



## COMMONWEALTH of VIRGINIA

Parham Jaber, MD, MPH  
Acting State Health Commissioner

Department of Health  
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RICHMOND, VA 23218

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April 19, 2023

### By Email

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

**RE: Certificate of Public Need (COPN)  
No. VA-04842  
(COPN Request Number VA-8658)  
Henrico VA OPCO LLC  
d/b/a August Healthcare at Richmond  
Planning District (PD) 15  
Health Planning Region IV  
Addition of 88 nursing home beds to  
an existing nursing facility  
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 is consistent with applicable law.**

The reasons for my decision include the following:

- (i) The project complies with the components of the nursing home bed transfer statute, Va. Code § 32.1-102.3:7;
- (ii) The total capital and financing costs of the project are reasonable, and the project is feasible; and
- (iii) 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' to the right.

Parham Jaber, MD, MPH  
Acting State Health Commissioner

Encl.: 2

cc (via email):  
Elaine Perry, MD, MS, Director, Henrico Health District  
Deborah K. Waite, Virginia Health Information, Inc.  
Allyson Tysinger, Esq., Senior Assistant Attorney General  
Douglas R. Harris, JD, Adjudication Officer  
Erik O. Bodin, III, Director, Division of Certificate of Public Need

COPY

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

THIS CERTIFIES THAT Henrico VA OPCO LLC is authorized to initiate the proposal described herein.

NAME OF FACILITY: August Healthcare at Richmond

LOCATION: 1503 Michaels Road, Richmond, Virginia 23229

OWNERSHIP AND CONTROL: Henrico VA OPCO LLC will maintain ownership of and control over the approved resources.

SCOPE OF PROJECT: Addition of a total of 88 nursing home beds to August Healthcare at Richmond, an existing nursing facility, through transfer of: (i) 29 nursing home beds from Planning District (PD) 3; (ii) 21 nursing home beds from PD 5, and (iii) 38 nursing home beds from PD 11, in accordance with specifications and representations made during the course of review and adjudication. Corresponding numbers of beds at nursing facilities in each donating PD will be decertified. The total authorized capital and financing cost of the project is \$13,364,238. The project is scheduled to be completed by April 30, 2026.



Pursuant to Chapter 4, Article 11 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-04842

Date of Issuance: April 18, 2023

Expiration Date: April 17, 2024

Parham Jaber, MD, MPH  
Acting State Health Commissioner

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**Recommended Case Decision  
Certificate of Public Need (COPN)  
Request Number VA-8658  
Henrico VA OPCO LLC  
d/b/a August Healthcare at Richmond  
Planning District (PD) 15  
Health Planning Region IV  
Addition of 88 nursing home beds to  
an existing nursing facility**

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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 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>

Since 2013, Section 32.1-102.3:7 (the nursing home “bed transfer statute,”) applies with specificity to proposed relocations of nursing home beds across boundaries of Virginia’s various PDs. The bed transfer statute provides:

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 9, 2022. A 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, that statute was designed to remedy the annual introduction of ... piecemeal legislation, and, in particular, subsection B, 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. From 1874 to 2021, the Little Sisters of the Poor, a religious organization, operated a 32-bed nursing facility as a charity for the impoverished elderly in Richmond. Following an August 2021 transfer of operations from the Little Sisters of the Poor to Henrico VA OPCO LLC, d/b/a August Healthcare at Richmond (“August Healthcare”), that limited liability company owns, operates or both this nursing facility, located in Henrico County, PD 15.
2. Pursuant to the bed transfer statute, August Healthcare proposes to add 88 nursing home beds by transfer from nursing facilities in PDs 3, 5, and 11. The project would involve construction. Total capital and financing costs of the project are \$13,364,238.

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

1. **A Shortage of Beds Exists in PD 15.** DCOPN recently devised a 2022 statewide forecast of nursing home bed need and determined that, according to operation of a computational methodology designed to anticipate nursing home bed need,<sup>7</sup> a preliminary, numerical need for 86 nursing home beds currently exists in PD 15. The application meets this standard.
2. **The Number of Beds in PD 3, 5, and 11 Exceeds the Need for Such Beds.** In the same forecast DCOPN determined that a numerical surplus of 184 beds exists in PD 3, a surplus of 224 beds exists in PD 5, and a surplus of 103 beds exists in PD 11. 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) at 1-2.

<sup>7</sup> See 12 VAC 5-230-610.

3. **The Proposed Transfer of Beds would not Result in Creation of a Need for Additional Beds in PDs 3, 5, or 11.** Transferring the proposed nursing home beds would not create a current need for beds in the three donor PDs;<sup>8</sup> each would continue to have numerical surpluses if the project proposed by August Healthcare were approved. The application meets this standard.

