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**THE VERMONT ATTORNEY GENERAL'S NOTICE OF NON-OBJECTION
TO THE PROPOSED DISPOSITION OF ASSETS BY MARLBORO COLLEGE
TO EMERSON COLLEGE & DEMOCRACY BUILDERS**

On June 29, 2020, the Corporation of Marlboro College ("Marlboro College") provided the Office of the Vermont Attorney General ("AGO") with written notice of its intent to dispose of "all, or substantially all, of its property" through an "Asset Exchange Agreement" with Emerson College, a Massachusetts public benefit corporation located in Boston ("Emerson College").¹ It also provided the AGO with written notice of its intent to sell its campus² in Marlboro, Vermont, to Democracy Builders Fund, Inc. ("Democracy Builders"), a Delaware nonprofit corporation based in New York.

This report sets forth (I) the role of the AGO in reviewing asset-dispositions by Vermont charitable nonprofit corporations; and, (II) the AGO's findings regarding the proposed dispositions referenced above.

As to the AGO's findings: ultimately, while the AGO recognizes that Marlboro College's impending closure is an occasion of significant and challenging import for many of the College's students, faculty, staff, and alumni, as well as community members of Marlboro, Vermont, the AGO finds that the proposed transactions are consistent with relevant state laws governing charitable nonprofit corporations and their assets. Accordingly, the AGO issues this Notice of Non-objection to the proposed transactions.

¹ Marlboro College provided the AGO with written notice and related documents regarding its proposed Asset Exchange Agreement with Emerson College on June 26 and June 29, 2020. It provided the AGO with written notice and related documents regarding its proposed Purchase and Sale Agreement with Democracy Builders on June 2 and June 5, 2020. The AGO considered Marlboro College's notice of both transactions effective June 29, 2020.

² And certain related assets, per the proposed Purchase & Sale Agreement.

I. The Role of the Attorney General in Reviewing Asset Transfers by Charitable Nonprofit Organizations

The Office of the Vermont Attorney General (“AGO”) is empowered to ensure that charitable nonprofit corporations operating in Vermont—called “public benefit corporations”—use their assets in line with (1) their charitable purposes and (2) certain potential additional restrictions governing a specific asset’s use, such as the terms of a charitable trust or gift instrument.³

Accordingly, under Vermont state law, at least twenty days before a public benefit corporation “disposes of all, or substantially all, of its property,” it is required to provide the AGO with notice of that transaction. 11B V.S.A. § 12.02(g). This notice-requirement allows the AGO to review:

- what the purpose of the relevant public benefit corporation is;
- what the corporation’s assets are;
- whether any of the corporation’s assets are subject to certain kinds of specific restrictions, such as the terms of a charitable trust or gift instrument;
- how the corporation is proposing to dispose of its assets; and,
- whether the corporation’s proposed disposition of its assets aligns with the corporation’s purpose and asset-restrictions.

While the AGO also reviews the rationale behind the public benefit corporation’s decision to dispose of these assets in the proposed manner, public benefit corporations have wide latitude in making such business decisions. *See generally* 11B V.S.A. § 8.30 (“General Standards for Directors”); 11B V.S.A. § 12.02 (“A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property... on the terms and conditions and for the consideration determined by the corporation's board.”) In turn, the AGO has limited authority to challenge such decisions. *See, e.g.*, 11B V.S.A. § 3.03 (authorizing the Attorney General to challenge a corporate action only if the corporation lacked the “power to act” in the manner in question).

Ultimately, if the AGO has concern that a proposed disposition of charitable assets—or aspects of the same—are inconsistent with Vermont state laws, then, depending on the circumstances, it may seek court intervention. However, if the AGO determines that a proposed disposition of assets under 11B V.S.A. 12.02(g) is (1) within the public benefit corporation’s legal power and (2) aligns with the corporation’s charitable purpose and any specific legal restrictions on those assets, then the AGO’s practice is to issue a Notice of Non-objection, such as this one.

