



## **The Steward Hospital Crisis:**

### **How Medicare for All and Eminent Domain Would Solve this Problem**

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#### **Introduction**

The recent crisis of the Steward Health Care system's bankruptcy and threat to close nine hospitals serving eastern and southeastern Massachusetts demonstrates the problem of having for-profit corporations owning vital health care institutions and infrastructure.

The Steward hospital debacle is just the latest in an ongoing crisis of access to health care in Massachusetts. The Massachusetts Nurses Association has published a list showing 42 hospitals that closed in Massachusetts from 2009 to 2022. (Appendix 1) They have also published a list of 10 closed maternity units in Massachusetts from 2010 to the present. (Appendix 2)

This is not the first time that Massachusetts has faced problems caused by corporations closing facilities, yet the State government appears to have learned little. In the 1980s, faced with massive factory closings as corporations chased higher profits by moving to Mexico and the South, the Dukakis administration, under pressure from the labor movement, convened a "Commission on the Future of Mature Industries". The Dukakis administration, however, forbade the commission from recommending any actions to actually stop factory closings. The end result was just more unemployment insurance, some advance notice of closings, and a little bit of job retraining. A tragic failure of public policy.

In 1986 the City of Boston considered taking by eminent domain the Colonial Provisions meat packing plant. The city's corporation lawyer ruled that the city could not take over the company, a move that was lauded by the business press. What followed were many opinions by legal scholars that the City could have taken the plant by eminent domain. A missed opportunity.

With the Steward crisis we are seeing the same refusal of the legislature and Governor to take any action that would interfere with a for-profit health care corporation's ability to deprive our communities of decent health care in the drive for greater profits.

There are at least three methods that could be used to prevent the Steward closings.

1) If the Governor declares a health care emergency (as was done because of COVID), the Public Health Commissioner can take whatever steps necessary to protect public health. Chapter 17 Section 2A:

The commissioner, with the approval of the public health council, may establish procedures to be followed during such emergency to [e]nsure the continuation of essential public health services and the enforcement of the same.

The Commonwealth could take over the hospitals and appoint people who will run them. Who owns the hospitals can then be sorted out without endangering the public.

2) If An Act Establishing Medicare for All in Massachusetts were enacted, provisions within the legislation could be used to keep all the Steward hospitals open and serving their communities.

3) The State or local governments could use their power of eminent domain to take over the hospitals and either run them as community hospitals or sell them to a non-profit organization. We are aware of eminent domain being abused in the past to harm communities, homeowners, farmers, etc. However, that would not be the case with seizing Steward's hospitals and providing health care.

We will examine all three options in this paper and provide detailed information on how eminent domain could be used.

### **A Brief Look at the History of Steward Hospitals in Massachusetts**

Massachusetts regulated hospitals until, in 1991, Senator Ed Burke (D-Framingham), co-chair of the Committee on Health Care, pushed through the deregulation of hospital finance, claiming this would reduce health spending: to "put all the scorpions in one bottle to see who comes out alive." He meant expensive teaching hospitals, but scores of community hospitals have since failed or been absorbed by chains.

This prompted for-profit hospital chains to enter Massachusetts for the first time. In 1995, the Hospital Corporation of America bought MetroWest Medical Center. Not surprisingly, now-private citizen Ed Burke represented HCA. In 1999, Worcester's Saint Vincent Hospital was sold to OrNda/Tenet. And in 2010, the Archdiocese of Boston sold its six-hospital chain Caritas Christi, with surgeon Ralph de la Torre at the helm, to Steward Health Care, initially a wholly-owned subsidiary of Cerberus Capital Management, a major global private equity player.

In 2010 and 2011, Steward Health Care and Attorney General Martha Coakley agreed that services would be maintained for defined durations (five and ten years), with conversion of Caritas and other not-for-profit hospitals to for-profit status. But in 2013 Steward closed the pediatric unit at Taunton's

Morton Hospital. In 2014, Quincy Medical Center was shuttered. Steward claimed poverty and no penalties were imposed by any state official, fearing that Cerberus might abandon the whole system, impacting all of eastern Massachusetts. There was no enforcement mechanism in place.

