

Prisco Tammaro, President
Friends of Fellsmere Heights, Inc.
56 Pine Street
Malden, MA 02148

September 14, 2015

Attorney General Maura Healey
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

RE: Proposed sale of former Malden Hospital site by Hallmark Health Systems to a private developer; request for investigation under G.L. c. 180, sec. 8A(d)

VIA EMAIL WITH HARDCOPY FOLLOWUP

Dear Attorney General Healey,

The Friends of Fellsmere Heights¹ respectfully requests that your office investigate the proposed sale of the former Malden Hospital site by Hallmark Health Systems to a private developer under G. L. c. 180, sec. 8A(d). This matter requires your immediate attention, as we have reason to believe that a Purchase and Sale Agreement has been entered into and the sale will be completed in the near future. We set forth below our arguments to support this request.

¹ The Friends of Fellsmere Heights, Inc., is a non-profit corporation with the purpose "to help keep Fellsmere Park, situated in Malden, Massachusetts, forever open as a public park and playground consistent with the historic character of this Olmsted-designed park; to promote recreation consistent with the historic uses of the park; to promote use as a community open space so residents and visitors can both enjoy the beauty of nature and gather in a sense of community; to promote protection of wildlife habitat and watershed in Fellsmere Park and Fulton Heights, situated in Medford, Massachusetts; to defend the generous donations, primarily by Malden residents, to the former Malden Hospital Trust by helping ensure that the assets and land--situated in Malden and Medford between Fellsmere Park and Fulton Heights--of the former trust serve local public charitable interests and the local need for public open space for public health; and to actively seek and hold land or easements in these environs for these purposes ." The Friends have compiled data showing that Malden ranks second to last in terms of percentage of open space among nearby communities in the Boston metro area. Only Somerville ranks lower on the list.

Chapter 180, section 8A, concerning the sale, lease or exchange of nonprofit corporation's assets

The landmark case in this area of law is Attorney General v. Hahnemann Hospital, 397 Mass. 820 (1986), in which the Supreme Judicial Court decided a case under c. 180, sec. 6, since section 8A did not yet exist. The issue before the court concerned the ability of the board of trustees of a charitable corporation to redirect the corporation's assets to a new purpose that, in the view of the AG, would violate the purposes for which the donations had been given.² Although the AG's side prevailed, the decision turned on the wording of the trust, since the court held that the law as then written did not prevent the trustees from selling the hospital.

G.L. c. 180, section 8A (a)-(c), was passed in 1989. A charitable corporation planning to dispose of its assets must notify the Attorney General 30 days before doing so. The passage of the law may reflect the financial difficulties of venerable charities in the late twentieth century (see, e.g., Butterfield, "Proposed sale of hospital by Harvard raising fears," New York Times, September 4, 1983). A decade later, the law was strengthened again.

Paragraph (d) was added to GL c. 180, sec. 8A, effective July 21, 2000. Paragraph (d) requires a nonprofit acute-care hospital or health maintenance organization to give 90 days' notice to the AG and to the commissioner of public health before "the sale, lease, exchange or other disposition of a substantial amount of its assets with a person or entity other than a public charity." Following receipt of that notice, the AG is to investigate and hold a public hearing. The purpose of the investigation is to determine whether the proposed transaction complies with existing law, whether the nonprofit entity exercised due care and avoided any conflicts of interest in the process, whether fair value will be received for the nonprofit assets, and whether the proposed transaction is in the public interest. In summary, therefore, paragraph (d) represents a significant strengthening of the law with regard to a particular type of public charity – a nonprofit acute-care hospital or health maintenance organization.³ We argue that paragraph (d) is triggered, not by a hospital's decision to close an operation as such, but instead by *any* proposed transaction

² The donor in the Hahnemann Hospital case was Mary Ida Converse, who – coincidentally enough – was a donor to the Malden Hospital site as well. She was the daughter-in-law of Elisha and Mary Converse, the original founders of Malden Hospital.

³ The AGO published Guidelines on Notice Requirements of G.L. c. 180, sec. 8A(c) (Martha Coakley, Attorney General, no date). These guidelines specifically state that they do not apply to transactions by nonprofit acute-care hospitals or health maintenance organizations subject to the requirements of G.L. c. 180, sec. 8A(d).

with a for-profit entity involving all or a significant portion of the hospital's assets. To be sure, paragraph (d) represents the Legislature's concern for the issues raised by the dissolution of these nonprofit hospitals but that concern extends beyond those issues.

In the summer of 2015, the Friends of Fellsmere Heights inquired of the AGO's Charities division whether an investigation of the proposed sale of the Malden Hospital site was contemplated. In an email dated July 9, 2015, Assistant AG Brett Blank stated that no review under 8A(d) is required because "Malden Hospital is not an acute-care hospital." We believe, however, that an examination of the facts will lead to the opposite conclusion. We turn to that history now.