³ *See generally*, Title 11B, Vermont Statutes Annotated (“Nonprofit Corporations”); Title 14, Chapter 120, Vermont Statutes Annotated (“Uniform Prudent Management of Institutional Funds Act”); and Title 14A, Vermont Statutes Annotated (“Trusts”).

II. The AGO Review Process & Findings as to the Proposed Disposition of Assets by Marlboro College

Below is an overview of the AGO's review process and findings regarding the proposed disposition of assets by Marlboro College.

a. Review Process

In order to review (1) Marlboro College's decision to wind down its affairs and consolidate its assets with those of another educational institution and (2) Marlboro College's proposed disposition of assets as to Emerson College and Democracy Builders, in particular, the AGO inspected:

- information and records reflecting this decision's rationale, including:
 - a written narrative by Marlboro College's Board of Trustees describing its decisions to wind down the College's affairs and enter into the proposed transactions;
 - Marlboro College's audited financial statements for FYs 2017-2019 and unaudited financial statement as of February 29, 2020;
 - Marlboro College's financial projections as of February 2019;
 - Ernst & Young / Parthenon's financial projections regarding Marlboro College as of February 2019;
 - correspondences between Marlboro College and its accreditor (the New England Association of Schools and Colleges / New England Commission of Higher Education) from 2015-'19;
 - the recommendation of a Marlboro College Campus Working Group regarding the future use and sale of the Marlboro College campus; and
 - related Marlboro College Board of Trustees meeting minutes;
- information and documentation related to the respective purposes of Marlboro College, Emerson College, the proposed Marlboro Institute for Liberal Arts and Interdisciplinary Studies at Emerson College ("MIEC"), and Democracy Builders, including relevant articles of incorporation, bylaws, Internal Revenue Service 501(c)(3) Determination Letters, and documents reflecting the MIEC's intended academic programming;
- information and documents regarding Marlboro College's assets, including Marlboro College's endowment and its 46 restricted endowment funds; and,
- the legal documents memorializing the proposed disposition of assets in question, including the (1) Asset Exchange Agreement between Marlboro College and Emerson College ("AEA") and (2) Purchase and Sale Agreement between Marlboro College and Democracy Builders.

Additionally, on January 23, 2020, and July 7, 2020, the AGO met with Marlboro College's counsel, President, Chief Financial Officer, other representatives of Marlboro College's Board of Trustees, and (on July 7) a Marlboro College faculty representative to discuss the proposed transactions and address the AGO's questions regarding them. Further, prior to and

particularly during the AGO's 20-day review period, the AGO and Marlboro College's counsel conferred on a regular basis to address the AGO's questions and information/document-requests regarding the transactions in question.

Finally, the AGO reviewed all correspondences to it by members of the public regarding the proposed transactions in question.

b. Findings

As a result of the review process described above, the AGO finds that Marlboro College was and is within its rights to decide to wind down its affairs as an educational institution and consolidate its assets with those of another institution of similar purposes. Further, the proposed dispositions of assets to Emerson College and Democracy Builders, in particular, are consistent with Vermont laws governing nonprofit corporations.

i. Marlboro College was within its rights to decide to wind down its affairs and consolidate its assets with those of another educational institution.

By way of legal background, Vermont laws permit public benefit corporations to wind down their affairs in various manners, including through dissolution (11B V.S.A. §14.01 *et seq.*), mergers (11B V.S.A. §11.01 *et seq.*), sales of assets (11B V.S.A. §12.02 *et seq.*), and transfers of assets otherwise (11B V.S.A. §12.02 *et seq.*). Indeed, a public benefit corporation “may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property... on the terms and conditions and for the consideration determined by the corporation’s board, if”—for a nonprofit corporation without members, like Marlboro College—“the proposed transaction... [is] approved...by the board,” 11B V.S.A. §12.02(a)-(b)(1), presuming the corporation’s board operates in conformity with applicable state laws (including “General Standards for Directors” pursuant to 11B V.S.A. § 8.30 *et seq.*) and its corporate bylaws otherwise. *See, e.g.*, Andover-Newton Theological School transfer of assets to Yale University Divinity School.