Steward sold its hospital laboratory services to another for-profit, Quest Diagnostics, in 2014. Then in 2016 it sold its hospital real estate to Medical Properties Trust so it could buy more U.S. hospitals, not secure the viability of its Massachusetts holdings. Steward hospitals have to pay rent for the land they once owned.

Thus we are in this crisis.

### **Public Health Emergency**

Under Chapter 17 Section 2A of the Massachusetts General Laws, the Governor can declare a health emergency and take all action necessary to protect the public health. The dysfunction and deaths already caused by Steward Health Care should constitute a public health emergency. The closing of 42 hospitals in Massachusetts should constitute a public health emergency.

On May 28, 2021, Governor Baker declared a public health emergency to deal with the COVID crisis. We all know the many steps that were taken during that crisis, including those that stepped on the toes of some profit-making businesses.

Here is part of the statement issued by the Commissioner of Public Health in response to that declaration.

On May 28, 2021, pursuant to Section 2A of Chapter 17 of the General Laws, Governor Baker declared that an emergency exists that is detrimental to the public health in the Commonwealth due to the continuing threat of COVID-19, and authorized the Commissioner with the approval of the Public Health Council to adopt measures to facilitate COVID-19 testing and vaccination, to mandate special measures to protect higher risk populations or to effectuate continued surveillance of COVID-19, and to respond as necessary to outbreaks of the virus as they may arise.

Consistent with the Governor's May 28, 2021 declaration, on June 9, 2021, the Public Health Council approved and authorized the Commissioner of Public Health to take such actions, incur such liabilities, and establish such rules, requirements and procedures which are necessary to prepare for, respond to, and mitigate the spread of COVID-19 in order to protect the health and welfare of the people of the Commonwealth." [Public Health Emergency Order No. 2022-18, September 30, 2022]

While the deaths and problems caused by hospital closings are not as dramatic as the COVID deaths, they still deserve real action.

### **How would Medicare for All Legislation Handle Infrastructure and Ownership Questions?**

For Mass-Care: the Massachusetts Campaign for Single Payer Health Care and other proponents of the adoption of a Medicare for All single payer health insurance system in Massachusetts, the question is, "how would An Act Establishing Medicare for All in Massachusetts handle this situation?"

The primary thrust of Massachusetts Medicare for All (currently S.744 and H.1239) is to eliminate private health insurance and create the Massachusetts Health Care Trust, a single payer for all health care bills.

However, the creation of the Trust would not, by itself, resolve the potential infrastructure crisis of communities having health care facilities shuttered. Medicare for All in Massachusetts goes further than just creating the Trust.

For example, the legislation (<https://malegislature.gov/Bills/193/SD2182>) in Section 2, states (emphasis added):

It is hereby further declared that in pursuit of universal access to quality, affordable care, the Commonwealth supports the following goals:

- (a) **to guarantee every resident of the Commonwealth access to high quality health care by:**
  - (i) providing reimbursement for all medically appropriate health care services offered by the eligible practitioner or facility of each resident's choice; and
  - (ii) **funding capital investments for adequate health care facilities and resources statewide.**

### Section 3. Establishment of the Massachusetts Health Care Trust

(a) There shall be within the Executive Office of Health and Human Services, but not under its control or any political subdivision thereof in the Commonwealth, a division known as the Massachusetts Health Care Trust. The Trust shall be responsible for the collection and disbursement of funds required to provide health care services for every resident of the Commonwealth. The Trust is hereby constituted a public instrumentality of the Commonwealth and the exercise by the Trust of the powers conferred by this chapter shall be deemed and held the performance of an essential governmental function.

