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MEMORANDUM OPINION RE PETERSBURG BOROUGH RELATIONSHIP WITH PETERSBURG MEDICAL CENTER

ATTORNEY CLIENT PRIVILEGED COMMUNICATION

The Borough Manager has requested our opinion as to the general existing relationship between the Petersburg Borough and the Petersburg Medical Center ("PMC"). I think it best that the following confidential opinions be conveyed initially only to the Assembly and Manager. After your consideration of these matters, I can prepare an opinion, if appropriate, to share with the Hospital Board.

The following is intended to address both the general issues concerning the Borough's relationship with PMC and certain specific issues which have recently arisen, which I will discuss first.

1. Is PMC prohibited by Alaska Statute from investing in the stock market?

No. The State of Alaska, unlike some other states, does not prohibit political subdivisions or municipal entities from investing in the stock market. I note that the Borough itself recently adopted Ordinance No. 2013-14, which adopts, with revisions, prior City of Petersburg ordinances authorizing Borough investment in the stock market, subject to stated conditions. See Petersburg Borough Code at Section 4.36.040(G)(2). Other Alaska municipalities, including the City and Borough of Juneau, have adopted similar ordinances.

A.S. 37.10.085(a)(1) does not prohibit such investment. This statute generally prohibits various forms of financial aid to corporations by the State of Alaska and political subdivisions, and this particular subsection prohibits the state or a municipality from making "a subscription to the capital stock of a corporation". This is much narrower than a prohibition against purchase of (investment in) stock of a corporation generally, which the statute could have proscribed, but did not. A "subscription to the capital stock" of a corporation arises from a contractual agreement, authorized under A.S. 10.06.328 - .330, which is made directly between a subscriber and a corporation ordinarily immediately prior to or following the formation of the corporation, by which the subscriber promises to purchase treasury stock to be sold directly to it by the corporation. It is a device to directly capitalize or finance a corporation, ordinarily in its startup phase. This is why the prohibition against state/municipal subscription in A.S. 37.10.085 is included with the prohibition against state/municipal lending of its credit to

a corporation (.085(a)(2)), and against municipal borrowing of funds for the use of a corporation (.085(a)(3)); all are forms of direct financial aid to corporations, and all are prohibited.

By contrast, more general state or municipal investment in the stock market involves purchase of shares of stock from an existing shareholder, not directly from the corporation itself. Alaskan municipalities, and the State of Alaska (e.g., the Alaska Permanent Fund) are permitted to make such investments, ordinarily under self-imposed constraints.

While the Petersburg Borough has clearly identified constraints on the Borough's investment of its funds (Borough code sections 4.36.010 et. seq.), it has not clearly imposed such constraints upon PMC, either in Charter or ordinance. Against the background of Charter provisions granting the "greatest possible autonomy" to the PMC Board, current Borough code does not directly address or constrain the PMC Board's investment authority; the closest code section on point is Section 3.50.080(A) which provides that the PMC Board has "full power and authority to manage the finances of the hospital".

The recently proposed Code section 3.50.080 would require that the PMC board comply with Chapter 4.36 of the Borough Code, relating to Borough investments, and with the Assembly's investment policy adopted under section 4.36.120 of the Code. This would permit investment by PMC in the stock market under strict constraints.

2. Are PMC employees Petersburg Borough employees?

This is a "gray area", and as discussed below, I do not think it is presently in the Borough's interest to publically assert or deny that PMC staff are Borough employees.

As is not unusual in legal matters, good arguments can be made on both sides of this question. PMC does not exist as a stand-alone corporation, association or partnership, but rather exists as a municipally-owned entity, managed by a municipally-elected board, under both the Borough and prior City charters and codes. Most of the real property on which the hospital owned hospital is situated is deeded to the City (now Borough), though I understand that two parcels are in the name of PMC. As a subordinate entity of the Borough, it would follow that employees are Borough employees.