Regarding Marlboro College: between 2009 and the present, Marlboro College’s enrollment and net tuition revenue have dramatically declined such that the College is currently operating at a multi-million-dollar annual deficit and is no longer financially sustainable. By way of illustration, in the 2009-'10 academic year, Marlboro College enrolled 310 students, charged net tuition revenues of \$7.2M, and drew \$1.5M from its endowment. By the 2018-'19 academic year, Marlboro College’s enrollment had dropped to 142 (-52%), net tuition revenues had fallen to less than \$2M (-72%), and the College drew \$5.2M (+200% increase) from its endowment and other reserves.

Since at least FY2015, Marlboro College has been operating at a deficit. Between FY2015 and FY2019, its operating deficit increased from (-)\$0.7M to (-)\$3.9M. Marlboro College projects that, to fund the continued costs of operating at such (increasing) deficits, it would likely be required to spend down its endowment (approximately \$29M as of April 2020) at double-digit (\$M) levels annually.

While Marlboro College undertook an array of efforts to improve its financial sustainability between 2009 and 2019,⁴ these efforts were ultimately unavailing. In fact, during these years, the College’s financial position continued to deteriorate, causing the Board of Trustees to conclude, in February 2019, that continuing the College on a stand-alone basis was financially unsustainable. The Board’s then-consultant, Ernst & Young / Parthenon, concurred in this conclusion.

Given these circumstances, Marlboro College’s Board of Trustees subsequently determined that some form of alliance with another educational institution was preferable to outright closure, as an alliance could potentially “preserve Marlboro’s ‘DNA’ relating to its identity, pedagogy, people and campus.” *Narrative of Marlboro College’s Efforts to Maintain its Independence*, at 4. After undertaking substantial efforts to solicit, consider, and negotiate proposals of other educational institutions that were potentially interested in some such form of alliance,⁵ the Board of Trustees identified Emerson College as a potential alliance partner—and one preferable to potential alternatives in light of Emerson College’s apparent financial sustainability; alignment with Marlboro College’s values and pedagogy; and willingness to integrate Marlboro College’s faculty, students, and core pedagogy into a “Marlboro Institute for Liberal Arts and Interdisciplinary Studies at Emerson College,” as described further below.

Meanwhile, in December 2019, Marlboro College’s accreditor, the New England Commission of Higher Education (“NECHE”), indicated to Marlboro College that it “concurred” that a successful merger with another educational institution was the “only way” Marlboro College could address the enrollment and financial trends that would otherwise put its accreditation at significant risk. *See Letter from NECHE to Marlboro College*, dated December 19, 2019, at 2.

Thus, on May 16, 2020, in conformity with Article VII of Marlboro College’s Bylaws, which authorizes the Board of Trustees to dissolve Marlboro College or enter into mergers and/or partnerships otherwise, the Board of Trustees voted unanimously in favor of a resolution to consummate the proposed disposition of assets as to Emerson College (excepting its campus and related assets, as addressed below in section II(b)(iii)).

⁴ Including the development and implementation of a Task Force on the Future; dual enrollment courses with Brattleboro High School; summer programs for high school students; revised marketing and admission approaches; a new Strategic Plan; a Six College Collaborative to facilitate cross-enrollment; a Beautiful Minds competition; the Renaissance Scholarship program; an expanded experiential learning curriculum; and the “Marlboro Promise.” Additionally, the College implemented a spending freeze, reduced employee health care benefits, and eliminated staff positions. Most recently, the College implemented a Strategic Options Task Force to explore ways in which to “preserve Marlboro’s ‘DNA’ relating to its identity, pedagogy, people and campus,” and hired an expert educational consultant, Ernst & Young/Parthenon, to assist its process.