### Section 4. Powers of the Trust (emphasis added)

- (5) **to acquire, own, hold, dispose of, and encumber personal, real or intellectual property of any nature or any interest therein;**
- (13) **to do any and all other things necessary and convenient to carry out the purposes of this chapter.**

### Section 5. Board of Trustees: Composition, Powers, and Duties

- (g) The Board is responsible for ensuring universal access to high quality, affordable health care for every resident of the Commonwealth and shall specifically address the following:
  - (1) establish policy on medical issues, population-based public health issues, research priorities,

scope of services, expanding access to care, and evaluation of the performance of the system;

#### Section 17. Establishment of the Health Care Trust Fund (emphasis added)

(a) In order to support the Trust effectively, there is hereby established the health care trust fund, hereinafter the Trust Fund, which shall be administered and expended by the Executive Director of the Trust subject to the approval of the Board. **The Trust Fund shall consist of all revenue sources defined in Section 19, and all property and securities acquired by and through the use of monies deposited to the Trust Fund,** and all interest thereon less payments therefrom to meet liabilities incurred by the Trust in the exercise of its powers and the performance of its duties.

The legislation commits Massachusetts to providing high quality health care to all residents and the Trust has the authority to spend money and acquire property to ensure this happens.

So, what could the Health Care Trust do to provide and maintain high quality health care when faced with a crisis like Steward's?

Under the legislation, all health care providers must be deemed "eligible", which means meeting a series of requirements (Section 13) one of which is "(4) meets state and federal quality guidelines including guidance for safe staffing, quality of care, and efficient use of funds for direct patient care".

Steward could be declared as an ineligible health care provider, because it does not meet those requirements, and the Health Care Trust could stop payments to Steward from the Trust. This would likely cause them to shut the facility down.

What could happen then? Since the Health Care Trust has the authority to authorize expenditures to insure "high quality health care," it could decide to purchase Steward facilities and run them publicly.

### **A Guide to Eminent Domain (see Appendix 3)**

The fightback against factory closings resulted in attempts to use eminent domain as a tool to keep the factories open. The United Electrical, Radio & Machine Workers of America (UE) was key in developing these tactics. What follows is an explanation of how eminent domain can be used in these situations.

The Fifth Amendment to the United States Constitution guarantees the right to own property. But that right has never been absolute. Seizure of private property through eminent domain for a greater "public purpose" as long as "just compensation" is paid, is a centuries-old precept balancing the rights of an individual to own property and the rights of government to create or maintain projects for the greater good of the community.

The use of eminent domain to save jobs in economically depressed communities puts the rights of workers, homeowners, farmers, and small business people on the same level as the rights and privileges of corporations. Use of eminent domain to stop corporations from threatening our health care system

presents opportunities to insure our communities are able to maintain decent health care infrastructure.

## **Basic Legal Theory**

Eminent domain establishes the right of a municipality, state, or federal government to take private property (house, farm, land, or business) for the greater good of the community. It is what the government uses when building highways, power plants, urban development, etc. The only requirement is that the government pay a "fair market price" to the owner(s).

Personal and intangible property, such as patents, contracts, franchises, etc., could be taken as well.

Federal law has long recognized that the government can take private property by eminent domain. In the 1940s, the federal government took a family-owned laundry, Kimball Laundry Company and continued to run it as a federal operation. (*Kimball Laundry Company v. United States*, 338 U.S. 1 [1949].) The government retained most of the 180 workers; one of the owner-brothers stayed on as operating manager.

A number of cases have established the principle that intangible property (contracts, patents, inventory, receivable, customer lists, goodwill, etc.) can also be taken. (For example, *Kimball Laundry*, 338 U.S. at 11-13, *Midkiff*, 467 U.S. at 241, and *West River Bridge Co. v. Dix*, 47 U.S. [How.] 507 [1848], allowing the exercise of eminent domain over contract rights.)

