

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL.  
BURTON HEALTHCARE CENTER INC.

Relator,

v.

OHIO DEPARTMENT OF HEALTH, ET  
AL,

Respondents.

Case No. 11-1783

ORIGINAL ACTION IN MANDAMUS

RESPONDENTS' MOTION TO DISMISS

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SUPREME COURT OF OHIO

## I. INTRODUCTION

This matter begins and ends with one issue: was the Director required to issue a reviewability ruling when one was not requested and the rules permit him to make a reviewability ruling only when one is requested. Burton inappropriately conflates the Director's duty to issue a reviewability ruling with Certificate of Need ("CON") concepts in an effort give itself standing in this matter. The underlying actions by the facility now known as Heather Hill Communities and whether or not it needed a CON is immaterial because this case begins and ends with whether there exists a duty of the Director to issue a reviewability ruling independent of a request for one.

Upon close review of the Complaint, it becomes clear that Burton is not exactly sure what relief it wants or why it is entitled to that relief, or what action by the Director it is complaining about. On the one hand it asserts that the Ohio Department of Health ("ODH") has a duty to issue a reviewability ruling for the Heather Hill project (Complaint ¶6) but later states "[t]he ODH patently abused its discretion and acted with disregard for the law in issuing a private reviewability ruling and not informing potentially affected persons that it had done so." (Complaint ¶51). However, under either scenario, its request for the writ of mandamus must fail. Furthermore, to the extent that Burton is complaining about the issuance of the license to Heather Hill Communities, there is no legal right for Burton to object to a license being issued and it cannot use mandamus to get something it is not legally entitled to receive.

For all of these reasons, ODH and the Director of Health ask the Court to dismiss the Relator's Complaint for Writ of Mandamus as it has failed to state a claim for relief.

## II. STATEMENT OF FACTS

For purposes of this Motion only, Respondents, the Ohio Department of Health and Director Theodore Wymyslo accept the factual assertions as set forth in the Complaint. However, the Ohio Department of Health and the Director specifically deny and do not accept any allegations that mischaracterize actions as secretive; private reviewability ruling; or any other terms which suggestion ODH and/or the Director acted in a way not in conformance with the law.

## III. LAW AND ARGUMENT

### A. Reviewability Ruling

#### 1. What is a Reviewability Ruling?

A reviewability ruling means “a ruling issued by the director of health under division (A) of section 3702.52 of the Revised Code as to whether a particular proposed project is or is not a reviewable activity.” R.C. 3702.51(Y)(1). A nonreviewability ruling means “a ruling issued under that division that a particular proposed project is not a reviewable activity. R.C. 3702.51(Y)(2). “The director shall issue rulings on whether a particular proposed project is a reviewable activity. The director shall issue a ruling not later than forty-five day *after receiving a request for a ruling* accompanied by the information needed to make the ruling. If the director does not issue a ruling in that time, the project shall be considered to have been ruled not a reviewable activity.” (Emphasis added). R.C. 3702.52(A). Neither the statutes nor the rules permit the Director to sua sponte conduct and issue a reviewability ruling if one is not requested.

**B. Burton Is Not Entitled to A Writ of Mandamus**

**1. No clear legal right to the requested relief:**

The purpose of a writ of mandamus is to compel a public officer to perform an act the law requires him to do. To be entitled to the writ, Burton must establish a clear legal right to the requested relief, a clear legal duty on the part of the Department to provide it, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. Am. Civ. Liberties Union of Ohio, Inc. v. Cuyahoga Cty. Bd. of Commrs.*, 128 Ohio St.3d 256, 2011 Ohio 625, 943 N.E.2d 553, ¶ 22. In order to prevail, Burton must “come forward with proof by clear and convincing evidence” of its right to mandamus relief. *State ex rel. Doner v. Zody*, 2011 Ohio 6117, P55-P56 (Ohio Dec. 1, 2011). “The facts submitted and the proof produced must be plain, clear, and convincing” before a writ will be granted. *Id.*, quoting 35 Ohio Jurisprudence 2d (1959) 285, Section 37. Because Burton has failed to provide proof of a clear legal right to the relief requested; a corresponding legal duty on the part of the Director to provide it; and lack of adequate remedy at law, the Court should dismiss the Complaint for failure to state a claim.

Burton asserts it has a clear legal right to object to a reviewability ruling issued by the Director however, that “right” is conditioned upon the Director issuing a reviewability ruling. “The point of a reviewability determination is to ascertain whether a particular act is ‘reviewable’ by the Director of ODH, which would require a CON under Ohio’s CON law.” *Fairview General Hospital v. Fletcher*, 63 Ohio St.3d 146, 151, 586 N.E.2d 80, 84 (1992). It is intended to give guidance to a facility seeking to take some action as it relates to its business at the health care facility as to whether or not a CON is required. The reviewability ruling is not for the universe of “affected persons” who want to exercise an objection. This purpose for the reviewability ruling is supported by the language of R.C. 3702.52(A). The section provides that

if the Director receives a request for a reviewability ruling with the required information but fails to issue the ruling within 45 days, the project shall be considered to have been ruled not a reviewable activity. R.C. 3702.52(A). Burton has failed to provide clear and convincing proof that it has a right to the relief requested. The condition precedent for Burton to be an “affected person” with the ability to object to a reviewability ruling never took place and it is using mandamus as a vehicle to trigger the condition precedent.

Alternatively, if the “right” Burton asserts it is entitled to through this action is the ability to request a reviewability ruling on behalf of Heather Hills, the Court must dismiss the Complaint for failure to state a claim. Burton cannot use a writ of mandamus to get relief it otherwise is not legally entitled to receive. See *In the Matter of Valley Radiation Oncology, Inc.*, (Mercy Medical Center of Springfield, Ohio), 10<sup>th</sup> Dist. No. 93AP-693, 1993 Ohio App. Lexis 4872, \*9 (Oct. 5, 1993).

