



**MONTGOMERY COLLEGE
BOARD OF TRUSTEES**

**RECORD OF RESOLUTIONS
August 14, 2013**

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**BOARD OF TRUSTEES
MONTGOMERY COLLEGE**
Rockville, Maryland

Agenda Item Number: 5
August 14, 2013

**APPROVAL OF FIRST AMENDMENT TO HOLY CROSS HEALTH, INC., GROUND LEASE
FOR GROUND SUBLEASE TO NEXCORE BY HOLY CROSS HEALTH, INC.**

BACKGROUND

The College and Holy Cross Health, Inc. (“HCH”) are parties to a Ground Lease (the “Lease”) on the Germantown Campus dated October 28, 2009 for a hospital and associated health care uses. The Lease contemplates the construction of associated Medical Office Buildings (“MOB’s”) on the leased premises in phases; however, in order to assure that the hospital would become a reality before associated buildings were constructed through a transfer or sublease to any third parties, the Lease prohibited any subleasing to such third parties until after substantial completion of the initial hospital building. In addition, except for non-disturbance agreements to a carefully defined set of “occupancy subtenants” consistent with hospital financing (not applicable to the NexCore situation), the Lease did not require or provide for such a non-disturbance agreement by the College with a third party sublease at any time, either before or after substantial completion of the hospital building.

HCH has determined that it would like to sublease a portion of the premises to a third party, NexCore, that will finance, construct, own and operate a MOB commencing in the early Fall of 2013, substantially before the completion of the hospital contemplated. HCH entered into a sublease with HCH MOB, LLC (“NexCore”), a Subtenant to HCH under the Lease, to construct, own and operate a medical office building adjacent to the hospital. The term of the sublease is 45 years, with two (2) 15-year extension options.

The First Amendment to the Ground Lease (“First Amendment”) is necessary to allow Holy Cross to proceed with the sublease, prior to substantial completion of the initial improvements, and to provide a basis on which any future sublease would be permitted if a similar arrangement is used for the two additional medical office buildings identified on the approved site plan. In order for the Subtenant NexCore to obtain financing, the subtenant, and its proposed and future lenders, require a non-disturbance agreement (“NDA”) from the College consenting to the sublease and agreeing to recognize and allow the sublease to remain in place, as a direct lease with the College, if the Ground Lease is terminated.

Accordingly, this First Amendment includes a sublease for a medical office building within the definition of a “Permitted Transfer” so that the sublease may proceed prior to substantial completion of the hospital building. It also adds definitions to the Ground Lease for each proposed medical office building, and also for a sublease of the respective medical office buildings. Further, the First Amendment adopts a form of “NDA” that would be used for this sublease, and any future medical office building sublease, to ensure that the rights and obligations of the College under the Ground Lease would not be increased or abrogated if the College became the landlord under such sublease(s). The First Amendment also follows-up on the Lease closing requirements to confirm the date Holy Cross obtained its Required Approvals, which fixes the expiration date of the Ground Lease and also dates when certain development rights granted to Holy Cross must be exercised or expire.

The NDA incorporated by reference into the First Amendment is an important and complex document; in effect, it is a contingent lease between the College and the Subleasee, NexCore, that becomes effective in the event that the Lease between HCH and the College terminates. The NDA contains several specific provisions that protect the College in such event, which may include the elimination of the hospital from the Germantown campus. These provisions include:

- The subtenant's use is limited to operating a medical office building or certain health care related uses and remains subject to further restrictions on providing certain medical services that might compete with a successor hospital.
- The College is not liable for acts or omissions of Holy Cross, and is entitled to all rent and additional rent payable under the sublease, without offset for defaults or liability of Holy Cross and without regard to payment made more than 30 days in advance
- Except for routine maintenance obligations, the College is not required to perform any obligation which Holy Cross had as landlord if it was impossible to do so, or, in its good faith judgment it would impose an undue burden. In that event, the subtenant could perform the obligation and offset the costs against future rent.
- If the College becomes the landlord under the sublease, the College is not bound by the current indemnification provisions of the sublease, but will agree to a limited indemnification provision for acts, omissions or negligence of the college and its employees.
- There is no waiver of the college's sovereign immunity and State mandated provisions are incorporated into the Sublease.
- While the ground lease remains in effect, the College will agree to provide estoppel certificates to the subtenant, its lenders, or transfers once in any 12-month period, with a limited exception for additional estoppels certificates for new lenders or a transfer or assignment of the subtenant's entire interest. This will avoid the situation of burdensome certifications for every sub-subtenant and other ownership and financing parties that could require virtually a certification each week.

RECOMMENDATION

It is recommended that the Board of Trustees authorize the chair and the president to execute the First Amendment, and to authorize the president to execute the incorporated NDA and estoppels certificates contemplated by the First Amendment.

BACKUP INFORMATION

Board Resolution

Copies of the First Amendment, NDA and Estoppel Certificate form

SENIOR RESPONSIBLE ADMINISTRATORS

Dr. Wormack

RESOURCE PERSONS

Mr. Sorrell

Dr. Rai

Dr. Yeatts

Robert E. Gough, Esq., Special Counsel

**BOARD OF TRUSTEES
MONTGOMERY COLLEGE**
Rockville, Maryland

Resolution Number: n/a
Adopted on:

Agenda Item Number: Poll
August 14, 2013

Subject: Approval of First Amendment to Holy Cross Health, Inc., Ground Lease for Ground Sublease to NexCore by Holy Cross Health, Inc.

WHEREAS, The College and Holy Cross Health, Inc. ("HCH") are parties to a Ground Lease (the "Lease") on the Germantown Campus dated October 28, 2009 for a hospital and associated health care uses; and

WHEREAS, HCH has requested the College to approve HCH entering into a sublease with HCH MOB, LLC ("NexCore") to construct, own and operate a medical office building adjacent to the hospital on its ground lease land for a term of 45 years, with two (2) 15-year extension options; and

WHEREAS, The Lease must be amended to permit such a sublease to NexCore and can also provide for an acknowledgment of commencement date and future medical office buildings on the HCH site; and

WHEREAS, The financing for the NexCore subleasee's project requires that the College enter into a non-disturbance agreement ("NDA") and execute certain estoppel certificates; and
WHEREAS, The College has negotiated the forms of the First Amendment, the NDA and the estoppel certificates; and

WHEREAS, With advice of general counsel and outside counsel, the president of the College recommends the following action; now therefore be it

Resolved, That the First Amendment, the NDA and the estoppel certificate forms are hereby approved by the Board of Trustees in accordance with their terms and the chair and the president are authorized to execute these documents and associated support documents, as may be appropriate and required to permit HCH to sublease a portion of the Lease premises to NexCore for a medical office building.