Across the U.S., states have taken over businesses, including the land, buildings, equipment and vehicles, personal property, and intangible property. In 1979, the Twin Cities Metropolitan Public Transit Area of Minnesota condemned all of the assets of a private transit company, including buses, pension liabilities, vacation pay, and insurance for workers. The Transit Area took the company "as a going concern," and continued to operate it. (*Twin Cities Metropolitan Transit Area v. Twin Cities Lines, Inc.*, 301 Minn. 386 [1974].) Wisconsin, New York, and Connecticut have condemned private utility companies through the use of eminent domain and continued to operate these companies for the benefit of the public. (*Milwaukee and Suburban Transport Corp. v. Milwaukee County*, 82 Wis. 2d 420 [1978]; *Matter of City of New York [Fifth Avenue Coach Lines]*, 18 N.Y.S. 2d 212 [App. Div. 1976]; and *Gray Line Bus Co. v. Greater Bridgeport Transit District*, 188 Conn. 417 [1982].)

The City of Oakland's use of eminent domain to prevent the loss of the Oakland Raiders football team to Los Angeles is probably the best known case (at least to those who follow sports). (*City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 646 P. 2d 835 [1982].) The City of Oakland already owned the stadium, so what the City took was the multi-million dollar franchise agreement with the NFL, player, coach, and other employee contracts, football equipment, vehicles, and the valuable goodwill. The California Supreme Court approved the taking of the intangible and personal property, stating "[i]ntangible property, such as ... patent rights, franchises, charters, or any other form of contract are within the scope of [eminent domain] as fully as land or tangible property." (32 Cal. 3d at 67, 646 P. 2d at 839). The Raiders moved anyway because of the City's failure to pay "just compensation."

## **Massachusetts and Eminent Domain**

The Commonwealth of Massachusetts recognizes the power of governmental bodies to take personal and intangible property by eminent domain. The Massachusetts Declaration of Rights, Part I, Article 10, states that the government can take property to satisfy a public purpose. "And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."

The Massachusetts courts have consistently interpreted Part I, Article 10 as broadly authorizing the state to take personal and intangible property, as well as real property. The Supreme Judicial Court in *Boston & Lowell R.R. Co. v. Salem and Lowell R.R. Co.*, 68 Mass.1 (1854), upheld the state's right to take an exclusive railroad franchise. The Court ruled that "a franchise may be taken for public uses," and the Court further explained that the term "property" as used in the Declaration of Rights "extends to every species of valuable right and interest, and includes real and personal property ... Whatever exists ... may thus be appropriated." (Id. at 35). In *Hazen v. Essex Co.*, 66 Mass. 475 (1853) the Court ruled that a state can authorize a corporation to take intangible property rights such as mill privileges by eminent domain.

Massachusetts General Law Chapter 79 Section 10 explicitly recognizes the power of the state to take private property by eminent domain when it states that "when the personal property of any person has been damaged, seized, destroyed, or used for a public purpose ... he is entitled to compensation."

## **Taking a Business as a Going Concern**

In Massachusetts the courts have consistently upheld the principle that government action to promote economic development is a "public purpose", and the Supreme Judicial Court has stated that "reducing unemployment and stimulating the economy are public purposes." (Opinion of the Justices to the Governor, 373 Mass. 904, 907 [1977]. See also Opinion of the Justices to the House of Representatives, 368 Mass. 880, 885[1975].)

On the federal and state levels, the courts usually defer to the determination of legislative bodies when determining what is and what is not a public purpose. The U.S. Supreme Court, in a landmark decision, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 239 (1984), allowed for the seizing of private feudal lands in order that they could be redistributed to tenants and non-landowning residents of Hawaii: "[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1014-16 (1984) reaffirmed a legislative body's wide discretion in determining public purpose. The Michigan Supreme Court upheld the City of Detroit's condemnation and destruction of an entire neighborhood of private homes and small businesses so that General Motors could build a Cadillac factory and keep jobs from leaving Detroit. (*Poletown Neighborhood Council v. City of Detroit*, 410 Michigan 616, 620-21, 304 N.W. 2d 455, 457 [1981])

## **Eminent Domain, Step by Step**

To succeed in taking an operating business by eminent domain, it is necessary to fight a battle on four fronts: legal, financial, political, and public relations. Fighting these battles takes time.

