

**PROPOSED CHANGE OF CONTROL INVOLVING THE RIVERWOODS
COMPANY, AT EXETER, NEW HAMPSHIRE**

REPORT OF THE DIRECTOR OF CHARITABLE TRUSTS

December 16, 2020

I. Introduction

On April 24, 2020, The RiverWoods Company, at Exeter, New Hampshire (“RWE”) submitted to the Charitable Trusts Unit of the New Hampshire Department of Justice a notice of a proposed change of control pursuant to RSA 7:19-b (“[Notice](#)”). While the Notice addresses a plan of reorganization involving RWE, Birch Hill Terrace, and RiverWoods Durham, the “change of control” within the meaning of RSA 7:19-b applies only to RWE because under the plan, RWE no longer would have the right to nominate the majority of the members of the board of trustees of its sole corporate member. This report describes the proposed change of control and plan of reorganization and the CTU’s review and conclusions.

A. The Entities Involved.

The RiverWoods Company at Exeter, New Hampshire

On June 6, 1983, Life Care Services of New Hampshire, Inc. was incorporated as a voluntary corporation to “establish, own, maintain, and operate a facility which provides housing, food services, health services, and other services to elderly persons admitted into the facility.” Articles of Agreement, Article II, paragraph 1.¹ On January 2, 1996, the organization filed an affidavit of amendment with the New Hampshire Secretary of State, amending the name of the corporation to “The RiverWoods Company, at Exeter, New Hampshire.” Affidavit of Amendment, Article I. RWE is a charitable organization within the meaning of RSA 7:21, II (b) and is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code.

RWE, which consists of three campuses, operates a continuing care retirement community in accordance with RSA 420-D and is licensed as a nursing and supported residential care facility. “The Woods” campus was established in August 1994 and currently has 201 independent living units, 20 assisted living units, and 39 skilled nursing beds. “The Ridge” campus was established in October 2004 and has 81 independent living units and 11 cottages, 27 assisted living units, and 23 skilled nursing beds. The third campus, “The Boulders,” was established in March 2010, and has 76 independent living units and 24 cottages, 24 assisted living units, and 16 skilled nursing beds. As of February 2020, RWE was 95% occupied.

¹ The Articles of Agreement of RWE and the other charitable corporations involved in the plan of reorganization can be found on the [NH Secretary of State's website](#).

The RiverWoods Group

On February 17, 2011, five members of the RWE board of trustees formed The RiverWoods Group (“TRWG”) to “support and further the charitable purposes and activities of [RWE]” as well as future organizations that would participate in a network of nonprofit senior living service providers. Articles of Agreement, Article 2. Specifically, TRWG was established to, among other things, “establish, maintain and govern an integrated system of continuing care retirement communities and related organizations;” provide central management and administrative services to its participant organizations; develop a system-wide strategic plan; develop relationships and alliances and identify new participant organizations to join the system; and develop methodologies for the effective and efficient delivery of quality senior living services. *Id.* TRWG is a charitable organization within the meaning of RSA 7:21, II (b) and is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code.

According to testimony at the public hearing by the chair of the board of RWE, RWE established TRWG for several reasons. First, it believed it had a moral obligation as a charitable nonprofit to serve more people. RWE also thought that maintaining the status quo without addressing competition and shifts in senior needs would jeopardize the current RWE community and its future, and forming TRWG and establishing a system would protect RWE’s current assets and reduce potential risks as it addressed those issues. Finally, RWE sought a more structured system in which to operate.

On November 1, 2012, RWE revised its articles of agreement to make TRWG its sole corporate member. Affidavit of Amendment, Article V. Initially, all of the members of TRWG’s board of trustees were nominated by RWE. Once other participating organizations joined the TRWG system, additional board members were added to the TRWG board. Under the current structure, however, RWE continues to have the right to nominate the majority of TRWG board members.

On July 19, 2012, Anthony Blenkinsop, then the Director of Charitable Trusts, issued a letter regarding the applicability of RSA 7:19-b to the creation of TRWG and the amendment to the RWE articles of agreement naming TRWG as its sole member. The Director of Charitable Trusts found that the naming of TRWG as the sole member of RWE did not constitute a change of control under RSA 7:19-b, but further stated that “when and if [TRWG] is expanded in order to establish an integrated system of non-profit charitable continuing care retirement communities, such a transaction would be subject to review under RSA 7:19-b.” *See* Notice, Appendix D. The Director required that RWE and TRWG amend its transaction documents to state expressly that any restricted assets would not be available for reallocation to the RiverWoods system if one develops and that the funds would remain under the sole control of the RWE Board to further RWE’s charitable purposes. *Id.*