## **2. No legal duty to make a reviewability ruling:**

Without a legal duty to issue a reviewability ruling, Burton’s request for mandamus fails. In order for the Director to make a reviewability ruling, there must be a request for one. R.C. 3702.52(A) provides as follows:

The director shall issue rulings on whether a particular proposed project is a reviewable activity. The director shall issue a ruling not later than forty-five day *after receiving a request for a ruling* accompanied by the information needed to make the ruling. If the director does not issue a ruling in that time, the project shall be considered to have been ruled not a reviewable activity.

In its Complaint, Burton asks this Court to create a legal duty for the Director of ODH to issue a reviewability ruling although one was never requested. The “creation of the duty is the distinct function of the legislative branch of government.” *State ex rel. Hodges v. Taft*, 64 Ohio St. 3d 1, 3 (1992) citing *State ex rel. Stanley, v. Cook*, 146 Ohio St. 348, 66 N.E.2d 207 (1946); *Davis v.*

*State, ex rel. Pecsok*, 130 Ohio St. 411, 200 N.E. 181 (1936), paragraph one of the syllabus. If the legal duty must be created by this Court then Burton has failed to show by clear and convincing proof of its right to a writ of mandamus.

Burton misstates the law when it argues that the Director was required to issue a reviewability ruling. R.C. §3702.52(A) and OAC §3701-12-04(A) make clear that the Director of Health will issue a reviewability ruling *after a request for a ruling is made*. In this matter no request for a reviewability ruling was made. To the contrary, counsel for Geauga contacted the Ohio Department of Health and specifically stated he was not requesting a reviewability ruling “at this time.” Burton cannot point this Court to any rule or revised code section that requires the Director to sua sponte engage in a reviewability decision when one has not been requested. Burton’s statement that the Director was required to issue a reviewability decision is erroneous and misstates the requirements of the statute and rule.

In order to succeed in its claim, Burton must show that the Director of Health had an affirmative duty to issue the reviewability ruling even though no request was made for the ruling. Burton can only prevail in a mandamus action if there is a clear legal right to the requested relief, a clear legal duty on the part of the Department to provide it. *State ex rel. Coble v. Lucas County Bd. of Elections*, 130 Ohio St. 3d 132, 133; 2011 Ohio 450 ¶10.

The lack of a clear legal right and a legal duty by the Director to issue a reviewability ruling in the absence of a request is fatal to Burton’s Complaint. Through this action, Burton cannot get what it is not otherwise entitled to receive. Burton asks this Court to order the Director to issue a reviewability ruling thereby giving power and authority to a third party to request a reviewability ruling regarding the conduct of a competitor. There is no provision in the rules or statutes that allows a competitor to request a ruling from the director regarding another’s

conduct. *In the Matter of: Miami Valley Radiation Oncology, Inc., (Mercy Medical Center of Springfield Ohio)*, Franklin Co. Case No. 93AP-693, 1993 Ohio App. Lexis 4872 (Oct. 5, 1993) Allowing Burton to request the Director issue a reviewability ruling on behalf of Heather Hills would again be creating a duty and a right that the legislation never intended. *Hodges*.

**3. Burton has an adequate remedy at law.**

In addition, Burton, in its zeal to attribute nefarious intent to the Director's actions, erroneously refers to the director's conduct in this matter as constituting the issuance of a "private reviewability ruling". This characterization is misleading in that it implies a reviewability ruling (albeit a private one) was in fact issued, when such was not the case. Respondents vehemently deny that a request for a reviewability ruling was ever received or that a ruling was issued, and even if this court construes that a request was received and ruling issued, Mandamus is still inappropriate. Assuming a request for a reviewability ruling was received by the director and assuming a reviewability ruling was in fact issued, then Burton had a remedy at law set forth in R.C. 3702.60. In particular, R.C. 3702.60(A) provides as follows:

(A) Any affected person may appeal a reviewability ruling issued on or after April 20, 1995, to the director of health in accordance with Chapter 119. of the Revised Code, and the director shall provide an adjudication hearing in accordance with that chapter. An affected person may appeal the director's ruling in the adjudication hearing to the tenth district court of appeals.

Burton did not appeal this so-called "private reviewability ruling" and cannot complain that it did not know about it in sufficient time to appeal as there is no requirement in law or rule for publication of reviewability rulings issued by the director.

Burton leads this Court to believe its only avenue for relief is through the extraordinary writ of mandamus however, it overlooks R.C. 3702.53, et seq which provides an adequate remedy. R.C. 3702.53 provides, in relevant part,

No person shall carry out any reviewable activity unless a certificate of need for such activity has been granted under sections 3702.51 to 3702.62 of the Revised Code or the person is exempted by division (S) of section 3702.51 or section 3702.5210 or 3702.62 of the Revised Code from the requirement that a certificate of need be obtained.

After the Director receives information regarding an alleged violation of R.C. 3702.53, he will evaluate the information and then decide if an investigation is warranted. Specifically, R.C.

3702.531 provides:

The director of health shall evaluate and may investigate evidence that appears to demonstrate that any person has violated section 3702.53 of the Revised Code. If the director elects to conduct an investigation, he shall mail to the alleged violator by certified mail, return receipt requested, a notice that an investigation is underway.