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

#### **Application of Criteria of Public Need**

In 2012, before enactment of the bed transfer statute and in anticipation of such legislation, the Commissioner wrote the eventual patron of statute to provide recommended provisions.<sup>9</sup> The Commissioner specifically requested (i) that such legislation include a requirement that *public need* for beds – not just a shortage of beds – be demonstrated in the PD proposed to receive beds, and (ii) that *all provisions* of the COPN Law, the SMFP and COPN regulations apply in the review of a project submitted pursuant to the eventual legislation. The bed transfer statute, adopted the following year, contains no provisions adopting these two requests.<sup>10</sup>

Regardless, the eight statutory considerations, contained in the COPN Law and customarily applied in review of applications for a Certificate, appear below with notations pertinent to August Healthcare's proposed project:

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.**

August Healthcare assures the Commissioner that, if the project were approved, it will "help increase access to skilled nursing care," and all 88 beds proposed for transfer will be available to individuals without regard to source of payment.<sup>11</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**

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<sup>8</sup> This statement is true even when accounting for the transfer of 30 nursing home beds from PD 5 by virtue of the recent approval of COPN Request No. VA-8657.

<sup>9</sup> Letter from M. Dempsey to R. Orrock, Dec. 4, 2012, at 1-2 (August Healthcare Exhibit 3).

<sup>10</sup> See IFFC Transcript 32-35 (Cobb, Peck).

<sup>11</sup> August Healthcare Proposed Findings and Conclusions at 9, 11.



**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.**

A legislator,<sup>12</sup> Bon Secours St. Mary's Hospital, and others support the project proposed by August Healthcare. DCOPN is not aware of any opposition to the project. August Healthcare argues that no alternative to the project exists.

August Healthcare assures the Commissioner that the project is the least costly and most effective way to achieve the purposes identified and touted.

The total costs of the project are reasonable. Benefits of the project, according to August Healthcare, include greater access to single-bed rooms, and greater achievement of economy from achieving an operationally optimal scale with achieving a total of 120 nursing home beds at the facility.

**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 annually in PDs, statewide.<sup>13</sup> This section, like the provisions of 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.<sup>14</sup>

The project proposed by August Healthcare appears to demonstrate adequate compliance with the few applicable provisions of the SMFP, as they are currently deployed.

**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 would foster institutional competition in PD 15 by allowing August Healthcare to achieve economies of scale and to offer skilled nursing services.

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<sup>12</sup> Va. Sen. S. Dunnavant.

<sup>13</sup> This provision, and the resulting forecasts of need for nursing home beds, were the impediment encountered so often by actual or prospective applicants of relocation projects, leading to the 2013 enactment of the bed transfer statute that established a deviation from the applicability of public need to bed transfer projects between PDs.

<sup>14</sup> See text relating to Footnotes 9 and 10, above.

**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.**

Following its review, DCOPN recommended a partial approval of the project proposed by August Healthcare. DCOPN raises a concern that, with the recent approval of 30 beds relocated from PD 5,<sup>15</sup> that PD might dip closer to having an actual need. But the projected net need in PD 5 determined by the nursing home bed need forecast for 2022 would still be appreciable; it would total 173 if August Healthcare's project were approved.<sup>16</sup>

In making its recommendation of partial approval, DCOPN also observes that the nursing home bed occupancy rates for PDs 3 and 5 are higher than that for PD 15. DCOPN relies on this fact as basis for recommending approval only of the transfer of beds from PD 11.

But if the lots of beds proposed for transfer from each of the three PDs are considered separately, the transfer of each lot would still comply with the bed transfer statute, leaving no rational basis for denying transfer of beds from PDs 3 and 5. Since review of a project proposing a transfer of beds is constrained by the bed transfer statute, and each lot would independently comply with that statute, the rationale for a partial approval of August Healthcare's project (*i.e.*, approval of the relocation of 38 beds from PD 11, but denial of relocation of 29 beds from PD 3 and 21 beds from PD 5), as DCOPN recommends, is insubstantial.

**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 – the total number of beds – by 275 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**

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<sup>15</sup> See COPN Request No. VA-8657.

<sup>16</sup> *Id.* at 4.



**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 bed transfer statute. The project is approvable under applicable law. Specific reasons for this recommended decision include:

- (i) The project complies with the components of the nursing home bed transfer statute;
- (ii) The total capital and financing costs of the project are reasonable, and the project is feasible; and
- (iii) 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 stylized flourish at the end.

Douglas R. Harris, JD  
Adjudication Officer

April 13, 2023