⁵ For example, in July 2019, Marlboro College entered into a letter of intent to merge with the University of Bridgeport (CT). For reasons not pertinent here, that transaction was not consummated.

Given Marlboro College's (1) current financial position and projections, (2) inability to restore the College to a financially sustainable position despite substantial efforts in that regard, and (3) likelihood of loss of accreditation should it continue operations in a stand-alone manner, Marlboro College's Board of Trustees was within its rights under Vermont state laws governing public benefit corporations to wind down Marlboro College's affairs through an alliance with another educational institution. In fact, as discussed below, Marlboro College has undertaken laudable effort to maximize the extent to which its charitable purpose and charitable assets could "live on," given the College's evident inability to operate independently in a financially sustainable manner.⁶

- ii. Marlboro College's proposed disposition of assets to Emerson College is consistent with Vermont state laws governing public benefit corporations.

By way of legal background, Vermont public benefit corporations are required to apply their assets in a manner that is consistent with their charitable purposes and any restrictions on those assets' use per the terms of a gift instrument or charitable trust. *See, e.g.*, 11B V.S.A. §14.30 (reflecting the requirement that public benefit corporations apply their assets to their respective purposes); 11B V.S.A. §17.05 (defining "public benefit corporations" as corporations required, "upon dissolution," to "distribute its assets to the United States, a state, or a person which is recognized as exempt under section 501(c)(3) of the Internal Revenue Code, or any successor section..."); 14 V.S.A. §3411 *et seq.* (requiring a "charitable institution" to use a restricted "institutional fund" consistent with the terms of the relevant "gift instrument."); 14A V.S.A. §101 *et seq.* (requiring charitable trusts to be applied to their respective intended uses per their respective terms).

Accordingly, when a public benefit corporation disposes of "all, or substantially all" of its assets to another public benefit corporation, state law requires that the disposition be consistent with the corporation's purposes. Practically speaking, where a public benefit corporation is disposing of its assets to another charitable nonprofit corporation, this calls upon the AGO to evaluate whether the charitable purposes of these corporations are sufficiently similar.

Further, if the assets of a public benefit corporation are restricted by the terms of a gift instrument (under the *Uniform Prudent Management of Institutional Funds Act, or "UPMIFA"*) or charitable trust (under the *Vermont Trust Code*), those assets must be disposed of in a manner that is consistent with the relevant restrictions' terms, absent statutory exceptions or court approval otherwise. *See generally*, 14 V.S.A. §3411 *et seq.* (requiring a "charitable institution" to use a restricted "institutional fund" consistent with the terms of the relevant "gift instrument."); 14A V.S.A. §101 *et seq.* (requiring charitable trusts to be applied to their intended uses per their respective terms).

Here, for the reasons set forth below, the AGO finds that (1) the charitable purposes of Marlboro College and the proposed Marlboro Institute at Emerson College are (and/or will be, pending consummation of the proposed transaction) sufficiently similar to support the proposed

⁶ Marlboro College also sought to maximize outcomes for its current faculty and students, given its determination that it could no longer sustainably operate on a stand-alone basis.

disposition of assets from the former to the latter and (2) the proposed disposition of assets by Marlboro College is consistent with, and will require continued adherence to, the terms governing the College's restricted assets.

1. The charitable purposes of Marlboro College and the proposed Marlboro Institute at Emerson College are substantially similar.

Marlboro College is a public benefit corporation recognized by the Internal Revenue Service as a 501(c)(3) organization. Per its Articles of Association, the purpose of Marlboro College is to “maintain[] an educational institution of higher learning offering instruction in courses of post-secondary grade, and awarding to the students satisfactorily completing the same the degree of Bachelor of Arts, Bachelor of Science, Master of Arts, Master of Business Administration or Master of Science, or such other equivalent degrees as shall be voted by the Trustees.”

