

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL.  
BURTON HEALTH CARE CENTER, INC.

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Case No. 2011-1783

Relator,

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:

Original Action in Mandamus,  
Filed October 18, 2011

v.

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:

OHIO DEPARTMENT OF HEALTH, et al.,

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:

Respondents.

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MOTION OF RELATOR, BURTON HEALTH CARE CENTER, INC.,  
TO LIFT MEDIATION STAY

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Ohio Attorney General's Office  
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Columbus, Ohio 43215

Attorneys for Respondents

Attorneys for Relator  
Burton Health Care Center, Inc.

FILED  
NOV 10 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

**MEMORANDUM IN SUPPORT OF MOTION OF RELATOR, BURTON HEALTH  
CARE CENTER, INC., TO LIFT MEDIATION STAY**

Relator, Burton Health Care Center, Inc. (“Relator”), respectfully moves this Court to lift the mediation stay issued by the Court on October 28, 2011. See Exhibit A. As set forth below, Relator respectfully submits that mediation will not help settle this matter, simplify the issues or expedite procedures in this case. For these reasons and the reasons that follow, Relator requests that the Court lift the mediation stay and return this case to the Court’s regular calendar.

By way of context, Relator Burton filed its Complaint for a Writ of Mandamus on October 18, 2011. Relator seeks to compel Respondent, The Ohio Department of Health (“the ODH”), to comply with certain mandatory provisions of Ohio law. Specifically, Relator’s Complaint prays that this Court issue an Order in Mandamus compelling the ODH to issue a required Reviewability or Nonreviewability ruling for the development of a new nursing home located in Geauga County, Ohio. See e.g., Complaint. Ohio law requires the ODH to issue such reviewability rulings, which rulings determine whether a proposed nursing home project may proceed without obtaining a Certificate of Need (“CON”). *Id.* at ¶13-16. CONs are issued following an application process which provides, among other procedures, the right to object and for hearings. Ohio law mandates that “affected persons,” like Relator Burton, “shall” have the right to appeal reviewability rulings and hearings on such appeals. *Id.* at ¶17, citing R.C. §3702.51(O); 3702.60(A); OAC3701-12-04(B). Affected persons cannot exercise their statutorily-guaranteed rights to appeal, however, if the ODH does not issue the required rulings. Relator respectfully submits that its Complaint sets forth facts demonstrating that, among other violations of Ohio law, the ODH failed to issued a required reviewability or non-reviewability

ruling, in violation of its clear legal duty under Ohio law and in frustration of Relator's clear legal right to appeal. Id. at ¶¶58-88.

Supreme Court Practice Rule 17.1 (A) sets forth some of the issues the mediator may address at mediation. "The mediator may conduct mediation conferences at which the the parties shall explore settling the case, simplifying the issues, and expediting the procedure, and may consider any other matter that may aid in resolving the case." Id. None of these issues or criteria apply in this case.

Inasmuch as this is an action in mandamus and thus seeks to compel a state agency to comply with mandatory Ohio law, it does not appear to be a case amenable to mediation. Relator Burton does not have the authority to excuse the ODH from the obligations of its office and Relator can find no authority that would permit the ODH to negotiate the requirements of Ohio law.

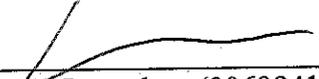
Nor would mediation simplify the issues in this case; the issues are clear and direct. For example, Ohio law mandates that the ODH issue a reviewability or non-reviewability ruling. Mediation will not further clarify this issue.

Mediation will also not expedite procedures. To the contrary, mediation may delay the Court's ruling. The initial mediation conference has been scheduled for December 16, 2011, and the Court's stay will prevent the case from moving forward during the pendency of the mediation. See Exhibit B.

Lastly, Relator Burton is not aware of other matters the Mediator might address that ~~could aid in resolving the substantive issues in this case.~~ Accordingly, Relator Burton respectfully requests that the Court issue an Order lifting the mediation stay and placing this case back on the Court's regular calendar for such cases.

Respectfully submitted,

**VORYS, SATER, SEYMOUR AND PEASE LLP**

By  (0069941)

Peter A. Lusenhop (0069941)  
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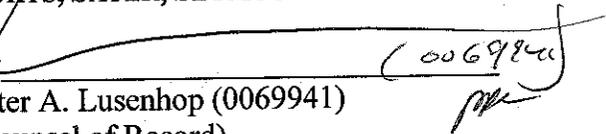
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing Motion of Relator Burton Health Care Center Inc. to Lift Mediation Stay was served upon the following via hand delivery on this 10th day of November, 2011.