On the legal front, legislative scheduling issues, statutory notice and hearing provisions, waiting periods, appraisal requirements, and competitive bidding requirements can combine to make quick action an impossibility. On the financial side, putting together a funding package that may include contributions from private investors, commercial lenders, government agencies, and employees also takes time. The political and public relations battles, each of which is also critical to the success of the effort, also requires substantial lead time. Fighting each of these battles typically involves information gathering, performing legal research, identifying investors, obtaining financial information, all of which also takes time.

### **Who Can Take Property by Eminent Domain?**

Under Massachusetts law there are basically two entities that can take property by eminent domain: local or state elected government and agencies or redevelopment authorities granted the authority to take property by eminent domain. Redevelopment authorities are authorized to redevelop the inner cities and are almost always appointed, not elected.

The federal government can also take property through eminent domain.

### **Liability and "Fair Market Price"**

Compensation paid to the owner of any property must be based on its "fair market value." During the battle to take J.C. Rhodes by eminent domain (Appendix 4), the City of New Bedford took the Scrub-A-Dub car wash directly across the street from the plant. The car wash happened to be adjacent to a toxic waste superfund site; the land was needed for a pumping station. The Wampanoag (Native American) nation was planning to build a casino near the car wash site. The owner claimed that due to the proximity of the proposed casino, the value of the land and business was much more than its appraised fair market value. However, it is the appraised fair market value, not the potential value, that is paid in compensation.

### **Lay Out the Public Purpose**

A resolution laying out the public purpose of the taking is necessary in any eminent-domain taking, and, especially important in these cases, it serves as a public record and the basis for a potential (and likely) future court battle. In the J.C. Rhodes case, the City Council passed a resolution outlining the "public purpose" of the taking and an ordinance specifying the plot designations and every square inch of land, buildings, equipment, personal and intangible property (patents, receivables, books, records, good will, etc.) to be taken. In Massachusetts, a resolution requires one reading and one vote.

### **Ordinance**



During the J.C. Rhodes campaign, the City Council adopted an ordinance which authorized seizure under the Massachusetts Home Rule Amendment. That amendment gives local governments rights not "denied by express or clearly implied state legislation or constitutional provisions." This was the vehicle UE Local 284 chose for City Council legislation.

In Massachusetts an ordinance has two readings (two votes); the second reading can take place only after the first reading has been published in the local newspaper for 10 days. An ordinance can pass by a simple majority.

### **Appraisal and Appropriation**

In Massachusetts, before the third and final City Council vote (the "order of taking"), a municipality must undertake an appraisal. Who has the authority to order the appraisal? The mayor? The city or town manager? The city or town council president? This is important - if the taking goes to court, the validity and "standing" of the appraisal will be an issue. It depends on the Municipal Charter to define who has the authority to order an appraisal.

### **Conclusion**

We have laid out three methods that can be used to secure the public's access to health care in Massachusetts. It is clear to most people that health care should not be left in the hands of those who only seek to make a profit. It is up to municipalities, the legislature, and the Governor to take action to prevent the closing of Steward hospitals and indeed, to stop the tidal wave of hospital closing in Massachusetts. Health care is a right, not a privilege.



**Mass-Care's mission** is to establish a single payer health care system in Massachusetts so that all residents of the Commonwealth will have access to comprehensive, quality, affordable, and equitable health care, publicly financed and free of out-of-pocket cost at point-of-care, because it is basic to life and human dignity. The Mass-Care Coalition is now 102 organizations.