In practice, Marlboro College's primary purpose has been to provide for (1) a four-year undergraduate course of self-directed, liberal arts, interdisciplinary study and (2) the “Marlboro Promise” that, whatever course of study Marlboro College undergraduate students pursue, they learn the following practical skills needed for “success,” however they define that term:

- to “Write and communicate with clarity and precision;”
- “Live, work and collaborate with a wide range of people;” and,
- “Lead ambitious projects from idea to execution.”

Also in practice, Marlboro College's purpose is embodied in its current faculty, who, through their teaching (in both substance and approach), most immediately reflect how the College's purpose—including the “Marlboro Promise”—are operationally delivered to undergraduate students.

Like Marlboro College, Emerson College is a public benefit corporation⁷ recognized by the Internal Revenue Service as a 501(c)(3) organization. Per Emerson College's bylaws,⁸ the purposes of Emerson College are to, among other things:

- “Give a general education such as is obtained in college with special reference to perfection in speech, drama, and other communication arts, with authority to confer, in addition to the degree of Bachelor of Literary Interpretation[]; the degree of Bachelor of Arts[]; the degree of Master of Arts []; the degrees of Bachelor of Science in Speech and Master of Science in Speech (changed to Master of Science in Communication Disorders in 2007), and the honorary degrees of Master of Arts, Doctor of Humanities, Doctor of Literature, and Doctor of Laws; the degree of Bachelor of Music; the degrees of Bachelor

⁷ Emerson College is a public benefit corporation under Massachusetts law. It would likewise qualify as a public benefit corporation under Vermont law. *See* 11B V.S.A. § 1.40(28) (defining “public benefit corporation”).

⁸ While Emerson College's bylaws generally parallel its Articles of Organization, they expand upon them in pertinent ways, so are cited here instead of the College's Articles of Organization.

of Science and Bachelor of Fine Arts; the degree of Master of Fine Arts; the degree of Doctor of Philosophy in Communication Disorders;” and,

- “To nurture, encourage, educate and train students to think creatively, to work efficiently, and to achieve in practice what they envision in their imagination. To award degrees in recognition of the attainment of the practical and theoretical skills necessary to practice vocations chosen by the students. To conduct research and to document and publish the results of that research. To receive and hold gifts and grants of tangible and intangible property and to invest and reinvest the same for the aforesaid purposes.”

While the purposes of Marlboro College and Emerson College are consistent in fundamental ways (both being charitable 501(c)(3) organizations with the purpose of offering degree programs in the liberal arts and interdisciplinary studies), Marlboro College’s proposed disposition of assets involves a near-wholesale transfer of the College’s academic programming—through its core pedagogy, faculty, and supporting charitable assets—to a distinct division within Emerson College.

That is, under the proposed AEA, Emerson College is required to:

- rename Emerson College’s Institute for Liberal Arts and Interdisciplinary Studies the “Marlboro Institute for Liberal Arts and Interdisciplinary Studies at Emerson College” (the “MIEC”);
- collaborate with Marlboro Faculty to integrate Marlboro College’s liberal arts pedagogy as embodied in the “Marlboro Promise” into the MIEC;⁹
- appoint and employ current Marlboro College tenured and tenure-track faculty at the MIEC or in affiliation with the MIEC;¹⁰
- accept and enroll for the 2020-‘21 academic year those Marlboro College undergraduates in good standing who wish to accept such enrollment;¹¹

⁹ Emerson College and Marlboro College faculty working groups have collaboratively created a four-year academic model for the MIEC, including, as described in the Asset Exchange Agreement, “yearly Marlboro Institute courses that support student independent and interdisciplinary work and culminates with a capstone experience....” AEA, Appendix B.

¹⁰ Following consummation of the AEA, 20 of 24 Marlboro College tenured or tenure-track faculty would transition to Emerson College. 16 would be housed within the MIEC; the remaining 4, while in other Emerson College Departments pertinent to their areas of expertise, would nonetheless maintain a secondary appointment to—and thereby a substantive affiliation with—the MIEC.

¹¹ Following consummation of the AEA, approximately 55 of 95 Marlboro College students would transfer to Emerson College.