In crafting these sections, the legislature intended to grant discretion in the oversight of the CON program and enforcement of the program to the Director. This was endorsed by the Tenth District Court of Appeals in rendering its decision in the case of *In the Matter of: Miami Valley Radiation Oncology, Inc., (Mercy Medical Center of Springfield Ohio)*, 1993 Ohio App. Lexis 4872 (October 1993). The Court said:

In the event a concerned entity believes the project is not being constructed in accordance with the plans and information submitted with the reviewability request, that the project as being constructed is a reviewable activity, then its remedy is to seek enforcement through the director, who may take such action as allowed by statute and any applicable regulations, including seeking through the Attorney General to enjoin the illegal activity and to assess civil monetary penalties against the party who is constructing the reviewable project without the benefit of a CON.

*Id* at \*5. Burton's request to this Court for a writ of mandamus to Order the Director of Health to take certain actions is contrary to the authority the legislature vested in him and is inappropriate for a writ of mandamus.

Burton cannot ignore this remedy by arguing that relying upon R.C. 3702.53 and R.C.3702.531 would be futile or a vain act. This Court has viewed a “vain act” in the context of lack of authority to grant administrative relief and not in the sense of lack of probability that the application for administrative relief will be granted. *See Nemazee v. Mt. Sinai Medical Center*, 56 Ohio St. 3d 109, 115 (1990). Thus, “a vain act occurs when an administrative body lacks the authority to grant the relief sought; a vain act does not entail the petitioner's probability of receiving the remedy.” *Id.* In this matter, Burton could get its requested relief from the Department. Additionally, the Director has the authority to sanction a non-conforming entity by way of R.C. 3702.54. In evaluating whether it is a vain act, the Court focuses on the authority of the administrative body to afford the relief requested *Id.* In this matter, the Director of Health has the authority and discretion to conduct an investigation. If the Director elects he can then take enforcement action if in his discretion a violation has occurred.

**4. Mandamus is not a proper vehicle to protect a private right.**

Throughout its Complaint, Burton states it has lost its right to object or appeal to the reopening of the nursing facility now known as Heather Hill Care Communities. However that right exists only through the operation of statutes and/or rules and is not an independent right that can be exercised without condition precedents. Said another way, Burton does not have the right to object to actions of Heather Hill Care Communities solely based upon its (Burton's) location and existence as a healthcare facility. Burton and Heather Hill are competitors in the healthcare field. It seeks to use mandamus as a way to interrupt the operations of a competitor when it does not have another mechanism available to it to disrupt a competitor. Mandamus will not lie to enforce a private right against a private person. A party can use mandamus to compel an officer to perform an official act where he is under a clear legal duty to do so, but absent that legal duty,

Burton does not have a right to object or appeal and should not be granted the requested writ. *State ex rel. Pressley v. Indus. Comm'n*, 11 Ohio St. 2d 141, 163-164 (1967).

The changes over the years to OAC 3701-12-04 reflect the importance of a request to the Director as the mechanism to trigger issuance of a reviewability ruling. Previously, OAC 3701-12-04 provided, “[t]he director may issue such a determination at any time after receiving a notice of intent or other information relating to a proposed or actual activity that may be reviewable.” See OAC 3701-12-04 with effective date of October 12, 1987. (Attached as Appendix 1). The current version of the rule does not contain this language and specifically requires a request be made before the reviewability ruling is done.

**C. Burton Lacks standing to bring this action**

In addition to failing to meet the requirements to be granted a writ of mandamus, Burton has also failed to adequately plead sufficient facts to give it standing in this action. “Standing” is defined at its most basic as “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.” Black’s Law Dictionary (8th Ed.2004) 1442. Before an Ohio court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue. *Ohio Pyro, Inc., et al v. Ohio Department of Commerce, Division of State Fire Marshal*, 115 Ohio St. 3d 375, 2007 Ohio5024 ¶27 citing *Ohio Contrs. Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320, 1994 Ohio 183, 643 N.E.2d 1088.

As a shortcut to establish standing, Burton asserts it is an “affected person” however that term is unique to the Certificate of Need process and it cannot be a stand-in for adequately establishing by clear and convincing evidence that it has standing to file this action. Relator alleges “Burton Health Care, is an ‘affected person’ under ORC §3702.60, in that it is a health care facility located in the health service area in which the disputed projected is located.”

(Complaint ¶8). However, records from the Ohio Department of Health reveal that Relator is actually the “operator” of the facility known as “Burton Health Care Center”. (See Copy of License attached as Appendix 2). Also, per the Geauga County Ohio Auditor Website, the address “14095 E. Center Street, Burton Ohio” is classified as a Nursing Home owned by John J Masternick and Kenneth R. James, Trustees. (See Printout from Geauga County Auditor of State Website attached as Appendix 3). Per the Ohio Secretary of State Website, Relator is a Corporation with its principal office within Ohio in Girard, Trumbull County, Ohio. (See Printout from Ohio Secretary of State Website attached as Appendix 4). Thus, the entity bringing this action—Burton Health Care Center, Inc.—does not appear to be the same entity as Burton Health Care which it asserts is the “affected person” for the disputed project. Said another way, even if Burton Health Care (the facility) is an “affected person” for CON purposes and being an affected person gives it standing (which Respondent argues it does not), then Relator, Burton Health Care Center, Inc. lacks the standing to bring this action.

Furthermore, Relator’s Counsel’s affidavit is insufficient to meet the requirements of S.Ct. Prac R. 10.4(B). The rule provides:

All complaints shall contain a specific statement of facts upon which the claim for relief is based, shall be supported by an affidavit specifying the details of the claim, and may be accompanied by a memorandum in support of the writ. The affidavit required by this division shall be made on personal knowledge, setting forth facts admissible in evidence, and showing affirmatively that the affiant is competent to testify to all matters stated in the affidavit. All relief sought, including the issuance of an alternative writ, shall be set forth in the complaint.

