and lies in some evidence suggesting PD 8 does not, in fact, have a public need for additional nursing home beds overall. HSANV maintains that the computational methodology in the SMFP is unreliable when it shows a need for beds in PD 8. HSANV firmly holds to the conclusion that the SMFP methodology is "discredited" and "a problematic policy."<sup>9</sup> HSANV maintains further that "[n]ursing home [bed] demand in Northern Virginia has been falling for more than three decades."<sup>10</sup> Inescapably, though, the methodology is one of two basic indicators of numerical need in the SMFP, adopted as regulation, to begin the analysis of public need.

HSANV has, since enactment of the nursing home bed transfer statute, disagreed fundamentally with that law, as it presumably did with earlier legislative bills, routinely enacted before the bed transfer statute to further the approval and certification of particular endeavors by health care interests that would carry out the transfer of nursing home beds. Since 2013, HSANV has recommended denial of each project in a series of COPN reviews that has looked at relocations proposed pursuant to the bed transfer statute.

The total costs of the project are reasonable. Benefits of the project, according to MFA, include a specialized on-site dialysis service and expanded availability of Medicare and Medicaid certified beds.

Despite evidence brought and argument made by HSANV indicating an absence of public need for the project, the computational methodology, decried by HSANV, exists in adopted regulation and is the only means by which an analysis of numerical need for nursing home bed need customarily begins. But no other methodology exists to attempt an answer of actual nursing home bed need, and the Commissioner continues to rely on the methodology in issuing periodic RFAs, as required by the COPN Law.

### **3. The extent to which the application is consistent with the State Medical Facilities Plan.**

12 VAC 5-230-610 contains the computational methodology by which need for nursing home beds are calculated in PDs statewide. This section, like the provisions of

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<sup>9</sup> Letter from D. Montgomery to E. Bodin, Nov. 9, 2022.

<sup>10</sup> Transcript at 80 (Montgomery). Further, HSANV states that "... the population [of PD 8] has more than doubled, but the aggregate demand for nursing home care is essentially no greater than it was over [this] period of time. And that's because the use rate is falling," reflecting, in part, a younger population. *Id.* at 80-82.

the COPN Law calling for an RFA, does not operate to determine any numerical need for nursing home beds sought to be relocated under the bed transfer statute.

The project appears to demonstrate adequate compliance with applicable provisions of the SMFP, as they are currently applied.

**4. The extent to which the proposed service or facility fosters institutional competition that benefits the area to be served while improving access to essential health care services for all persons in the area to be served.**

The project will increase the nursing home bed complement at Cherrydale by approximately 17 percent. As proposed, the project is unlikely to engender substantial negative competition.

**5. The relationship of the project to the existing health care system of the area to be served, including the utilization and efficiency of existing services or facilities.**

Cherrydale has a strong and symbiotic, institutional relationship with nearby Virginia Hospital Center (VHC), taking over the care of many of that hospital's acute patient discharges needing sub-acute and long-term care. MFA states that Cherrydale has had a very high post-pandemic occupancy rate, and the addition of 30 beds would allow Cherrydale to continue having a beneficial relationship with VHC and an appropriate relationship to the health care system in the surrounding area.

**6. The feasibility of the project, including the financial benefits of the project to the applicant, the cost of construction, the availability of financial and human resources, and the cost of capital.**

The project is feasible, overall. Approval of the project would be substantially beneficial to the applicant, increasing revenue-generating resources by 17 percent. Resources for construction and operation appear generally available.

**7. The extent to which the project provides improvements or innovations in the financing and delivery of health services, as demonstrated by: (i) The introduction of new technology that promotes quality, cost effectiveness, or both in the delivery of health care services; (ii) The potential for provision of services on an outpatient basis; (iii) Any cooperative efforts to meet regional health care needs; (iv) At the discretion of the Commissioner, any other factors as may be appropriate.**

Not applicable, without prejudice to the applicant.

**8. In the case of a project proposed by or affecting a teaching hospital associated with a public institution of higher education or a medical school in the area to be serve (i) The unique research, training, and clinical mission of the teaching hospital or medical school, and (ii) Any contribution the teaching hospital or medical school may provide in the delivery, innovation, and improvement of health care for citizens of the Commonwealth, including indigent or underserved populations.**



Not applicable, without prejudice to the applicant.

**Conclusions and Recommendation**

Review of the record indicates sufficient evidence to support the conclusion that the project is adequately consistent with the eight statutory considerations of public need. The project is approvable under applicable law. Specific reasons for this recommended decision include:

- (i) The project fully complies with the components of the nursing home bed transfer statute;
- (ii) The project is adequately consistent with applicable provisions of the SMFP;
- (iii) The total capital and financing costs of the project are reasonable, the project is feasible; and
- (iv) Approval of the project would be consistent with administrative precedent, as insisted by the applicant.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "D. Harris", with a horizontal line extending to the right.

Douglas R. Harris, JD  
Adjudication Officer

March 7, 2023