- appoint two members of the Marlboro College Board of Trustees (at least one of whom must be a Marlboro alumnus) to the Emerson College Board of Trustees for a three-year term;
- use all assets transferred to it by Marlboro College under the AEA exclusively for the purposes of the MIEC;¹² and, among other obligations,
- identify the MIEC by signage, stationery, advertising, logos, public relations and the like to include “Marlboro,” and include the name “Marlboro Institute” in diplomas awarded to students earning degrees from the MIEC.

As Emerson College stated in its request to its accreditor (NECHE) for approval of these “substantive changes” to the “nature of [its] institution,”¹³ these steps “will ensure that the Marlboro College legacy will live on at Emerson and that its name and distinctive educational mission will be immortalized.” *Emerson College Substantive Change Request to NECHE*, dated June 1, 2020.

Emerson College further represented to NECHE: “The new [MIEC] is crafted to uphold Marlboro’s distinctive educational promise that students can craft their own education, engage in self-directed inquiry, and bring a big idea to life from conception to execution. This legacy will live on in the new curriculum that offers an interdisciplinary liberal arts experience in an otherwise specialized environment. Students will combine liberal arts courses with professional and studies courses from across the College in a program of their own design that culminates in a senior capstone project centered on a coherent idea or solution to a problem that sparks their interest and that integrates learning across their chosen disciplines... The program captures and emphasizes the value of agency, independent thinking, and self-direction that we believe are desirable to students. It is designed to nurture independence of mind, innovative thinking, and project-based inquiry valued by employers.”

Given the substantial and intentional similarity in charitable purpose as between Marlboro College and Emerson College vis-à-vis the MIEC, Marlboro College was and is clearly within its rights as a public benefit corporation to transfer its assets (as part of a broader effort to transfer of its academic programming) to Emerson College for the purposes of the MIEC.

¹² Excepting assets required to satisfy certain assumed liabilities under the Asset Exchange Agreement.

¹³ Educational institutions accredited by NECHE are required to submit “substantial change proposals” to NECHE when, according to NECHE, proposed institutional changes will “affect significantly the nature of the institution, its mission and objectives, its educational program, and the allocation of its resources.” See NECHE webpage regarding “Substantive Change Proposals,” available at <https://www.necche.org/institutional-reports/substantive-change-proposals/#:~:text=and%20Policy%20Revisions-.Substantive%20Change%20Proposals,not%20affect%20its%20accredited%20status>. (last visited July 15, 2020). NECHE then determines whether the proposed substantive change may be included in the institution’s accreditation. On May 29, 2020, Emerson College submitted a “substantive change proposal” to NECHE regarding the changes the terms of the AEA. On July 6, 2020, NECHE approved the proposal.

2. The proposed disposition of assets by Marlboro College is consistent with, and will perpetuate, the terms governing Marlboro College’s restricted assets.

By way of legal background, when a donor gives a gift to a charitable institution and the accompanying gift instrument contains restrictions on how the institution is to manage, invest, or use that donation, the charitable institution is generally required to abide by the terms of these restrictions. *See generally*, 14 V.S.A. §3411 *et seq.* (requiring a “charitable institution” to use a restricted “institutional fund” consistent with the terms of the relevant “gift instrument.”)¹⁴ Accordingly, as part of its review of Marlboro College’s proposed disposition of assets to Emerson College, the AGO reviewed the terms governing Marlboro College’s restricted endowment funds and whether the proposed disposition of these assets abides by them.

Marlboro College’s endowment includes 46 restricted endowment funds collectively worth approximately \$14M as of April 2020. The AGO reviewed all of Marlboro College’s records, as to each fund, including gift instruments, where available. The AGO then evaluated whether (1) the proposed disposition of restricted endowment funds constitutes a change in the respective fund’s purposes, management, or investment pursuant to UPMIFA, and, relatedly, (2) whether and to what extent the AEA would require Emerson College to abide by these funds’ restrictions, going forward.