On the other hand, PMC, in its name alone and not the Borough's, has historically and presently undertaken all of the functions of an employer, with the Borough's acquiescence and exercises direct employer control over the employees. Under Borough code section 3.50.070, the PMC Board has authority "to employ" an administrator, physicians, surgeons, advisers, accountants, consultants, attorneys "and any other medical care providers or professionals", and to determine the ranges of salary, wages and benefits of these. In tax matters, PMC, in its name alone, functions as the employer, with its own federal tax ID number, directly issuing paychecks, making withholdings, filing payroll reports and making employer's tax contributions. PMC procures its own worker's compensation insurance coverage for the benefit of the hospital employees. In labor matters, hospital employees are not enrolled as members of PMEA.

I see no advantage to the Petersburg Borough to now publically assert that PMC staff are Borough employees. Of paramount concern here is potential employer liability for personal injury or death which may be alleged to result from negligent hospital care. When such damages are alleged to have occurred as the result of the actions or inactions of one or more members of the hospital staff, their direct employer is ordinarily sued under the doctrine of *respondent superior*, by which the employer is held vicariously (automatically) liable for the actions of its employees, regardless of whether the employer itself was negligent. Claims arising in hospitals can conceivably be very large. While adequate insurance coverage is always the first measure of protection for the employer, insurance coverage can be inadequate for a number of reasons, including exclusions, insufficient limits of coverage or financial failure of the carrier. Employer liability based upon *respondent superior* is based upon the understanding that the employer has direct control over the employee.[1] I would recommend that the Borough preserve the option of asserting that it is not the employer of hospital staff, to provide it with at least a colorable defense which might permit it to be dismissed from a future hospital injury or death lawsuit in which a plaintiff names not only PMC but also the Borough as defendants. Again, I see no advantage to encouraging suit against the Borough by asserting that the Borough is the employer of hospital staff. Nevertheless I

[1] A 2011 suit (Thorsen v. City of Petersburg) named the City as a defendant, though this was not a personal injury claim against PMC but rather arose from a labor rights issue. As discussed below, personal injury claims against the Sitka hospital have not named the City and Borough of Sitka, that hospital's owner, as a defendant.

would also like to confirm that the Petersburg Borough is listed as a named insured on all of the hospital's liability insurance policies.

Another concern here is that public assertion that the Borough is the employer of PMC staff may result in an effort to enroll the staff in PMEA collective bargaining.

A public declaration that hospital staff are Borough employees may also complicate current relationships regarding employee taxes and worker's compensation insurance.

Finally, I am unaware of any current problem that is attributable to failure of the Borough to assert that PMC employees are Borough employees. Other issues regarding PMC management can be separately addressed by ordinance or Charter change if the Assembly so wishes, as discussed below.

I could obtain no clear answer from Wrangell as to whether their hospital staff are considered employees; they appear to assume otherwise. The attorney for the City and Borough of Sitka states that their hospital employees are not considered to be Borough employees; hospital administration, hiring/firing, wage payments and records are all done in-house by the hospital administrator. Where lawsuits have been filed against the Sitka hospital and individual doctors, the Borough was never named as a defendant in the suits.

In summary, I see no reason for the Borough to now affirmatively assert an "employer" status where current understandings have presented no significant problems.

3. Overall relationship between Borough and PMC; Optional changes.

The foregoing issues only scratch the surface of the larger question as to the Borough's existing relationship with PMC, and whether and how this should be altered. It is my understanding that the Assembly has recently become increasingly concerned with PMC's management actions, including those relating to (1) incurrence of PMC indebtedness, undisclosed to the Assembly, (2) the method and amount by which the PMC Administrator's salary and benefits were increased, (3) questionable procurement of construction contracts and change orders and (4) PMC investment policy.

The relationship between the Borough and PMC is entirely based upon the Charter and Code of the Petersburg Borough. The relationship is not dictated by federal

or state law. The Borough Charter and Code are obviously not set in stone, though Charter amendments require ratification by a majority of voters. Draft amendments to Chapter 3.50 (Hospital Board) of the Borough Code are already under discussion; further changes can be considered.