Birch Hill Terrace

In 2004, Hillcrest Manor, Inc. was formed to, among other things, “obtain, manage, and provide funding and services to subsidiary corporations to provide a continuum of residential care for aged men, women and couples.” Articles of Agreement, Article II. In July 2016, Hillcrest Manor, Inc., the parent organization of Birch Hill Terrace and Pearl Manor in Manchester, New Hampshire, became a participant organization in the TRWG system, and TRWG became the sole corporate member of Hillcrest Manor, Inc. Affidavit of Amendment, Article XI. In June 2017, Hillcrest Manor, Inc. was merged into Birch Hill Terrace (“BHT”), and BHT became the surviving entity. BHT is a charitable organization under RSA 7:21, II (b) and is exempt from income taxation under section 501(c)(3) of the Internal Revenue Code. The Charitable Trusts Unit reviewed the 2016 transaction pursuant to RSA 7:19-b and issued a no action letter dated March 9, 2017.

BHT has 134 independent living units and 4 cottages, 41 assisted living units, 2 memory care units, and 9 intermediate nursing care suites. As of February 2020, it was 85% occupied.

RiverWoods Durham

RiverWoods Durham (“RWD”) was formed as a voluntary corporation in 2017 to, among other things, establish, maintain, and operate a continuing care retirement community or similar facility or facilities. *See* Articles of Agreement, Article 2. RWD is exempt from federal income taxes as a senior living services provider and is a charitable organization under RSA 7:21,II (b) and 501(c)(3) of the Internal Revenue Code. TRWG is the sole corporate member of RWD, and TRWG and RWD currently have mirror boards of trustees.

Construction of the RWD facility began in 2018. RWD consists of 150 independent living units, 49 assisted living units, and 24 nursing units. As of March 2020, it was 95% occupied.

B. The Proposed Plan of Reorganization.

1. Background.

In August 2018, while RWD was under construction, TRWG established a task force of trustees from RWE, BHT, and TRWG to review and develop recommendations regarding the governance structure of the TRWG system participants. The task force considered five different options for a governance structure, one of which was simply to maintain the status quo. For over one year, the task force met, consulted with legal counsel, and received input from the boards of RWE, BHT, and TRWG. The task force ultimately recommended that a single, unitary board of trustees govern each of RWE, BHT, and RWD and any future system participants. *See* Notice, Exhibit Z (Schedule of Task Force and RWE Board meetings).

For more than one year after making its initial recommendations, the task force worked on a plan of reorganization. In developing the plan, the task force held a series of meetings and consulted with, among others, members of the boards of trustees, the Resident Council of RWE, and residents of RWE. *See* Notice, Exhibit Z (timeline of meetings held by the task force). The board also met with outside consultants, including Kathy Anderson, a retired CEO of Goodwin House Incorporated, Keith Robertson, Managing Director of Ziegler Investment Banking, Lisa Henderson, Executive Director of Leading Edge Maine and New Hampshire, and legal counsel. As a result of the input received by the task force and the board, the plan was modified. *See* Notice, Exhibit AA (Cross-walk of Revisions). For example, the plan originally called for the unitary board (the “CCRC Board”) to include one nominee from each of the system participants, but the final proposed plan of reorganization requires that the CCRC Board consist of a minimum of two members nominated by RWE. *Id.*

In January 2020, the boards of RWE, BHT, and RWD met to approve the proposed plan of reorganization. The board of RWE, which includes three members who are residents of RWE, voted unanimously to approve the plan. The RWE board concluded that a unitary board was in the best interest of RWE because it would, among other things, maximize the benefits of the system to ensure quality and financial stability, eliminate silos between communities, attract talented volunteer board members who are engaged and focused on board level work, allow for system learning, and ensure sustainability over time.² In addition, a unitary board would be more efficient and cost-effective. *See* Notice, Exhibit O (Estimation of Efficiencies of Unitary Board).

2. Overview of the Plan of Reorganization.

Under the Plan of Reorganization, each of RWE, BHT, and RWD would maintain its separate legal status but would be governed by a single board of trustees (the “CCRC Board”) that would be responsible for oversight of each organization. The CCRC Board would be composed of not less than 5 nor more than 20 persons,³ provided that the Board would include the following trustees at all times:⁴

1. Four (4) trustees who are residents of the system participants (i.e., currently, RWE, BHT, and RWD), two of whom would be nominated by RWE;
2. One (1) at large trustee elected by the CCRC who could either be a resident or a community representative;⁵ and
3. The TRWG Chief Executive Officer, serving *ex officio*.

² Testimony at Public Hearing on October 22, 2020.

³ In accordance with RSA 292:6-a, at least five of the board members would not be of the same immediate family or related by blood or marriage.