The affidavit supporting the complaint in the instant case fails to comply with the requirements of S.Ct.Prac.R. 10.4(B). Counsel for Relator, after being duly cautioned and sworn, states in his affidavit that the:

statements contained in the foregoing Complaint for Writ of Mandamus, which are incorporated by reference as if completely rewritten in this Affidavit, are true and accurate *to the best of his personal knowledge*, information and belief, based upon a review of certified records provided by the Ohio Department of Health, by documents produced by the Ohio Department of Health in response to public records requests for the same and by the review of public records maintained by the Ohio Department of Health on its publicly available website. [Emphasis Added]

Counsel for Relator uses language, to wit: “to the best of his personal knowledge”, that has been repeatedly deemed insufficient by this Court. In *State ex rel. Hackworth v. Huges, Mayor, et al.*, 97 Ohio St.3d 110, 2002-Ohio-5334, 776 N.E.2d 1050, ¶ 24 this Court held:

We have routinely dismissed original actions, other than habeas corpus, that were not supported by an affidavit expressly stating that the facts in the complaint were based on the affiant’s personal knowledge. See *State ex rel. Tobin v. Hoppel*, 96 Ohio St. 3d 1478, 2002 Ohio 4177, 773 N.E.2d 554; *State ex rel. Shemo v. Mayfield Hts.* (2001), 92 Ohio St. 3d 324, 750 N.E.2d 167. The affidavit attached to Hackworth’s complaint, in which one of his attorneys stated that the facts in the complaint were “true and accurate to the best of her knowledge and belief,” does not comply with S. Ct. Prac.R. X(4)(B).

Specifically, the affidavit provides no admissible facts regarding the Relator’s assertion in paragraph 8 of the complaint that it is an “affected person under ORC § 3702.60, in that it is a health care facility located in the health service area in which the disputed project is located.” This complete dearth of factual support that the entity, Burton Health Care Center, Inc., is a health care facility is also a failure of Relator to establish jurisdiction in this matter. Relator’s assertion in paragraph 8 of its complaint that it is a health care entity (as opposed to the “operator” of the healthcare facility) is not only unsupported by affidavit, it appears to be incorrect. This failure to comply with the requirements of S.Ct Prac R.10.4(B) warrant dismissal of the complaint.

D. **When ODH Licensed Heather Hills Care Communities Burton's Cause of Action Was Rendered Moot.**

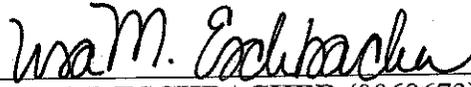
This action was moot before it was filed. On or about September 16, 2011 the Ohio Department of Health issued a nursing home license to Munson Healthcare, Inc. to operate Heather Hill Care Communities. (Certified Copies of License attached as Appendix 5). There is no right for a third-party to insert itself into the licensure process to object to the Director issuing a license to a nursing home facility. Neither the statutes nor rules permit a competitor to challenge the issuance of a nursing home license to another operator. Burton cannot directly oppose the issuance of a nursing home license and therefore has failed to prove by clear and convincing proof of its right to the requested writ of mandamus.

**IV. CONCLUSION**

For all of the foregoing reasons, Burton has failed to prove by clear and convincing evidence it is entitled to a writ of mandamus and therefore the Complaint should be dismissed for failure to state a claim.

Respectfully Submitted,

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OHIO ATTORNEY GENERAL



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Counsel for Respondents

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Respondents' Motion to Dismiss* was sent U.S. Mail, postage prepaid, on December 27, 2011 to:

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Counsel for Relator



**LISA M. ESCHBACHER** (0069673)

Assistant Attorney General

Chapter 3701., 4123., or 5101. of the Revised Code, or any self-insurance plan.

(S) "To offer" means, with respect to a health service, that a health care facility holds itself out as capable of providing, or as having the means for the provision of, a specified health service.

(T) "Health service area" means a geographic region designated by the director under section 3702.55 of the Revised Code.

**HISTORY:** Eff. 10-12-87

1987-88 OMR 49; 1986-87 OMR 714; 1985-86 OMR 501; 1984-85 OMR 259; 6-22-84

Note: Effective 12-17-83, former 3701-12-01 (10-18-83) expired.

#### CROSS REFERENCES

RC 3702.52, Public health council to adopt rules

#### 3701-12-02 The SHPDA—Repealed

**HISTORY:** Eff. 10-12-87

Note: Effective 7-23-87, former 3701-12-02 (3-19-83) was repealed.

#### 3701-12-04 Reviewability determinations

The director shall issue rulings on whether a proposed project is a reviewable activity (reviewability determinations). The director may issue such a determination at any time after receiving a notice of intent or other information relating to a proposed or actual activity that may be reviewable. The director shall issue a reviewability determination upon written request by any person. The director may request additional information necessary to determine whether the activity is a reviewable activity as described in any provision of rule 3701-12-05 of the Administrative Code. The director shall issue a determination within forty-five days after receiving a request and all necessary information. The date that the determination is mailed by certified mail to the person who filed the request shall be the date of issuance of the determination. If the director does not issue a reviewability determination within forty-five days after receiving a request and all necessary information, the project shall be considered to have been ruled not a reviewable activity. A determination that a project is not a reviewable activity only relates to the project as described in the request and any additional information and does not authorize conducting a different, reviewable activity.

**HISTORY:** Eff. 10-12-87

Note: Effective 10-12-87, former 3701-12-04 (1987-88 OMR 51) was repealed.

