

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, ex rel. :  
 Burton Healthcare Center :  
 :  
 Relator, : Case No. 12-0101  
 : ORIGINAL ACTION IN MANDAMUS  
 v. :  
 :  
 Ohio Department of Health, et al, :  
 :  
 Respondents. :

Motion to Dismiss of the Ohio Department of Health & Director Wymyslo

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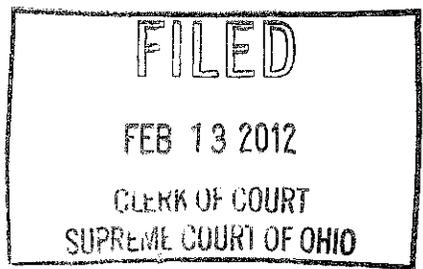
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## **I. INTRODUCTION**

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 erroneously conflates the Director's duty to issue a reviewability ruling with Certificate of Need ("CON") concepts in a vain attempt to create a viable ground for relief. The underlying actions by the facility now known as Heather Hill Communities and whether or not it needed a CON is immaterial to this Court's analysis of granting a writ of mandamus. Rather, this case begins and ends with whether there exists a duty on the Director to issue a reviewability ruling without a request for one being made.

Throughout its Complaint, Burton Health Care incorrectly uses the terms "required formal reviewability ruling" and "mandatory reviewability ruling" and in doing so misrepresents to the Court that the Director had a duty to unilaterally or sua sponte issue a reviewability ruling when none was requested. Burton's statements are incorrect and contrary to the plain language of the rules and statutes that pertain to reviewability rulings.

Finally, to the extent that Burton urges this Court to order the Director to revoke the license to the Heather Hill Communities, there is no mechanism in the law that allows a third-party to object to the issuance of a license to a nursing home. 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. LAW AND ARGUMENT**

### **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 issue a reviewability ruling absent a request. There is no rule or statute that requires the ODH to publish the request for a reviewability ruling or any reviewability ruling that is issued by the director. Any argument by Burton that there is such a requirement is incorrect and misrepresents the law.

### **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. Burton has the burden to “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). The reviewability ruling is not for the universe of “affected persons” who want to exercise an objection. Rather, a reviewability ruling is intended to give guidance to a facility seeking to take some action at the health care facility as to whether or not a CON is required. Further evidence that the reviewability ruling is intended to be for the benefit of the requestor and not for potential “affected persons” is found in the plain language of the rule and statute. Specifically, it provides, 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 Burton cannot use mandamus as a vehicle to trigger the condition precedent.

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

Absent the Director having 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 an affirmative duty for the Director 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. 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.

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 rule requires a request be made to the Director for a reviewability ruling before the reviewability ruling is done. 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.

There is no provision in the rules or statutes that allows a competitor to request a ruling from the director regarding another facility’s conduct. Through this action, Burton seeks relief for which there is no statutory basis for it to receive. See *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) Burton’s request to this Court for an order to the Director to issue a reviewability ruling seeks to give power and authority to a third party to request a reviewability ruling regarding the conduct of a competitor. Granting Burton’s request to order the Director to issue a reviewability ruling on behalf of Heather Hills would be creating a duty and a right that the legislation never intended. *Hodges*.

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

Burton's Complaint is full of contradictions. In several paragraphs Burton asks the Court to compel the Director to "issue a formal reviewability ruling" (See for example ¶4, ¶6, and ¶23) but then asserts there was a "tacit, private reviewability ruling." (See ¶39). The Director either issued a reviewability ruling or he didn't. Burton cannot in one instance ask this Court to compel the Director to issue a formal reviewability ruling but then allege a private reviewability ruling was issued. If, as Burton contends in ¶39, the Director issued a reviewability ruling then Burton had an adequate remedy at law by way of objecting to the ruling.

Respondents deny that a request for a reviewability ruling was ever received or that a ruling was issued. But, if this court construes that a request was received and a ruling issued, mandamus is inappropriate because 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 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 and in doing so it overlooks R.C. 3702.53, et seq which provides Burton 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 position 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 cannot ignore this available 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. Burton seeks to use mandamus as a way to interrupt the operations of a competitor presumably because it does not have another effective competition mechanism. 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).

**C. 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.

**D. Relator's Counsel's Affidavit Is Insufficient**

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:

factual statements contained in the foregoing Complaint for Writ of Mandamus, incorporated by reference as if completely rewritten in this Affidavit, are true and accurate *to the best of his personal knowledge*. Said persona knowledge is derived from a review of certified public records provided by the Ohio Department of Health, of public records produced by the Ohio Department of Health in response to public records for the same, and 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).

This failure to comply with the requirements of S.Ct Prac R.10.4(B) warrants dismissal of the complaint.

### III. 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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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Motion to Dismiss* was sent U.S. Mail, postage prepaid, on February 13<sup>th</sup>, 2012 to:

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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:

These rules are emergency rules which become inoperative in ninety days.