[www.masscare.org](http://www.masscare.org) / 617-297-8011 / [info@masscare.org](mailto:info@masscare.org)

## Appendices

Note: this paper and appendices are in

<https://drive.google.com/drive/folders/1wFbFkRLKVF9ngqkQ66SzwNGqRB0pA8zh>.

1 ~ Hospital closings in Massachusetts, MNA Map

(attached and [https://drive.google.com/file/d/1WSjcgmTQ5R\\_3bU9ILqUitPyKrr0FKuq/](https://drive.google.com/file/d/1WSjcgmTQ5R_3bU9ILqUitPyKrr0FKuq/))

2 ~ Maternity Desert, MNA Map

(attached and [https://drive.google.com/file/d/1RI6zpZ\\_D29ww1rLs2\\_QL8LYeht6\\_SSLs/](https://drive.google.com/file/d/1RI6zpZ_D29ww1rLs2_QL8LYeht6_SSLs/))

3 ~ Using Eminent Domain to Fight Plant Closings. How to Do it in Massachusetts.

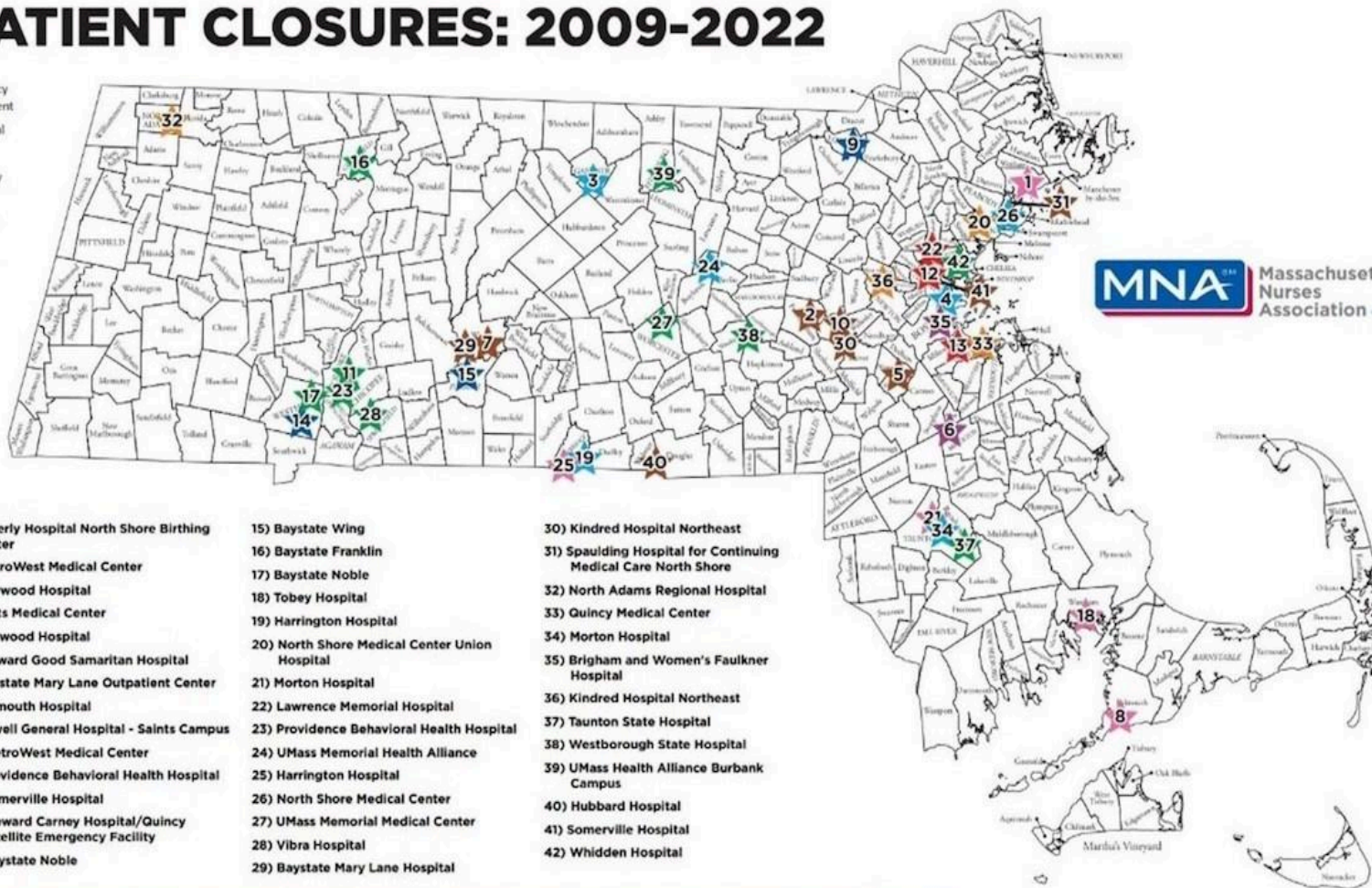
(Please visit <https://drive.google.com/file/d/1tQOmoYalZzhfzerq0g13QfNOAhu3iJVn/>.)