⁴ The CCRC Board may alter the size of the Board from time to time as long as the Board includes the 4 resident trustees, 1 at large trustee, and the TRWG CEO.

⁵ For the first five years, the at large trustee would be a RWE resident.

The Executive Directors of the system participants would be present at CCRC Board meetings to serve as resources to the CCRC Board, but would not have a vote. The Executive Directors would be members of the Governance Committee of the CCRC Board. The Executive Directors would report to the TRWG CEO who would be responsible for hiring, firing, evaluating, and determining the compensation of the Executive Directors, following input from the CCRC Board.

Each of RWE, BHT, and RWD would retain their own assets and be responsible for their own liabilities. Both donor restricted and unrestricted gift funds at RWE would remain to support programs and operations at RWE. Donor restricted and unrestricted gift funds at BHT also would remain to support programs and operations at BHT.⁶

The members of the CCRC Board would have independent fiduciary duties to each of RWE, BHT, and RWD. The plan includes CCRC Board Conflict of Interest Guidelines intended to address situations involving decisions by the CCRC Board that could affect one CCRC participant differently from others in the system or benefit one participant to the detriment of another. *See* Notice, Exhibit H (Plan of Reorganization, appendix A). Those Guidelines provide procedures intended to avoid conflicts of interest and a process for identifying and resolving them. For example, the Guidelines confirm that the CCRC Board would have no authority to approve or enforce loan arrangements between system participants. *Id.*

Residents of each of the system participants would continue to elect Resident Councils. Under draft procedures established for the CCRC Board, the CCRC Board would invite the input of the residents by: (1) asking for a quarterly written report from each Resident Council one month prior to the board meeting; (2) inviting the chair and vice chair of the Resident Council to participate in the meeting during which the CCRC Board would discuss the annual resident engagement/satisfaction results for their community; and (3) inviting the Resident Council chair and vice chair to participate in annual board education retreats focused on strategic planning and industry education.

II. Review by the Charitable Trusts Unit.

A. Overview.

Under state law, RSA 7:19-b, the Director of Charitable Trusts of the Attorney General's office is charged with reviewing acquisition and change of control transactions involving healthcare charitable trusts and determining compliance with the statute's provisions. In making this determination, the Director is required to accept public comment and may conduct public hearings. RSA 7:19-b, IV. Although RSA 7:19-b, IV requires that the Director of Charitable Trusts make his or her determination within a reasonable time not to exceed 180 days after receipt of a notice of a proposed acquisition transaction, the deadline for review of the Notice was suspended in accordance with the Governor's [Emergency Order #29](#), Exhibit B, issued as a result of the COVID-19 pandemic.

⁶ RWD did not have donor restricted or unrestricted gift funds at the time the Notice was filed.

After receiving the Notice on April 24, 2020, the Charitable Trusts Unit posted the Notice on the Department of Justice [website](#). On May 11, 2020, the Charitable Trusts Unit requested that RWE provide additional information and documentation, and the Charitable Trusts Unit received RWE's response on July 1, 2020.

In conducting its review, the Charitable Trusts Unit has reviewed the Notice and additional documentation, testimony, comments, and other information submitted to the Charitable Trusts Unit by the RWE board, the RWE Resident Council, RWE residents, and members of the public. The RWE Resident Council submitted to the Charitable Trusts Unit over 59 pages of testimony and subsequently met via Zoom with the Director and Assistant Director of Charitable Trusts.⁷ Members of the Resident Council, with the exception of the three resident trustees who serve on the RWE Board, expressed their opposition to the plan of reorganization. The reasons for their opposition include their concerns that the strategic initiatives of TRWG would take precedence over the needs and interests of RWE, that RWE would lose control over its assets, and that the CCRC Board would have an inherent conflict of interest. They were particularly concerned that the voices of the RWE residents would not be heard by the CCRC board. They noted that in the past, the Resident Finance Committee had success in convincing members of the RWE Finance Committee to make particular changes but suspected that suggestions made to the CCRC board by the Resident Finance Committee would “fall on deaf ears.”

On October 22, 2020, the Charitable Trusts Unit held a public hearing to obtain input regarding the proposed plan of reorganization. Because of restrictions implemented to avoid the spread of COVID-19, the public hearing was held both in person and remotely. The in-person session was held at the RWE Boulders campus, but it was broadcast on closed circuit television throughout the RWE facilities. Because the Boulders campus was restricted to Boulders residents, the hearing was broadcast in conference rooms in the other campuses, and staff members were available to transmit questions and comments to the moderator. In addition, the public hearing was broadcast via Zoom so that it could be watched within and outside RWE, and viewers could submit questions and comments through the Zoom comment function. A video of the hearing was posted to the Department of Justice [website](#).