#### CROSS REFERENCES

RC 3702.52, Public health council to adopt rules

#### 3701-12-05 Scope of review: reviewable activities and exemptions

(A) Reviewable activities. The following activities are reviewable activities which shall not be conducted without a valid certificate of need, except as exempted by paragraph (B) of this rule:

(1) Capital expenditures. The obligation by or on behalf of a health care facility of a capital expenditure associated with the provision of a health service, other than to acquire an existing health care facility, in an amount of one million five hundred thousand dollars or more. Whether an expenditure is a capital expenditure shall be determined in accordance with generally accepted accounting principles, except that:

(a) The cost of any studies, surveys, designs, plans, working drawings, specifications or other activities, including staff effort,

consulting and other services essential to the project, shall be considered part of the capital expenditure; and

(b) The acquisition of a capital asset by capital or operating lease, donation, or other means for less than fair market value is a capital expenditure in the amount of the fair market value of the asset.

(2) Health services.

(a) The addition by or on behalf of a health care facility of a health service with an average annual operating cost of five hundred thousand dollars or more for the first three full years of operation that was not offered by or on behalf of the health care facility within the preceding twelve months. Operating costs shall be determined in accordance with generally accepted accounting principles.

The addition of a megavoltage radiation therapy service operated by or on behalf of a health care facility, regardless of the amount of operating costs or capital expenditures.

(c) The addition, by any person, of any of the following services, regardless of the amount of operating costs or capital expenditures:

(i) A heart, heart-lung, liver, kidney or pancreas transplantation service;

(ii) A cardiac catheterization service or the addition of another cardiac catheterization laboratory to an existing service;

(iii) An open-heart surgery service; or

(iv) An extracorporeal shockwave lithotripsy service.

(3) Medical equipment. The acquisition, by any person, of medical equipment with a cost of seven hundred fifty thousand dollars or more. The cost of acquiring medical equipment includes the sum of the following:

(a) The greater of its fair market value or the cost of its lease or purchase;

(b) The cost of installation and of any other activities essential to the acquisition of the equipment and its placement into service.

(4) The establishment, development or construction of a new health care facility, as defined in paragraph (M) of rule 3701-12-01 of the Administrative Code, or a change from one category of health care facility, as specified in paragraph (H) of rule 3701-12-01 of the Administrative Code, to another.

(5) Changes in bed capacity. Any of the following changes in the bed capacity, as defined in paragraph (C) of rule 3701-12-01 of the Administrative Code, of a health care facility requires review regardless of the amount of capital expenditures or operating costs:

(a) An increase in bed capacity;

(b) A recategorization of beds registered under section 3701.07 of the Revised Code. A recategorization of beds from an adult medical/surgical unit to an existing adult intensive/special care unit or from a pediatric unit to an existing [sic] neonatal or pediatric intensive care unit does not require a certificate of need if:

(i) The beds are recategorized by a health care facility with an average annual occupancy rate of ninety-five per cent or greater for the preceding twelve months in the intensive care unit to which the beds are to be added;

(ii) The recategorization amounts to no more than nine beds or ten per cent of the bed capacity of the unit from which the beds were removed, whichever is less, within a two-year period; and

(iii) The recategorization is not associated with a capital expenditure of one million five hundred thousand dollars or more.

(c) A relocation of beds from one physical facility or site to another, excluding the relocation of beds within a health care facility or among buildings of a health care facility at the same location.

(6) The expenditure of more than one hundred ten per cent of the maximum expenditure specified in a certificate of need.

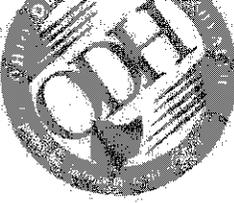
(7) Transfer of a certificate of need. Any transfer of a certificate of need from the person to whom it was granted to another person before the project that constitutes a reviewable activity is completed, any agreement to transfer a certificate of need upon completion of the project and any transfer of a controlling interest in a corporation that holds a certificate of need. The transfer of a certificate of need from a corporation to which it was granted to a second corporation that is a wholly owned or controlled subsidiary of the first corporation for the purposes of obtaining tax-exempt financing or other favorable financing for the activity that is the subject of the certificate of need does not constitute a reviewable transfer of a certificate of need.

(8) The conduct of an activity otherwise exempt under paragraph (B) of this rule if:

Italic denotes emergency rules which become inoperative in ninety days.

Appendix

1



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Columbus, Ohio 43215

614/466-3543  
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John R. Kasich/Governor

January 13, 2011

Administrator  
BURTON HEALTH CARE CENTER  
PO BOX 575  
101 WEST LIBERTY STREET  
GIRARD, OH 44420

Facility Type: NURSING HOME  
Facility ID: 2107N  
Capacity: 110

Dear Facility Administrator:

This renewal confirmation letter approves your facility to continue to operate through January 2012; unless the license is revoked pursuant to Chapter 119. of the Ohio Revised Code or voided at your request.

BURTON HEALTH CARE CENTER  
14095 EAST CENTER STREET  
BURTON, OH 44021

For online information regarding the licensure process, e.g. forms, rules (Ohio Administrative Code (OAC)) and regulations (Ohio Revised Code (ORC)), visit the Ohio Department of Health web site at <http://www.odh.ohio.gov>. Questions regarding the licensure process may be directed to our e-mail address, [licc@odh.ohio.gov](mailto:licc@odh.ohio.gov) or by calling Brian Jackson, Licensure Specialist, at (614) 466-7713.

Sincerely,

Bridgette C. Smith, Licensure Administrator  
Bureau of Information and Operational Support  
Division of Quality Assurance

Appendix  
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State of Ohio

# Department of Health

This is a Non-transferable License

LICENSE NUMBER  
5183

to operate a Nursing Home Home Number 2107

This is to certify that Burton Health Care Center, Inc.