History of Malden Hospital

Malden Hospital was incorporated before 1890, the date on which Elisha L. Converse and Mary D. Converse gave the first and largest donation of land at the top of a hill in Malden and Medford. The Converses also donated the land for the adjacent Fellsmere Park, designed by famous landscape architect Frederick Law Olmsted, as well as land for what became Pine Banks Park in Malden and Melrose. Over succeeding decades, Malden Hospital received land donated by a variety of other individuals, as well as public land donated in 1913 by the Metropolitan Parks Commission from land taken by the Commonwealth for the creation of the Middlesex Fells Reservation and the Fellsway East. More public land was donated to the hospital by the City of Malden when it rebuilt Hospital Road in 1933.

However, by the end of the twentieth century, Malden Hospital, like many small community hospitals, was struggling financially ("Malden Hospital strains to stay healthy," Boston Globe, May 23, 1999), and was acquired by Hallmark Health Systems. Hallmark decided to cut services at Malden Hospital to provide emergency medical care only, renaming it Malden Medical Center. Malden Medical Center operated for approximately one year.

In 2000, when it became clear that Hallmark Health Systems would close the Malden Medical Center, Malden city officials protested and threatened to seek an injunction, citing the new law discussed earlier, c. 180 sec. 8A(d) (see "Malden officials fighting closures test health care law in hospital cutbacks," Boston Globe, November 6, 2000). According to the Globe, a number of legal issues needed resolving first, however, including the possible effect of a ballot measure proposing universal health care in Massachusetts, so city officials dropped their plans to seek an injunction. The hospital was closed, and has stood empty in the fifteen years since that time.

While Malden city officials may have hoped to use the new law to prevent the closure of the hospital in 2000, we believe that the law would not have prevented the

hospital's closure. The intent of the law is not to tell a nonprofit hospital whether to open or close a facility, but rather concerns what happens when a nonprofit hospital disposes of its assets to a for-profit entity. What we argue, therefore, is that c. 180, sec. 8A (d) would have applied to a decision by Hallmark Health to sell the Malden Hospital site at the time it was closed – and the passage of time since then does not render the law inapplicable. Thus we argue, contra the response by AAG Blank, that Malden Hospital was inarguably a nonprofit acute-care hospital, and to classify it as something else is to subvert the purpose of the statute. If AAG Blank's response is adhered to, a charity need only bide its time, and wait, before selling its assets. Clearly, given the broad scope of paragraph (d), the Attorney General is required to examine and oversee the disposition of assets given to the hospital in such a way as to ensure that the public purpose embodied in the law of charitable corporations is carried out, all the way to disposing of the charity's assets.

To recap our argument

- Malden Hospital was an acute-care hospital for approximately a century. It was changed to an emergency medical center for one year prior to its closure in late 2000. The broad terms of c. 180 sec. 8A(d) cover the sale of Malden Hospital.
- We argue that c. 180 sec. 8A(d) applies to the Malden Hospital site today, because it would have applied when the hospital site was closed in 2000 if a sale was contemplated at that time.
- We argue that both requirements of 8A(d) are met here:
 - The Malden Hospital site constitutes a “substantial portion” of the charity's assets.
 - The proposed transaction is with a “person or entity other than a public charity,” namely, a real estate development company.
- We further argue that the terms of sec. 8A(d) place special emphasis on the AG's responsibility to safeguard the public interest in a transaction between a hospital and an entity other than a public charity.
 - The AG has authority under common law and under G.L. c. 12, sec. 8, to “enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust within the administration thereof.”
 - This authority is reiterated in sec. 8A(d)(1), in which the Attorney General is empowered to examine the proposed transaction from the perspective of five factors (mentioned above), the last of which is “whether the proposed transaction is in the public interest.”
 - A transaction between a hospital and a “person or entity other than a public charity” justifies this special emphasis when a “substantial portion” of the hospital's assets are involved.

- The donations of public land to the Malden Hospital make it particularly important that the AG review the proposed transaction from the perspective of the five factors enumerated in 8A(d), especially the fourth and fifth -- whether fair value will be received for the nonprofit assets, and whether the proposed transaction is in the public interest.

Conclusion

If, after receiving this request, General Healey, you determine that an investigation by your office is not required, we request that your office make available to us a list of all such investigations (under G.L. c. 180 sec. 8A(d)) which your office has conducted. Additionally, we would be interested in learning about cases where your office considered investigating but decided such an investigation was not warranted.

Thank you for your attention to this matter.

Very truly yours,

Prisco Tammaro

President, Friends of Fellsmere Heights, Inc.
857-488-0577

cc:

Sen. Jason Lewis
Rep. Paul Donato
Rep. Steven Ultrino
Rep. Paul Brodeur
Mayor Gary Christenson
Mayor Michael McGlynn
Councillor John Matheson
Councilor Spadafora
Councilor DeMaria
Councilor D'Arcangelo
Governor Baker
Rep. Katherine Clark
Sen. Edward Markey
Sen. Elizabeth Warren
Hallmark CEO Alan McDonald
Assistant Attorney General Brett Blank