Given that the purpose and design of the AEA is to perpetuate the identity, purposes and academic programming of Marlboro College at the MIEC, including facilitating the transition (en masse) of Marlboro College’s current tenured/tenure-track faculty and undergraduate students to the MIEC, the AGO concludes that Marlboro College’s transfer of restricted endowment funds to the MIEC does not constitute a change in the funds’ purposes under UPMIFA.¹⁵

Further, the AEA requires Emerson College/MIEC to abide by the governing terms of each such fund as to purpose, management, and/or investment. The AEA delineates each of these funds, each of their respective restrictions,¹⁶ and requires that, upon closing, Marlboro College transfer to Emerson College “all gift documentation associated with the funds that comprise the endowment.” The AEA then acknowledges the funds as “encumbered” by these restrictions and

¹⁴ A public benefit corporation that holds a specific asset in charitable trust is required to abide by the relevant charitable trust’s terms. 14A V.S.A. §101 *et seq.* (requiring charitable trusts to be applied to their respective intended uses per their respective terms). Based on Marlboro College’s representations and the AGO’s review of Marlboro College’s assets, Marlboro College does not currently hold any assets in charitable trust. Accordingly, the laws governing charitable trusts are inapplicable here.

¹⁵ Where an endowment fund’s restrictions require Marlboro College to undertake specific actions regarding the fund if and when the College ceases to operate, the AGO has confirmed with Marlboro College that it has abided by, and/or intends to abide by, the relevant restrictions.

¹⁶ The AGO cross-checked the AEA’s description of each such fund’s restrictions with available underlying fund documents to ensure the AEA honors the respective donors’ intents.

requires that “spendable income from restricted Marlboro Funds... shall be expended in connection with the Institute consistent with the purposes designated by the donors.” Under the AEA, “if it is not possible or feasible to use the funds in connection with the Institute consistent with the purposes designated by the donors, then Emerson may seek donor consent or court authorization to use the funds for other purposes in support of the Institute.”

For these reasons, the AGO is satisfied that Marlboro College’s proposed disposition of restricted assets to Emerson College abides by state laws governing public benefit corporations.¹⁷

iii. Marlboro College’s proposed sale of its campus and related assets to Democracy Builders is consistent with Vermont state laws governing public benefit corporations.

By way of legal background, in winding down their affairs, public benefit corporations may sell their assets. *See* 11B V.S.A. § 12.02(g) (“Sale of assets other than in regular course of activities”). Indeed, as mentioned above, a public benefit corporation “may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property... on the terms and conditions and for the consideration determined by the corporation’s board, if”—for a nonprofit corporation without members, like Marlboro College—“the proposed transaction... [is] approved...by the board,” 11B V.S.A. §12.02(a)-(b)(1), presuming the corporation’s board operates in conformity with applicable state laws (including “General Standards for Directors” pursuant to 11B V.S.A. § 8.30 *et seq.*) and its corporate bylaws.

Additionally, where one public benefit corporation sells assets to another charitable nonprofit corporation that would qualify as a public benefit corporation under Vermont laws, fair market value is not required. *Compare* 11B V.S.A. §12.02(a) (permitting public benefit corporation’s to sell “or otherwise dispose of” assets “for the consideration determined by the corporation’s board”) *with* 11B V.S.A. §11.02(a)(4) (requiring public benefit corporations that merge with business corporations to transfer assets equivalent to their fair market value to an organization they could have transferred said assets to in dissolution). That said, to the extent such a sale produces proceeds, it is within the AGO’s purview to review how the selling public benefit corporation applies them.