NAME OF OPERATOR

Burton Health Care Center

NAME OF HOME

14095 E. Center Street, Burton, Ohio

ADDRESS OF HOME

has been duly licensed by the State of Ohio, Department of Health as provided by sections 3721.02 and 3721.07 of the Ohio Revised Code.

In testimony whereof, witness my hand and seal this 28th day of October, 19 96

Pete Simoni  
DIRECTOR, OHIO DEPARTMENT OF HEALTH

THIS LICENSE MUST BE DISPLAYED IN A CONSPICUOUS PLACE IN THE HOME.



Frank J. Giba  
Gauga County Auditor

## Main Information

Parcel Number	Location Address	Owner Name
05-044650	14095 E CENTER ST	MASTERNICK JOHN J & JAMES KENNETH R TRUSTEES

Parcel Number	05-044650	Routing Number	05--11-03-00-001-00
Tax District	BURTON VILL-BERKSHIRE LSD	School District	2801-BERKSHIRE LSD
Location Address	14095 E CENTER ST	Acreage	3.26
Owner Name	MASTERNICK JOHN J & JAMES KENNETH R TRUSTEES	Deed Volume/Page	1001/0904
Owner Address	20 EAST LIBERTY ST GIRARD OH 44420	Legal Description	
Mailing Name	MASTERNICK JOHN J & JAMES KENNETH R TRUSTEE	Property Class	412 - Nursing Homes/Hospital
Mailing Address	101 W LIBERTY ST GIRARD OH 44420	Neighborhood Code	13000
		0 dwellings	
		Square Footage	[none]
		Grade	See <a href="#">improvements tab</a>

To view the values used to calculate your current tax bill, please select from the drop down box 2010 (Payable 2011)

2011 (Payable 2012)			Sales	
<b>2011 Valuation (Payable 2012)</b>			Sale Date	11-29-1994
	Market	Taxable	Sale Amount	\$0
Land	\$179,300	\$62,760	Source	Valid No
Improvement	\$2,777,900	\$972,270	Conveyance #	6736 Exempt #
Total	\$2,957,200	\$1,035,030	# Parcels	3 Type LB
CAUV	\$0	\$0		

Geauga County digital data is a representation of collected information for use within Access Geauga for purposes of Public Access and analysis. Geauga County assumes no legal responsibility for this information. Users noting errors or omissions are encouraged to contact the Geauga County GIS at [gis@co.geauga.oh.us](mailto:gis@co.geauga.oh.us).

Appendix  
3



# The State of Ohio

Bob Taft

05236-0028

Secretary of State

914352

## Certificate

It is hereby certified that the Secretary of State of Ohio has custody of the Records of Incorporation and Miscellaneous Filings; that said records show the filing and recording of: ARF MIS

of:

BURTON HEALTH CARE CENTER, INC.

United States of America  
State of Ohio  
Office of the Secretary of State

Recorded on Roll 5236 at Frame 0029 of  
the Records of Incorporation and Miscellaneous Filings.

Witness my hand and the seal of the Secretary of State at

Columbus, Ohio, this 17TH day of AUG

A.D. 19 95



*Bob Taft*  
Bob Taft  
Secretary of State

Appendix  
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00000-0009

## ARTICLES OF INCORPORATION

OF

BURTON HEALTH CARE CENTER, INC.

APPROVED

By..... *JO*Date..... *8-17-95*Amount..... *\$85**95081741801*

The undersigned, all of whom are citizens of the United States, desiring to form a corporation, for profit, under Section 1701.01 et seq., of the Revised Code of Ohio, do hereby certify:

FIRST: NAME: The name of said corporation shall be BURTON HEALTH CARE CENTER, INC.

SECOND: PRINCIPAL OFFICE: The location of its principal office within Ohio shall be Girard, Trumbull County, Ohio.

THIRD: PURPOSE: The purpose for which said corporation is formed is to engage in any lawful act or activity for which a corporation may be formed pursuant to Section 1701.01 to 1701.98, inclusive, of the Revised Code of Ohio, as amended, and the corporation is further granted any and all powers accorded to corporations by Chapter 1701 of the Revised Code of Ohio, as amended, which are necessary to exercise the foregoing purpose.

FOURTH: COMMON SHARES: The number of shares which the corporation is authorized to have outstanding is Seven Hundred Fifty (750) shares of no par common voting stock, subject to the following conditions:

A. No shares or offering of shares by the corporation in any manner whatsoever shall be subject to the exercise of preemptive rights by any shareholder or class of shareholders.

0522-3030

B. Any unissued shares, authorized herein or hereafter, from time to time, may be issued, from time to time, in such manner, amounts and proportions and for such consideration as shall be determined by the Board of Directors, from time to time.

C. Rights, warrants or options to purchase shares of the corporation may be created and issued, from time to time, by the Board of Directors, subject to such terms, duration, price and other conditions as the Board of Directors may determine, except for benefit plans for employees of the corporation which may only be authorized by the shareholders of the corporation.

D. Shares of the corporation may be created or issued in amounts of less than one (1.0) full share, and such fractional shares shall have all the rights and privileges of all other shares of the corporation.

E. Within the limits allowed by law, the corporation, through the Board of Directors, from time to time, may redeem any share or shares then outstanding on such terms and conditions as the Board of Directors may then determine, either proportionately from all existing shareholders by lot or otherwise.