4 ~ Refuse to Lose - JC Rhodes Story

(Please visit <https://drive.google.com/file/d/19stiKMBqsZOIzahqt-O9GswcxW5Rqdx3/>.)

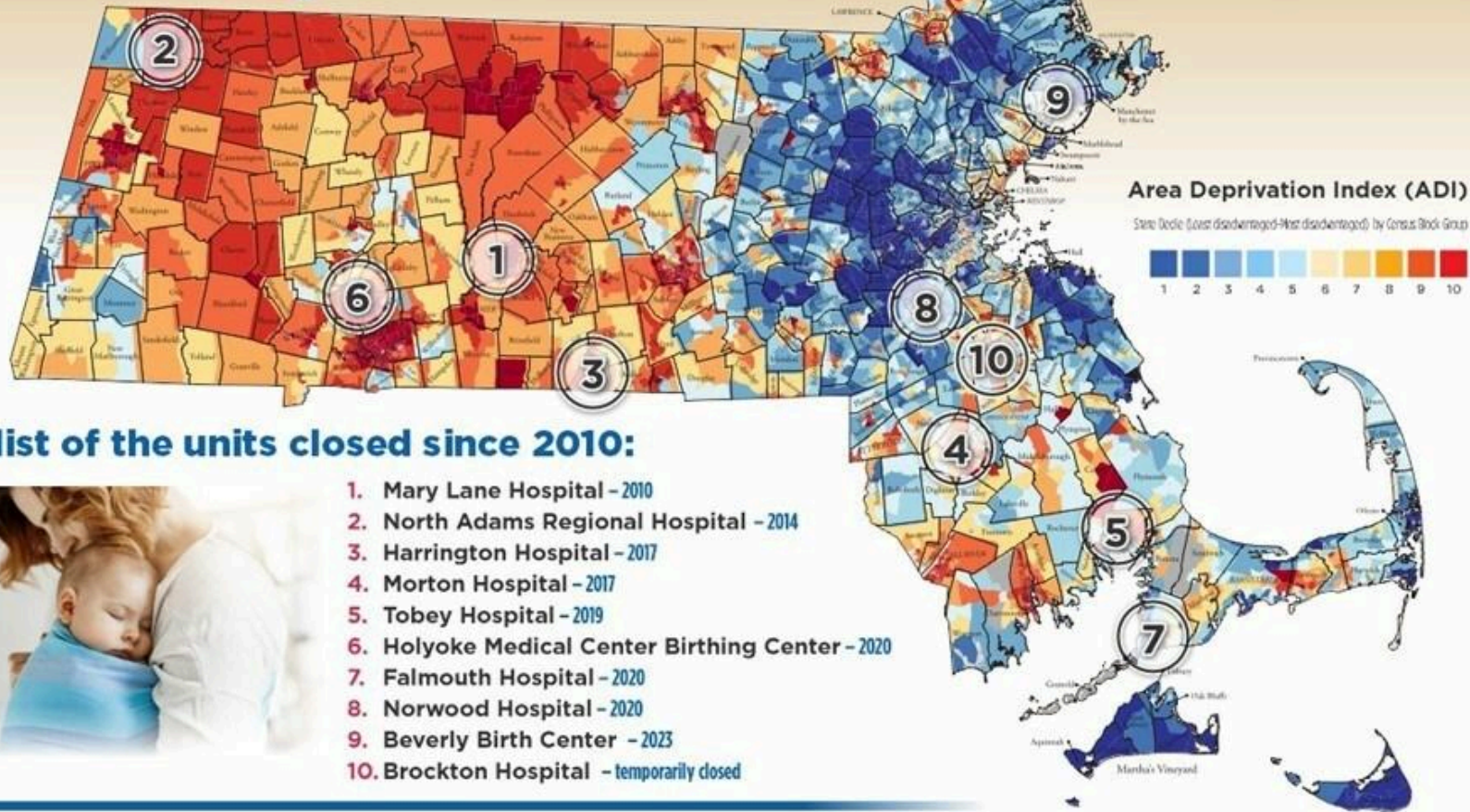
# INPATIENT CLOSURES: 2009-2022

- ★ Emergency Department
- ★ Behavioral Health
- ★ Maternity
- ★ Pediatric
- ★ Hospital
- ★ Detox
- ★ ICU
- ★ Other



- |   |   |  |
|---|---|--|
| 1) Beverly Hospital North Shore Birthing Center                 | 15) Baystate Wing                             | 30) Kindred Hospital Northeast                                 |
| 2) MetroWest Medical Center                                     | 16) Baystate Franklin                         | 31) Spaulding Hospital for Continuing Medical Care North Shore |
| 3) Heywood Hospital   | 17) Baystate Noble                            | 32) North Adams Regional Hospital                              |
| 4) Tufts Medical Center   | 18) Tobey Hospital                            | 33) Quincy Medical Center                                      |
| 5) Norwood Hospital   | 19) Harrington Hospital                       | 34) Morton Hospital  |
| 6) Steward Good Samaritan Hospital                              | 20) North Shore Medical Center Union Hospital | 35) Brigham and Women's Faulkner Hospital                      |
| 7) Baystate Mary Lane Outpatient Center                         | 21) Morton Hospital                           | 36) Kindred Hospital Northeast                                 |