Most hospitals in Alaska and in the United States are not publically owned and managed. There has been a general decrease in the number of publically-owned hospitals, some of which have been transferred to private nonprofit organizations. There are two other municipally-owned hospitals in Southeast Alaska of which I am aware: the Sitka Community Hospital and the Wrangell Medical Center. Each of these is managed by a hospital board; Sitka's board members are appointed by the Assembly, and Wrangell's board members, like Petersburg's, are elected by the voters. Sitka's Charter does not even mention its hospital and Wrangell's Charter merely states that the Wrangell Medical Center shall be operated by a board established by ordinance and elected by the voters. In contrast to these, the Petersburg Borough Charter specifies the number of hospital board members, their qualifications and terms, and their general powers and duties, and significantly includes statements that the hospital board is to have the "greatest possible autonomy" to operate and maintain the hospital and have "greatest possible autonomy" under ordinances establishing its procedures for administration. See Petersburg Borough Charter, Sections 9.01 - .05. These provisions did not exist in the prior City Charter, but were apparently included by the Charter Commission for the proposed Petersburg Borough.

Both the Sitka and Wrangell boroughs have enacted municipal codes providing for substantially more involvement and control over their hospitals, by their respective Assemblies, than is the case in the Petersburg Borough. While the Sitka/Wrangell codes may be suggestive of options to increase Petersburg Borough Assembly control over PMC, it is important to remember that Petersburg's recently adopted Charter has two "greatest possible autonomy" clauses not featured in the Sitka/Wrangell charters, and this may limit the extent to which code sections can be revised without an accompanying Charter amendment approved by a majority of voters. Consistent with the Charter, Code section 3.50 contains three different recognitions of the "full power and authority" of the PMC board - - to operate the hospital, to make and impose internal rules and procedures, and to manage hospital finances.

Before comparing the Sitka/Wrangell code sections with either the existing Petersburg Borough ordinances (Sections 3.50.010 - .090) or recently proposed amendments thereto, it is noteworthy that the greater Assembly control over hospital matters featured in the City and Borough of Wrangell Code was the product of substantial discontent of that borough's Assembly with the Wrangell Medical Center Board. Dissension between the Assembly and the board had grown to the extent that six of the seven board members were recalled in an election. After the recall election results were tallied but prior to election certification, the board met and granted its administrator a five-year severance package. This resulted in a lawsuit by the Borough against the hospital board regarding the amount of the administrator's severance compensation, which was resolved through a compromise settlement without a court judgment. The resulting tightened control over the Board adopted by Assembly ordinance did not encounter resistance from the Board or the administrator, because these were new, incoming board members and a new administrator. In short, the Wrangell code revision arose from extreme confrontation costly to the City and Borough of Wrangell.

I have compared the current Petersburg Borough Code, as well as the recently proposed changes to the Petersburg Code, with both the Sitka and Wrangell codes, under the following subject areas.

A. Hospital Board/Assembly Communication; Public Records Disclosure.

- Sitka: A member of the Assembly or borough manager cannot be excluded from executive session of hospital board. Wrangell: Borough Assembly liaison appointee shall represent the Assembly and attend and participate, as a non-voting member, in all hospital board meetings and executive sessions. **No such requirements exist in Petersburg Borough Charter or Code. Petersburg Borough Code Section 3.50.090 states that PMC board is "encouraged" to meet with Borough Assembly from time to time to discuss PMC issues. Charter Section 9.04 says Assembly and hospital board shall meet at least once yearly in public session, and a recently proposed amendment to Code Section 3.30.090 would also require a joint meeting annually and at other times called by the Assembly, to**

" . . .coordinate financial planning, capital improvement needs, comprehensive plans for health care and other issues".