F. The corporation, through the Board of Directors, may, from time to time, upon such terms and conditions as may then be satisfactory to the Board and the then majority vote of the holders of the voting shares of the

05001-0031

corporation, place reasonable restrictions against the voluntary transfer of any or all shares of the corporation, including authorized and unissued shares, treasury shares, and shares which may become authorized during the period when such restrictions are in full force and effect, provided that no such restrictions shall be effective against the corporation, unless the corporation is a party to any agreement establishing such restrictions, or the corporation has received written notice thereof.

FIFTH: MAJORITY VOTE: Notwithstanding any other provisions to the contrary contained in Chapter 1701 of the Revised Code of Ohio, as amended, which may require a two-thirds (2/3) vote of the shareholders of the corporation, including, but not limited to, adopting or amending the Code of Regulations, amending these Articles of Incorporation, reducing stated capital, or otherwise altering the capital account, making transfers from earned capital to stated capital, purchasing shares of the corporation, selling or other disposing of the entire assets, approving a merger or consolidation, or the liquidation or dissolution of the corporation, such vote will be effective upon receiving the affirmative vote or written consent of the holders of shares entitling them to exercise a majority of such voting power.

SIXTH: INDEMNIFICATION: Any person who at any time shall serve,

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or shall have served, as director, officer or employee of the corporation, or of any other business or firm at the request of the Board of Directors or management of this corporation, together with his heirs, successors, administrators and executors shall be saved harmless and indemnified by this corporation of all costs and expenses, including, but not limited to, counsel fees, amounts paid in settlement, judgments and interest on judgment and court costs, reasonably incurred in connection with the defense of any claim, action, suit or proceeding, whether civil, criminal, administrative or other, in which he or they may be involved by virtue of such position with or by direction of this corporation, PROVIDED, however, such indemnity shall not be applicable to the following situations:

- (1) Any matter where there is a final adjudication that such person has been guilty of gross negligence or willful misconduct in the performance of duty, or
- (2) Any matter where there has been a final adjudication that such person has been convicted of a felony arising under the laws of any state of the Union, or the United States, or
- (3) Any matter in which such person has participated of such nature as the indemnification herein would frustrate clearly defined public policy and a deduction be disallowed to this corporation for federal income tax

05/13/2003

purposes for such indemnification, or

(4) Any matter in which such person shall be required to disgorge any amounts realized to this corporation or any other business or firm, or any contracts, transactions, offers or acts of this corporation shall be rescinded, nullified or otherwise voided.

(5) Any matter in which there is a final adjudication that such person has been guilty of any violation of any state or federal securities law rule or regulations.

This indemnification shall not be deemed exclusive of any other rights to which those indemnified may be entitled under any agreement or vote of shareholders.

**SEVENTH: REIMBURSEMENT OF NON-DEDUCTIBLE EXPENSES:** If any expenditure made by the corporation to or for the benefit of any officer or employee which the corporation has claimed as an ordinary and necessary expense in the normal course of its business and thereby deductible in determining taxable income for federal income tax purposes is subsequently denied to be a deductible expense by the Internal Revenue Service, then after a final determination of such non-deductibility, any and all employees or officers of the corporation who have been recipients or beneficiaries of such expenditure or expenditures shall reimburse the company for the full amount of the non-deductible expenditure or expenditures. For the purpose of this article, final determination shall mean the

07/20/2014

conclusion of the controversy with the Internal Revenue Service through the acceptance of the deficiency assessment or the expiration of the time of appeal following judgment, should the corporation have initiated litigation before any District Court of the United States Tax Court.

EIGHTH: TRANSACTIONS WITH OFFICERS AND DIRECTORS: A director or officer of the corporation shall not be disqualified by his office from dealing or contracting with the corporation as a seller, purchaser, lessor, lessee or employee of any other business or firm, nor shall any transaction, contract, offer or act of the corporation be void or voidable, or in any other way affected or invalidated by reason of the fact that any director, officer or firm of which such director or officer is a shareholder, director or officer, is in any way interested in such transaction, contract, offer or act, PROVIDED the fact of such interest shall be fully disclosed in all material particulars to the Board of Directors of this corporation at any meeting at which action upon such contract, transaction, offer, or act may be taken. Upon such disclosure no such director or officer shall be accountable to the corporation for any gains or profits realized by reason of such transaction, whether or not the presence and/or voice of such officer or director was needed to provide a quorum for such meeting or approval or

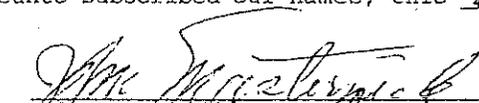
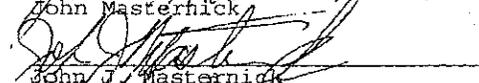
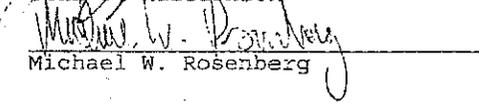
05236-0035

ratification of such contract, transaction, offer or act.

NINTH: TRANSFERABILITY OF SHARES: Unless and until the Board of Directors and the holders of a majority of the voting shares of the corporation otherwise provide, pursuant to paragraph F of the Fourth Article, herein, all shares issued by the corporation shall be subject to the following restrictions upon transfer:

Before any shareholder may sell or otherwise transfer any or all shares owned by the corporation, the shares must be offered, in writing, to the corporation upon the same terms and conditions as the shareholder would sell or otherwise transfer said shares to a third party. The corporation shall have thirty (30) days from the receipt of said offer to accept or reject said offer. Failure on the part of the corporation to act upon said offer shall be considered to be a rejection and the shareholder shall be free to dispose of said shares to the third party upon the terms offered to the corporation. A legend outlining these restrictions shall be placed on all certificates issued by the corporation.