The Charitable Trusts Unit received at the public hearing and via email and regular mail well over 100 thoughtful, insightful, and well-informed comments about the proposed reorganization from residents of RWE. The majority of the residents expressed their opposition to the plan. Many of the comments reiterated the sentiments expressed by the Resident Council in its testimony. Among the more prevalent concerns expressed were that the reorganization would result in a CCRC Board that would be system-focused and would not adequately represent the interests of RWE or its residents. Many of the residents also expressed concern about the use of RWE's assets to support the system, the system participants, and TRWG, and the inability to challenge the use of its assets without a dedicated RWE board. Some residents also expressed a sense of mistrust of

⁷ The three members of the Resident Council who also serve on the RWE Board support the reorganization and did not contribute to the written testimony submitted to the Charitable Trusts Unit.

senior management and TRWG, and reported a negative change in “morale” since the plan of reorganization was announced.⁸

Following the public hearing, the Director and Assistant Director of the Charitable Trusts Unit met with members of the RWE Board of Directors. In response to questioning, they demonstrated a thorough understanding of the particulars of the plan of reorganization. When asked if they continued to support the plan of reorganization in spite of the opposition expressed by many of the residents and in light of the impact of the COVID-19 pandemic, the Board members were unanimous in their support, and one member stated that these circumstances have strengthened his resolve. One member stated that governance has been a preoccupation of the board over the years, and the board has had many thoughtful, informed discussions about governance with input from residents. While the board members acknowledged that relationships between the board and management and the residents have been strained, due in part to isolation caused by the pandemic, they made it clear that they believe that a unitary board would be in RWE’s best interests. They believe that the change would allow RWE to be more agile and informed, would attract talented volunteer board members, and would be sustainable over time.

In accordance with RSA 7:19-b, IV (b), the Charitable Trusts Unit sought input and advice from the commissioner of the department of health and human services and the insurance commissioner. The Director and Assistant Director of Charitable Trusts spoke with Commissioner of Insurance and his staff on several occasions. The conditions set forth in this report reflect the input of the Insurance Commissioner.

After considering all of the evidence, the Charitable Trusts Unit has determined that the Notice complies with RSA 7:19-b and will take no action to oppose the corporate reorganization, subject to the conditions set forth in this report.

B. Application of the Review Standards under RSA 7:19-b.

The proposed reorganization constitutes a change of control under the change of control statute, RSA 7:19-b, because RWE currently has the right to nominate the majority of the board of trustees of TRWG. Under the proposed reorganization, on the other hand, the CCRC Board would have the power to nominate the majority of TRWG board of trustees on behalf of all of the system participants, including RWE, RWD, BHT, and any future system participants. As a result, and in accordance with the Director of Charitable Trusts’ letter dated July 19, 2012, the proposed reorganization constitutes a change of control.

RSA 7:19-b, II requires that a governing body of a health care charitable trust ensure that a change of control transaction complies with seven minimum standards. The

⁸ Some of the mistrust appears to be related to the fact that minutes of some board meetings were not posted to the intranet in a timely manner, and RWE had not yet posted its audited financials for fiscal year ending June 30, 2020. Other concerns were related to management decisions (and not governance issues), such as complaints about the quality of information technology services.

following sets forth the Charitable Trust Unit's analysis and conclusions with respect to each of the standards.

1. RSA 7:19-b, II (a): Permitted by Law

RSA 7:19-b, II (a) provides:

- (a) The proposed transaction is permitted by applicable law, including, but not limited to, RSA 7:19-32, RSA 292, and other applicable statutes and common law;...

The proposed plan of reorganization does not implicate consumer protection and antitrust laws. In addition, because RWE will maintain its separate corporate status, and because RWE's donor restricted and unrestricted gift funds would remain to support programs and operations at RWE, the plan does not implicate the doctrines of *cy pres*, deviation, or termination in accordance with RSA 7:19-b, VI (b).

As RWE is licensed by the New Hampshire Insurance Department as a continuing care retirement community under RSA 420-D, the transaction is subject to review and approval by the Commissioner of Insurance pursuant to RSA 420-D:13. Thus, this no-action report is subject to the condition that the Commissioner of Insurance approve the plan of reorganization.

2. RSA 7:19-b, II (b) Due Diligence in Structuring the Reorganization

RSA 7:19-b, II (b) provides:

- (b) Due diligence has been exercised in selecting the acquirer, in engaging and considering the advice of expert assistance, in negotiating the terms and conditions of the proposed transaction, and in determining that the transaction is in the best interest of the health care charitable trust and the community which it serves;...

a. Use of Expert Assistance.