- Sitka: Hospital board shall make timely delivery to Assembly of a record of its proceedings. **No similar requirement in current Petersburg Charter or Code. However, the recently proposed Code amendment would require public disclosure of records of the PMC board, as discussed below.**

- Sitka: Hospital board provides Assembly with quarterly operation reports, and such periodic or special reports as are requested by the Assembly. Wrangell: Hospital board required to submit annual detailed reports to Borough Manager and Assembly regarding policies, rules, regulations, procedures and statistics. **No such requirements in Petersburg Borough Charter or Code.**

- Disclosure of records to public: Neither Sitka's nor Wrangell's codes require disclosure, probably because this is assumed to be required under the Alaska Public Records Law. **The Petersburg Borough Code similarly contains no reference to records disclosure, but the recently proposed Code amendment would explicitly require disclosure of records of the PMC board and hospital, pursuant to both state law and Borough Charter.**

B. Grants/Procurements.

- Sitka and Wrangell: Solicitation of federal or state grants must have prior approval of Borough Manager, and hospital board must keep Manager advised of all grants and funds being sought. **No such requirement in Petersburg Borough Charter or ordinance.**

- Sitka: Hospital board makes recommendations for Assembly approval for procurements of hospital maintenance contracts in excess of $25,000, and for all hospital construction and architectural contracts, for either new construction or improvements, which contracts must be executed in the name of the Borough. Wrangell: Hospital board must obtain Assembly approval for any contracts, including repairs, improvements and

maintenance of hospital building, in excess of $25,000. **Current Petersburg Borough Charter and ordinance have no such requirements. Recently proposed Code change would require PMC board to adopt, subject to Assembly approval, procedures for competitive bidding for purchase, sale or lease of real or personal property.**

C. Budget/Expenditures.

- Sitka: Hospital board must submit to Borough Manager a detailed and itemized budget for next fiscal year by April 1; funds budgeted for hospital purposes are only made available to the hospital under a schedule approved by the Borough Manager. Wrangell: Hospital board annually submits budget in accordance with Borough procedure, through Borough Manager for approval by Assembly; expenditures for the hospital can only be made if identified with specificity in the budget and approved by the Assembly. **Petersburg Charter (Section 9.03(C)) requires hospital board "submission of an annual budget and six-year capital improvements plan for equipment and buildings", with submission presumably made to the Assembly, though this is not explicitly stated. Code section 3.50.080(D) requires hospital board to annually "prepare and adopt" a budget, before June 15 of each year. Recently proposed Code amendment would require that the PMC budget be prepared by April 1 of each year, to be promptly transmitted to Manager and Assembly. Neither Charter nor ordinance explicitly requires Borough Assembly approval of hospital budget, and there is no stated requirement that hospital expenditures be tied to its budget.**

D. Finances, Revenues.

- Sitka: Hospital accounts receivable are property of the Borough, deposited in a special Borough general fund account, to be used only in connection with hospital operations; hospital administrator and Mayor sign checks from account. Wrangell: Borough named on all hospital accounts, with Borough Manager as a signatory.

Petersburg Borough Charter or ordinance contain no such requirements.

- Sitka: The hospital's ability to borrow money and commit hospital to financial and loan obligations is not specifically addressed, but board is to advise Assembly of "funds being sought", with a budget (presumably addressing prospective loans) submitted to Borough Manager by April 1, with no Assembly approval required. Wrangell: "Financial obligations" are to be addressed in the budget, to be approved by the Assembly, with Board to advise Assembly of "funds being sought". **No similar requirements in Petersburg Borough Charter or Code, which give no express power to PMC board to borrow or to undertake loan obligations (but also contain no prohibitions or restrictions against this.) The recently proposed code amendment would require that any loan, line of credit or similar financing or credit transaction sought by the PMC board be approved by the Assembly and (if required by State or Borough law) by the voters. The Borough has previously taken the position that the Borough Charter, at sections 13.01(A) and 13.04, as well as the Alaska Constitution require voter approval when PMC borrows money for capital improvements, or in connection with revenue bonds secured by its revenues.**

- Wrangell: No property or equipment other than supplies can be purchased by hospital board except from funds derived from operations of the hospital and appropriated by the Assembly. Sitka has no such restriction. **Current Petersburg Borough Code (section 3.50.080(A)), like Wrangell's code, states that PMC may only purchase property or equipment other than supplies from funds derived from the operation of the hospital or appropriated for hospital purposes by the Assembly.**