Here, as discussed above, Marlboro College was and is within its rights under state laws governing public benefit corporations to undertake the proposed transaction with Emerson

¹⁷ Marlboro College is transferring its ownership and/or right of possession of certain archival materials to the University of Vermont (“UVM”) under a Deed of Gift. The Deed requires UVM to “manage and care for these collections according to accepted professional standards and in accordance with its educational mission and objectives.” It also states that “[i]n the event that UVM can no longer house the Marlboro College Archives Collection, UVM agrees in a reasonable and professional manner to find another suitable home for the Collection and make reasonable efforts to communicate with any existing MC stakeholders regarding the status of the Collection.” To the extent these materials could arguably be considered restricted assets under express or implied terms requiring their preservation for educational purposes, Marlboro College’s disposition of these materials to UVM would be consistent with such terms.

College. Because Emerson College was not interested in acquiring Marlboro College's campus and related assets, Marlboro College elected to dispose of the same to a different party.

To that end, in November 2019, Marlboro College's Board of Trustees established a Campus Working Group (CWG) including Trustees, faculty, staff, students, alumni, and town and county community members to (1) retain a consultant and a broker to market the College's campus and solicit bids and (2) recommend the favored bid to the Board of Trustees for approval. Ultimately, the CWG recommended that Marlboro College accept the bid of Democracy Builders, a Delaware nonprofit corporation recognized by the Internal Revenue Service as a 501(c)(3) organization.¹⁸

According to the CWG's recommendation to the Board of Trustees, "CWG easily reached consensus to recommend Democracy Builders and its plan to develop Freedom College on the Marlboro Campus as the CWG's first choice based on the merits of Democracy Builders' proposal and financial offer. Democracy Builders' submission contained a strong and detailed proposal that: [] Is in many ways consistent with Marlboro's educational mission and strongly aligns with the historical use of the campus[;] demonstrated a strong vision, a plan, organizational capacity and a strong track record in creating and operating educational projects like Freedom College[;] showed a commitment to the community by offering to making space on the campus available to Marlboro College alumni for an alumni center, an interest in land conservation and making some campus facilities available to community activities and developing local partnerships, and potentially hiring some of the College staff who will not be moving to Emerson; and [] was compatible with the Marlboro Music Festival's summer lease. Additionally, they demonstrated a strong commitment to stewarding the campus with an interest in continued community access."

The Board of Trustees accepted the CWG's recommendation and, on May 22, 2020, Marlboro College entered into the proposed Purchase & Sale Agreement with Democracy Builders. According to the terms of the Purchase & Sale Agreement, Marlboro College is selling its campus and certain related assets to Democracy Builders for more than nominal consideration.¹⁹ Consistent with then AEA, Marlboro College will transfer the proceeds of the sale to Emerson College for the purposes of the MIEC.

Based on these findings—namely, that Marlboro College is (1) selling its campus to another educational charitable nonprofit corporation for more than nominal consideration after a reasoned process of marketing the campus, soliciting and evaluating potential buyers, and selecting a winning bidder and (2) applying the proceeds of the sale to Emerson College for the purpose of the MIEC—the AGO has no basis on which to object to the proposed campus sale.

¹⁸ Counsel for Democracy Builders has represented to the AGO that Democracy Builders would provide the AGO notice upon registering as a foreign corporation in Vermont and requesting and/or obtaining accreditation to operate in Vermont.

¹⁹ Pursuant to at least 1 V.S.A. § 317(c)(9), given the confidentiality of the Purchase and Sale Agreement's price term prior to the sale's closing, the AGO is not publicizing said term at this time.

III. Conclusion

The proposed dispositions of assets by Marlboro College to (1) Emerson College for the purposes of the MIEC and (2) Democracy Builders are consistent with Vermont laws governing public benefit corporations. Accordingly, the AGO has no statutory basis on which to object.

The AGO has provided a copy this Notice of Non-Objection to the Massachusetts Office of the Attorney General to ensure continued oversight of Emerson College's application of the charitable assets in question. It has provided a copy of this Notice to Emerson College, as well.

This Notice of Non-Objection concerns the review of the AGO pursuant to 11B V.S.A. § 12.02(g). It does not implicate the jurisdiction of any other local, state, or federal agency that may also have a role in reviewing the proposed transactions.*