In developing the plan of reorganization, the task force and the RWE board consulted with legal counsel as well as with the Managing Director of Ziegler Investment Banking, the Executive Director of Leading Edge Maine and New Hampshire, and the retired CEO of a senior living organization. The RWE board members, all of whom are volunteers and many of whom have extensive experience serving on nonprofit boards, also drew on their own experiences, knowledge, and education in developing the recommendation. For example, the chair of the board operates a board governance consulting firm that serves nonprofit organizations including colleges and universities, hospitals, and healthcare systems, and community service organizations. Other board members include current and retired corporate and nonprofit executives, a certified public accountant, a town official, and a retired military leader.

b. Negotiating the Terms and Conditions.

While this plan of reorganization does not involve an asset sale, as discussed above, the plan of reorganization was developed over the course of a 17-month period. Before finalizing the plan, the task force and the RWE board amended and modified the plan in an attempt to address concerns raised by the Resident Council and other residents. *See* Notice, Exhibit AA (Cross-walk of Revisions).

c. Best interest of the health care charitable trust and the community it serves.

(i) Overview.

RSA 7:19-b, II (b) requires that the board of trustees of a health care charitable trust exercise due diligence in determining that the transaction is in the best interests of the health care charitable trust. This requirement is consistent with the board's fiduciary duty of loyalty under common law to "act in good faith and in a manner the fiduciary reasonably believes to be in the best interests of the charity in light of its purposes." *See Restatement of the Law, Charitable Nonprofit Organizations* § 2.02 (Tent. Draft No. 1, 2016);⁹ *see also* [Opinion of the Attorney General](#), Fiduciary Duty of Corporate Members of Charitable Organizations, at 3 (Feb. 13, 2017). It is important to note that unlike corporate law, the "duty of loyalty of charitable fiduciaries is to the charity's *purposes* and thus by extension to the indefinite beneficiaries of those purposes."¹⁰ *Id.* (emphasis supplied).

In reviewing whether a board exercised due diligence in determining whether the transaction is in the best interests of the charity, a court will not substitute its own judgment unless the exercise was not reasonably informed or objectively reasonable in light of the charity's purposes and the fact they have perpetual existence. *See Restatement of the Law, Charitable Nonprofit Organizations* § 2.02 (Tent. Draft No. 1, 2016). By comparison, the Charitable Trusts Unit's review requires a determination that the board achieved "compliance" with the specific due diligence requirements of RSA 7:19-b, II (b). RSA 7:19-b, IV.

⁹ The Draft Restatement of the Law, Charitable Nonprofit Organizations was cited with approval in *In re Trust of Mary Baker Eddy*, 172 N.H. 266, 274 (2019).

¹⁰ "In some instances, advancing the charitable purposes may be to the detriment of the charitable entity and thus result in the discontinuation of that entity." Restatement of the Law, Charitable Nonprofit Organizations § 2.02 (Tent. Draft No. 1, 2016).

(ii.) The Board's Conclusions.

Before it voted to approve the plan of reorganization, the RWE Board adopted the recommendations of the task force, met on many occasions to discuss and revise the plan of reorganization, consulted with outside experts, and met on a number of occasions with residents and members of the Resident Council. The Board ultimately determined that integrated board governance would better serve RWE and its purposes for the long term in that it would provide efficiencies, allow for “system learning” among the CCRC board members, would be sustainable over time, and would attract talented board members. The Charitable Trusts Unit believes that the board made its decision in “compliance” with the board’s specific due diligence requirements of RSA 7:19-b, II.

(ii) Loss of Representation

Some residents of RWE have argued that the plan of reorganization is not in the best interests of RWE because it resulted in some loss of their representation on the board and on the board of TRWG.¹¹

It is important to note that as RWE and TRWG are charitable organizations, their board members’ fiduciary duties are owed to the charities and their purposes and not to the particular residents of RWE. *See, e.g., Squeri v. Mount Ida Coll.*, 954 F.3d 56, 67 (2020) (holding that the officers and trustees of a college owed a fiduciary duty to the institution and not to the students); Restatement of the Law, Charitable Nonprofit Organizations § 2.02 (Tent. Draft No. 1, 2016). Thus, the Board reasonably could conclude that while the perspectives of some residents would be helpful on the CCRC board, in order to ensure its existence into the future, the CCRC board would benefit from having a board with a broader range of perspectives, experiences, and backgrounds.¹²

It is also important to note that regardless of the number of resident representatives on the boards, and even though RWE will not have its own board separate from the boards of the other system participants, the members of the CCRC board and TRWG board owe fiduciary duties of care and loyalty to RWE. *See* Opinion of the Attorney General, *Fiduciary Duty of Corporate Members of Charitable Organizations*, at 2 (February 13, 2017). That is, the CCRC and TRWG board members are obligated to act in the best interests of RWE in furtherance of its mission.