IN WITNESS WHEREOF, we have hereunto subscribed our names, this 3<sup>rd</sup> day of August, 1995.

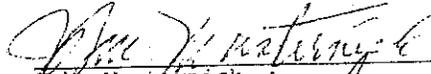
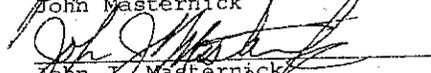
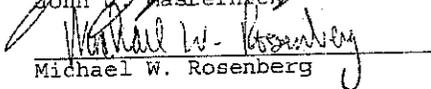
  
\_\_\_\_\_  
John Masternick  
  
\_\_\_\_\_  
John J. Masternick  
  
\_\_\_\_\_  
Michael W. Rosenberg

05236-2036

## ORIGINAL APPOINTMENT OF AGENT

The undersigned, all of the incorporators of BURTON HEALTH CARE CENTER INC., hereby appoint John J. Masternick, a natural person resident in Ohio, upon whom any process, notice or demand required or permitted by statute to be served upon the corporation may be served.

His complete address is 101 West Liberty Street, Girard, Ohio 44420.

  
 John Masternick  
  
 John J. Masternick  
  
 Michael W. Rosenberg

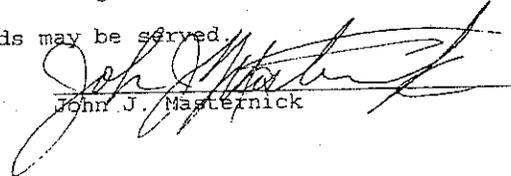
Warren, Trumbull County, Ohio

August 2, 1995

Burton Health Care Center, Inc.

Gentlemen:

I hereby accept appointment as agent of your corporation upon whom process, tax notices or demands may be served.

  
 John J. Masternick



**CERTIFICATION  
OF  
PUBLIC RECORDS**

As custodian of the records for the Nursing Home Licensure and Certification files, manager of the Public Information Unit (PIU) in the Bureau of Information and Operational Support (BIOS), Division of Quality Assurance (DQA), Ohio Department of Health (ODH), I, the undersigned, herby certify that the following document is a true and accurate copy of the original license as maintained during the normal course of business. The attached is a certified true copy of the nursing home license to operate, effective September 16, 2011 for

Heather Hill Care Communities  
12340 Bass Lake Road  
Chardon, OH 44024

*Christine Allen, RHIT*

Christine D. Allen, RHIT  
Health Information Administrator  
Bureau of Information and Operational Support  
Division of Quality Assurance  
Ohio Department of Health



LANCE DAVID HIMES  
Attorney at Law  
Notary Public, State of Ohio  
My Commission Has No Expiration  
Section 147.03 R.C.

Sworn to before me and subscribed in by presence this 20<sup>th</sup> day of December 2011.

*Lance David Himes*  
Notary Public

Appendix  
5



OHIO DEPARTMENT OF HEALTH

246 North High Street  
Columbus, Ohio 43215

614/466-3543  
www.odh.ohio.gov

John R. Kasich / Governor

Theodore E. Wymysio, M.D. / Director of Health

September 20, 2011

James Homa  
MUNSON HEALTHCARE, INC  
12340 BASS LAKE ROAD  
CHARDON, OH 44024

Re: HEATHER HILL CARE COMMUNITIES  
12340 BASS LAKE ROAD  
CHARDON, OH 44024

Facility Type: NURSING HOME  
Facility ID: 2596N  
Capacity: 99

Dear Mr. Homa:

The enclosed NURSING HOME license, effective September 16, 2011, approves your request to operate the above facility.

<u>Location</u>	<u>Capacity Non-Ambulatory</u>	<u>Capacity Ambulatory</u>
First floor (F unit)	15	N/A
First floor (G unit)	30	N/A
Second floor (C unit)	42	N/A
Unattached building (H unit)	12	N/A

The license is subject to the conditions of an annual license renewal fee in January of each year.

For online information regarding the licensure process, e.g. forms, rules (Ohio Administrative Code (OAC)) and regulations (Ohio Revised Code (ORC)), visit the Ohio Department of Health web site at <http://www.odh.ohio.gov>.

Questions regarding the licensure process may be directed to our e-mail address, [liccert@odh.ohio.gov](mailto:liccert@odh.ohio.gov) or by calling Brian Jackson, Licensure Specialist, at (614) 466-7713.

Sincerely,

Bridgette C. Smith, Licensure Administrator  
Bureau of Information and Operational Support  
Division of Quality Assurance

enclosure

cc: Bureau of Vital Statistics  
State Fire Marshal's Office  
Licensure  
Certification

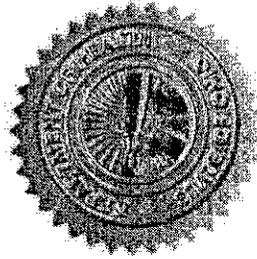
ODJFS  
Akron District Office  
BENHA  
NATCEP

STATE OF OHIO  
OHIO DEPARTMENT OF HEALTH  
NURSING HOME LICENSE

Hereby issued in accordance with Chapter 3721. of the Ohio Revised Code and Chapter 3701-17 of the Ohio Administrative Code to:

HEATHER HILL CARE COMMUNITIES  
12340 BASS LAKE ROAD  
CHARDON, OH

Facility ID #: 2596N  
Capacity: 99 Patients  
Effective Date: September 16, 2011  
Operator: MUNSON HEALTHCARE, INC



In witness thereof Theodore E. Wymyslo, MD  
Theodore E. Wymyslo, MD  
Director of Health

This is a non-transferable license and must be posted in a conspicuous place in the facility.