| 8) Falmouth Hospital  | 22) Lawrence Memorial Hospital                | 37) Taunton State Hospital                                     |
| 9) Lowell General Hospital - Saints Campus                      | 23) Providence Behavioral Health Hospital     | 38) Westborough State Hospital                                 |
| 10) MetroWest Medical Center                                    | 24) UMass Memorial Health Alliance            | 39) UMass Health Alliance Burbank Campus                       |
| 11) Providence Behavioral Health Hospital                       | 25) Harrington Hospital                       | 40) Hubbard Hospital   |
| 12) Somerville Hospital   | 26) North Shore Medical Center                | 41) Somerville Hospital  |
| 13) Steward Carney Hospital/Quincy Satellite Emergency Facility | 27) UMass Memorial Medical Center             | 42) Whidden Hospital   |
| 14) Baystate Noble  | 28) Vibra Hospital                            |  |
|   | 29) Baystate Mary Lane Hospital               |  |

# A Maternity Service Desert



## A list of the units closed since 2010:



1. Mary Lane Hospital - 2010
2. North Adams Regional Hospital - 2014
3. Harrington Hospital - 2017
4. Morton Hospital - 2017
5. Tobey Hospital - 2019
6. Holyoke Medical Center Birthing Center - 2020
7. Falmouth Hospital - 2020
8. Norwood Hospital - 2020
9. Beverly Birth Center - 2023
10. Brockton Hospital - temporarily closed