¹¹ Initially, RWE would continue to have the right to nominate three members on the CCRC board, but thereafter, RWE would have the right to nominate two members. While the RWE board currently has the right to nominate a majority of the members of the TRWG board, under the proposed plan of reorganization, the CCRC board would have the right to nominate a majority of the members of TRWG board.

¹²In light of their experiences, education, and backgrounds, many of the residents of RWE are highly qualified and would be very valuable members of any charitable boards, including the CCRC and TRWG boards.

(iii) Conflict of Interest.

The Resident Council expressed concerns that the plan of reorganization is not in the best interests of RWE because the CCRC board may be faced with a decision that would benefit one system participant to the detriment of another. The Resident Council was particularly concerned that a dedicated RWE board no longer would determine what would be in RWE's best interests before making RWE's assets available to the system and no longer would negotiate future amendments to the memorandum of understanding between TRWG and RWE. That memorandum of understanding is discussed further in Section II(B)(5), below.

This situation, where fiduciaries would serve more than one charitable organization, is not unique. Board members may have fiduciary duties to multiple organizations that have similar purposes. *See Restatement of the Law, Charitable Nonprofit Organizations* § 2.02 (Tent. Draft No. 1, 2016) (there are situations where a fiduciary may serve on multiple boards of charities, some of which have similar purposes). It may not be possible for board members to serve as trustees for charities when their purposes conflict, however. *Id.*

In this case, the purposes of RWE, BHT, and RWD are not in conflict, as they were all established to offer continuing care facilities to the elderly. While the CCRC board members would not have inherent conflicts of interest in serving as fiduciaries for each of the organizations, conflicts of interest could arise. For that reason, the Director of Charitable Trusts recommended that the plan of reorganization include guidelines for addressing such conflicts of interest.

The CCRC Board of Trustees: Conflict of Interest Guidelines, which are included as an appendix to the plan of reorganization, confirm that the CCRC board members would have fiduciary duties of care and loyalty to RWE as well as to the other system participants. *See* Notice, Exhibit H, at 1 (Plan of Reorganization, appendix A). The Guidelines provide that at each meeting, the CCRC board would review reports from the Executive Director and the Resident Council of each of the system participants, and the Executive Director would attend and participate in the meeting (without a vote). *Id.* at 1-2. The CCRC board would consider any matters affecting each system participant separately from matters concerning the other participants, and when making financial decisions, would consider the financial performance, resources, and objectives of that particular participant. *Id.* at 2. As discussed above, the CCRC Board would have no authority to approve or enforce loan arrangements between system participants. *Id.*

The Guidelines establish a procedure for identifying and resolving any conflicts, such as where a decision by the CCRC board would benefit one system participant but be detrimental or risky for another system participant. *Id.* at 2-3. The Guidelines provide that the CCRC board's decision must be based on its good faith determination as to "what is best for the collective interests of the affected System CCRC Participants and the System." *Id.* at 3. The Guidelines also provide that the CCRC board may not approve any action that would prevent a system participant from continuing its operations in furtherance of its mission or meeting its contractual obligations. *Id.* at 3. The TRWG

board, which has fiduciary obligations to further and preserve the charitable missions and assets of RWE and the other system participants, would be required to ratify any decision by the CCRC board. *Id.*

Members of the Resident Council have argued that this procedure prioritizes the “system” over the interests of RWE. However, as the Charitable Trusts Unit has made clear, as the corporate member of RWE, TRWG owes RWE duties of care and loyalty in the exercise of its powers and cannot ignore those duties in favor of its own interests. *See* Opinion of the Attorney General, Fiduciary Duty of Corporate Members of Charitable Organizations, at 3 (February 13, 2017).

3. RSA 7:19-b, II (c) Conflicts of Interest

RSA 7:19-b, II (c) provides:

Any conflict of interest, or any pecuniary benefit transaction as defined in this chapter, has been disclosed and has not affected the decision to engage in the transaction; ...

The members of the RWE board certified that “[a]ny conflict of interest has been disclosed and has not affected the decision to enter into the Reorganization, and the Reorganization does not constitute or establish any pecuniary benefit transaction as defined in RSA Chapter 7.” *See* Notice, Exhibit BB (Certification of Trustees under RSA 7:19-b, III). Pecuniary benefits are financial conflict of interest transactions involving charitable organization directors, their family members, their employers, or their businesses. RSA 7:19-a. There is no evidence or suggestion to contradict the certification provided by the board members with respect to conflicts of interest and pecuniary benefit transactions.

4. RSA 7:19-b, II (d) Fair Value of Transaction

RSA 7:19-b, II (d) provides:

(d) The proceeds to be received on account of the transaction constitute fair value therefor;...