Lisa M. Eschbacher  
Ohio Attorney General's Office  
Health and Human Services Section  
30 East Broad Street, 26<sup>th</sup> Floor  
Columbus, Ohio 43215

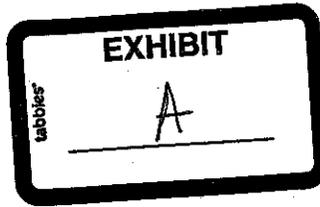
Respectfully submitted,

**VORYS, SATER, SEYMOUR AND PEASE LLP**

By  (0069941)  
Peter A. Lusenhop (0069941)  
(Counsel of Record)

Suzanne J. Scrutton (0043855)  
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Attorneys for Relator  
Burton Health Care Center, Inc.



FILED

OCT 28 2011

CLERK OF COURT  
SUPREME COURT OF OHIO

# The Supreme Court of Ohio

State of Ohio, ex rel. Burton Health Care  
Center, Inc.

v.

Ohio Department of Health and Dr. Theodore  
E. Wymyslo

Case No. 2011-1783

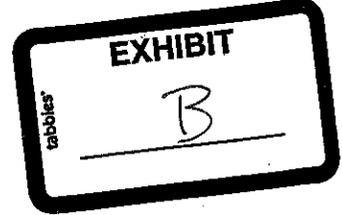
ENTRY

IN MANDAMUS

The Court refers this case to mediation under S.Ct. Prac. R. 17.1, and stays all filing deadlines for this case until further notice. No filings are permitted while this case is in mediation, except a motion to lift the mediation stay or a response to a motion to lift the mediation stay. The Clerk of this Court shall not accept for filing any documents while this case is in mediation, except a motion to lift the mediation stay or a response to a motion to lift the mediation stay. The Court will not issue any decision on the merits of this case until mediation has concluded.

A handwritten signature in black ink, appearing to read "Maureen O'Connor". The signature is written in a cursive style and is positioned above a horizontal line.

Maureen O'Connor  
Chief Justice



# The Supreme Court of Ohio

DISPUTE RESOLUTION SECTION  
65 SOUTH FRONT STREET, COLUMBUS, OH 43215-3431

CHIEF JUSTICE  
MAUREEN O'CONNOR

JUSTICES  
PAUL E. PFEIFER  
EVELYN LUNDBERG STRATTON  
TERRENCE O'DONNELL  
JUDITH ANN LANZINGER  
ROBERT R. CUPP  
YVETTE MCGEE BROWN

TELEPHONE 614.387.9422  
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November 2, 2011

## NOTICE OF TELEPHONE MEDIATION CONFERENCE

TO: Mike DeWine                      Peter Andrews Lusenhop  
  
State of Ohio, ex rel. Burton Health Care Center, Inc. v. Ohio Dept. of Health  
and Dr. Theodore E. Wymyslo  
Case No. 2011-1783

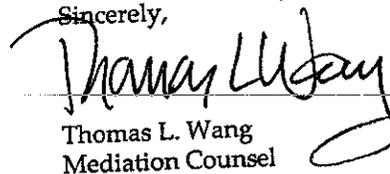
The Court has scheduled a mediation teleconference in this case for December 16, 2011 at 10:00 a.m. I will call the participants to connect the conference call. The Court requires all counsel to have authority to respond to settlement proposals at the mediation conference, and the person(s) with final settlement authority for each party should participate in the conference as well.

Provided the party has not previously obtained a continuance from the Case Mediation Section for the aforementioned case, a request for a continuance of the mediation conference must be submitted in writing stating good cause for a continuance at least two weeks prior to the mediation conference. The request may be faxed to the Case Mediation Section at 614.387.9359 or mailed to: The Supreme Court of Ohio, Case Mediation Section, 65 South Front Street, 6<sup>th</sup> Floor, Columbus, Ohio 43215. Do not file the request with the Clerk's Office.

For additional details about mediation and revised Supreme Court Rules of Practice with regard to mediation effective January 1, 2010, go to: <http://www.supremecourt.ohio.gov/Clerk/mediation/>.

If you have questions, you may contact me at 614.387.9367 or [Thomas.Wang@sc.ohio.gov](mailto:Thomas.Wang@sc.ohio.gov).

Sincerely,

  
Thomas L. Wang  
Mediation Counsel

Cc: Ohio Dept. of Health