- Wrangell: Hospital Board shall obtain an annual audit and submit it to the Borough Manager and Assembly. **Petersburg Borough Code (section 3.50.080(c)) requires that PMC board complete an annual audit, but contains no reporting requirement. My understanding is**

that starting this year, the Borough's annual audit report will contain summary information regarding the hospital's audit. The recently proposed Code amendment would require that the full hospital audit be annually submitted to the Assembly by September 15 "for review and discussion".

E. Management.

- Sitka and Wrangell: Hospital Board adopts personnel policies for annual review by Assembly in May of each year. **Petersburg Borough Charter and ordinance contain no such requirement.**

- Wrangell: Hospital Board employment of administrator is subject to approval by Borough Manager. **No such requirement exists in Petersburg Borough Charter or Code, but recently proposed Code amendment would require prompt notice to Assembly of terms and conditions of hospital administrator's contract.**

- Wrangell: Borough Manager has governing power over hospital administrator, like other department heads. **No such provision exists under either Sitka or Petersburg Borough Charter or Codes.**

- Sitka and Wrangell: Rules and regulations for hospital operations are subject to Assembly approval. **No such requirement under Petersburg Borough Charter or Code, where PMC board has "full power and authority" to make and enforce such rules (Code section 3.50.070(G)).**

- Wrangell: Rates for hospital services are subject to modification by Assembly. **No such requirement under Sitka or Petersburg Borough Charter or Code.**

- Petersburg, Sitka and Wrangell boroughs all require hospital board to adopt bylaws. The Wrangell code requires that the board's bylaws be approved by Assembly. **The recently proposed Petersburg Borough Code change would require that the PMC board's bylaws be provided to the Assembly.**

F. Investments.

- Sitka: Hospital board may make acquisitions or contracts that the Borough Manager would be authorized to make under Borough Procurement Code, which requires Assembly approval for any acquisition or contract exceeding $50,000. Wrangell: All expenditures of funds must be identified with specificity in the budget and approved by Assembly. **Current Petersburg Charter and Code contain no such restrictions. The recently proposed Code section would require PMC's compliance with Borough investment policies to be codified in section 4.36.010 et. seq., and in compliance with investment policy adopted by the Assembly.**

4. Summary.

The Borough's relationship with the hospital exists somewhere along a continuum between absolute control, on one end, and absolute autonomy on the other. It is in the interest of the Assembly, Borough Administration and PMC to have clarity and mutual understanding of respective roles, partly to avoid the type of meltdown that occurred in Wrangell. Recent Borough concerns with PMC management would seem to underscore this need.

At a minimum, the comparatively stronger Borough controls over their hospitals featured in Sitka and Wrangell provide some measure of protection, which the Petersburg Borough could impose through stronger code provisions. I offer no knowledge or opinion as to whether those hospitals are managed better than Petersburg's, or whether tighter control by those boroughs has had a beneficial result; I merely point out the differences for your consideration and, potentially, for the PMC board's consideration.

In nearly all of the subject areas I have outlined, the Sitka and/or Wrangell Boroughs have greater involvement with hospital management and exert stronger control. Whether to move in this direction is entirely within the judgment of the Assembly. However, adoption of Code changes imposing significantly greater Borough management/control might be challenged by the PMC board or others as being contrary to the Borough Charter provisions for the hospital board's "greatest possible autonomy". To address this, the Assembly could consider seeking, either prior to Code amendments exerting greater control or after a legal challenge (if one is made) to such Code changes, a Charter amendment which would at least qualify or condition the

"greatest possible autonomy" language, perhaps through addition of the words "...consistent with responsible oversight by the Assembly", or similar language.

If the Assembly wishes to consider Code changes in particular subject areas relating to PMC, I am available to review or draft such proposed changes.

Dated this _____ day of _____, 2013.

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James T. Brennan