The proposed transaction does not involve compensation or consideration, and RSA 7:19-b, II (d) therefore is inapplicable to the proposed plan of reorganization.

5. RSA 7:19-b, II (e) Use of Charitable Assets

RSA 7:19-b, II (e) provides:

(e) The assets of the health care charitable trust and any proceeds to be received on account of the transaction shall continue to be devoted to charitable purposes consistent with the charitable objects of the health care charitable trust and the needs of the community which it serves;

As discussed above, under the plan of reorganization, RWE will retain its charitable assets and its liabilities. RWE provided the Charitable Trusts Unit with documentation regarding its donor-restricted funds and confirmed that the funds would continue to be used to benefit RWE in accordance with the donors' restrictions.

The Resident Council and some of the residents expressed concern that RWE's charitable funds could be diverted away from RWE and used to support the system or other system participants. Some residents complained that certain facilities at RWE are in need of renovation and upgrade, and they are concerned that RWE funds would be used to expand to additional facilities beyond RWE, support TRWG administration, and support struggling system participants.¹³

For example, TRWG provides services to RWE, BHT, and RWD through separate memoranda of understanding. Each memorandum of understanding contains an "available assets" formula that determines the amount of funds transmitted from the system participant to TRWG to support the system. Currently, available assets are determined using numbers from the audited financial statements and reduced by projected capital needs as determined by the RWE board with input from the RWE Executive Director and finance staff. The concern is that after the plan of reorganization is implemented, the CCRC board, which owes fiduciary duties to the other system participants, would not have the same interests in advocating for the capital needs of RWE.

The CCRC board would be required to act as good stewards of the assets of RWE in support of its mission. The CCRC board would breach this duty if it transferred assets of RWE to TRWG or another system participant without regard to the best interests of RWE. While some residents expressed their opposition to RWE's participation in TRWG system, the RWE board in 2012 determined that it was in the best interests of RWE's mission in the long-term to establish TRWG and become part of a system.

The Charitable Trusts Unit recognizes that the residents have expressed reasonable concerns about the process by which RWE assets may be used by the system. The Charitable Trusts Unit therefore has included conditions to this no action letter to provide additional protections for the charitable assets of RWE.

6. RSA 7:19-b, II (f) Control of the Proceeds

RSA 7:19-b, II (f) provides:

(f) If the acquirer is other than another New Hampshire health care charitable trust, control of the proceeds shall be independent of the acquirer; ...

The proposed plan of reorganization does not involve a non-New Hampshire health care charitable trust, and RSA 7:19-b, II (f) therefore is inapplicable.

¹³ Many residents expressed their opposition to RWE's involvement in the TRWG system. The decision of the RWE Board to establish TRWG and the system, a decision that was made in 2011, is not currently under review by the Charitable Trusts Unit.

7. RSA 7:19-b, II (g) Notice and Hearing

RSA 7:19-b, II (g) provides:

(g) Reasonable public notice of the proposed transaction and its terms has been provided to the community served by the health care charitable trust, along with reasonable and timely opportunity for such community, through public hearing or other similar methods, to inform the deliberations of the governing body of the health care charitable trust regarding the proposed transaction.

The RWE board members certified that prior to voting to approve the plan of reorganization, reasonable notice of the plan was provided to the communities served by RWE (the RWE residents and the residents of BHT and RWD). *See* Notice, Exhibit BB (Certification of Trustees under RSA 7:19-b, III). The notification to and input of the community served is described more fully in the Notice, at 16-18 and appendices S through Z.

III. Conclusions and Determination.

Based on the evidence, it is clear that the members of the RWE Board seriously, carefully, and thoroughly undertook their responsibilities as fiduciaries in considering a revised governance plan for the charity. While many residents have expressed opposition to the change, the members of the Board owe their fiduciary duties not to the residents of RWE but to RWE in furtherance of its mission as a charitable organization. The Board reasonably could conclude that the establishment of a unitary board for RWE and the other system participants is in the best interests of RWE in light of its purpose.

Although the Charitable Trusts Unit has concluded that RWE has substantially complied with the minimum standards for changes of control set forth in RSA 7:19-b, II, the Charitable Trusts Unit's decision to take no action to oppose the plan of reorganization is subject to the following representations and conditions:

Representations

1. **Completeness of the Notice and Plan of Reorganization:** RWE represents that the statements and documents made or provided in the Notice and the documents thereafter submitted to the Charitable Trusts Unit are true and correct and that the reorganization will be implemented in accordance with the Plan of Reorganization, including all appendices.
2. **Conflicts of Interest:** There are no conflicts of interest or pecuniary benefit transactions involving directors or officers of RWE contemplated as part of the plan of reorganization.

3. RWE's Donor Restricted Assets and Unrestricted Gift Funds: RWE's donor restricted assets and unrestricted gift funds shall be used to support RWE in accordance with the gift instruments and donor intent.

Conditions

1. Approval by Commissioner of Insurance: The plan of reorganization shall be approved by the Commissioner of Insurance pursuant to RSA 420-D:13. As referenced above, the Charitable Trusts Unit spoke on several occasions with Department of Insurance which reviewed and provided input on the conditions set forth herein. The Commissioner of Insurance has stated that he is willing to approve the change of control pursuant to RSA 420-D:13 subject to the conditions set forth herein.
2. Notice to the Director of Charitable Trusts of Governance Changes: TRWG and the CCRC Board shall notify the Director of Charitable Trusts and the Insurance Commissioner at least 60 days in advance of any future changes to the governance documents for TRWG or RWE with respect to the purposes of the organizations, the reserved powers of TRWG, the corporate membership of TRWG and RWE, and the composition of the boards of trustees and the governance committee or the number of seats available on each.
3. Obligations of the CCRC Board and of TRWG as Fiduciaries: The CCRC Board and TRWG shall act as separate fiduciaries toward each of RWE, BHT, and RWD when exercising their voting rights and reserved powers.
4. Notice to the Director of Charitable Trusts of Plan Implementation: RWE shall notify the Director of Charitable Trusts and the Insurance Commissioner when the plan of reorganization is implemented and shall file with the Charitable Trusts Unit and the Insurance Commissioner the amended articles of agreement and bylaws contemplated as part of the reorganization.
5. Available Asset Calculation: The CCRC Board shall establish a written procedure documented in its Policy and Procedure Manual regarding the Available Asset Calculation/Distribution Formula requiring that the RWE Executive Director consult with the Resident Council before compiling and proposing a list of capital projects for inclusion in the Available Assets calculation. Any amendments to the Memorandum of Understanding, including any changes to the schedules, shall be approved by the TRWG board and the CCRC Board. In addition, the CCRC Board shall submit to the Insurance Department any amendments to the Memorandum of Understanding reflecting changes to the Available Asset Calculation/Distribution Formula, including the schedules.
6. RWE Budget Process: The CCRC Board shall establish a written procedure documented in its Policy and Procedure Manual regarding the annual budget process requiring that the RWE Executive Director consult with the RWE

Resident Council or the RWE Resident Finance Committee prior to finalizing and submitting to the CCRC Board RWE's budget and goals for the year.

7. Resident Council Engagement: The CCRC Board shall establish a written procedure documented in its Policy and Procedure Manual regarding the conduct of its meetings that requires that the CCRC Board seek the input of the RWE residents by: (1) establishing a standing invitation to the RWE Resident Council to submit a written report for review at each regular CCRC Board meeting, which will be held at least quarterly; (2) inviting the chair and vice chair of the RWE Resident Council to participate in each meeting during which the CCRC Board intends to discuss the results of the resident engagement/satisfaction survey (expected to be conducted at least bi-annually); and (3) inviting the RWE Resident Council chair and vice chair to participate in annual board education retreats focused on strategic planning and industry education.
8. Resident Engagement: The CCRC Board shall appoint qualified RWE residents or the residents of other system participants, who are not members of the CCRC Board, on CCRC Board committees and task forces.
9. Transparency:
 - a. CCRC Board Meetings: The CCRC Board shall establish a process to ensure that the agendas and the approved minutes of CCRC Board meetings are posted to the RWE Intranet in a timely manner and that the minutes are informative of the Board's proceedings.
 - b. Financials: The TRWG and the CCRC Board shall ensure that their Forms 990 and audited financial statements are posted to the RWE Intranet in a timely manner.
 - c. Disclosures: RWE shall include in the disclosure statements delivered to prospective residents as required by RSA 420-D information concerning the structure of RWE, including that RWE is part of a system and that Available Assets of RWE, which might include fees paid by residents, can be used to support system goals and RWE's charitable mission. The updated disclosure statement also shall be provided to prospective residents who have made a deposit and are on a waiting list. The foregoing required information is in addition to any disclosures required by RSA 420-D:4, the corresponding regulations of the Insurance Department, or by the Insurance Commissioner pursuant to his powers established under RSA 420-D.
10. Removal of Trustees: The RWE Bylaws shall provide that the removal of a trustee of the CCRC Board requires a 2/3 majority vote of the full CCRC Board, excluding the trustee subject to removal.

This no further action report concerns the review of the Charitable Trusts Unit pursuant to RSA 7:19-b and does not implicate the jurisdiction of any other bureau of the

New Hampshire Department of Justice or any other state agency that may have a role in reviewing the proposed plan of reorganization.