IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EDWARD GRAHAM, et al. Plaintiffs v. CITY OF LAKEWOOD, et al. Defendants	CASE NO. CV-15-846212 JUDGE JOHN P. O'DONNELL **PLAINTIFFS' REPLY IN SUPPORT OF PRELIMINARY INJUNCTION**

INTRODUCTION

> The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of [the United States Supreme Court]. [. . .] The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation.

Commonwealth of Mass. v. Mellon, 262 U.S. 447, 486-487, 43 S.Ct. 597, 67 L.Ed. 1078 (1923).

FACTS AND BACKGROUND

On Tuesday July 7, 2015, this Court denied Plaintiffs' motion for a temporary restraining order ("TRO"). Plaintiffs moved for an emergency TRO and preliminary injunction to prevent Defendants from further impairing Lakewood Hospital operations and medical services, violating and purporting to terminate the existing 1996 Amended and Restated Lease ("Lease") and Definitive Agreement ("DA"), and eventually closing and razing Lakewood Hospital until the merits of the case have been decided or a settlement has been reached. The Court denied Plaintiffs' motion for TRO in part for the following reasons: (1) Plaintiffs lacked precedent to present to the Judge to bolster their argument in favor of granting their motion for TRO; (2) the original proposed order of relief was too broad and vague (i.e. it was not narrowly drawn); and (3) the Court was concerned about the enforceability of such an order.

First, there is precedent in the State of Ohio and other jurisdictions for granting motions for TRO and preliminary injunction in regard to preventing the closure of hospitals until a case has been decided on the merits. Second, Plaintiffs do have a narrowly drawn, specific proposed order, which is prohibitory and not mandatory. Finally, such an order is enforceable.

If Defendants had nothing to hide, then they would not be opposed to the issuance of a preliminary injunction preventing the future removal of Lakewood Hospital medical services, assets, equipment, and employees in addition to the closure, razing, and sale of Lakewood Hospital and very desirable portions of real estate owned by the City of Lakewood ("City") in Westlake, Ohio (i.e. 850 Columbia Road) to the Cleveland Clinic Foundation ("CCF") at <u>below</u> fair market value.

Lakewood Hospital has been a City-owned hospital since 1930 and has been in existence since 1907. It has served the public and residents of the City for more than 100 years providing reasonable access to health care services and achieving its express purpose to serve the public health and welfare as provided by City laws and ordinances. According to City Ordinance 63-86, which approved the lease of Lakewood Hospital to Lakewood Hospital Association ("LHA") in 1986, Lakewood Hospital is a charitable trust with the City residents being the intended beneficiaries.

The evidence to be presented in this case will establish that as early as 2005 CCF and LHA began to remove medical services, equipment, and employees from Lakewood Hospital, including the transfer of whole medical service lines, equipment, and employees to other hospitals wholly-owned by CCF. For the past ten years, CCF and LHA continued to diminish the viability of Lakewood Hospital and now claim it is no longer sustainable. CCF created this condition by increasing and paying itself extraordinarily high "Administrative Services" expenses and by removing profitable medical services and equipment, <u>without</u> any reasonable

compensation or replacement medical services as promised. Even with CCF's intentional acts to diminish Lakewood Hospital, it still has a positive EBIDA operation when reviewing Ernst & Young's audited financial statement.

The evidence in this matter will demonstrate that CCF, without the knowledge or approval of the City, engaged in a secret plan to siphon valuable medical services and equipment so as to cripple the viability of the hospital. According to CCF's own 2012 Master Plan that was commissioned in 2011, a covert scheme was created to "Decant" Lakewood Hospital. The "Decanting Plan" specified that medical services, equipment, and employees would gradually be transferred from Lakewood Hospital to Fairview Hospital (and other CCF wholly-owned hospitals) in preparation for the closure and razing of Lakewood Hospital as an inpatient, acute care, and medical/surgical hospital. (Ex. 1). What is further troubling about this conduct is that LHF and CCF continued to solicit, campaign, and raise funds from the public for the support of Lakewood Hospital. These donors were never alerted or advised that their intended contributions for the support of Lakewood Hospital would never be a reality as the hospital would soon cease to exist.

CCF's decanting Master Plan violates the DA and Lease's express and implied terms to manage and operate Lakewood Hospital through 2026 and then return all assets and the hospital as a going concern. Moreover, CCF's decanting plan simultaneously with raising money from the public (who had no knowledge of such a plan) to support Lakewood Hospital, which CCF planned on closing all along, is evidence of fraud as the donors have been deceived.

On June 21, 2012, three years before the plan to close and raze Lakewood Hospital was revealed to the public and beneficiaries of the charitable trust, CCF representatives met to discuss the decanting plan of Lakewood Hospital. (Ex. 2). Under the decanting plan, 30-45 beds from Lakewood Hospital's nursing unit will be moved to Fairview Hospital; 16 intensive care

unit beds at Lakewood Hospital will be moved to Fairview Hospital; Fairview Hospital will absorb 700-800 births per year from Lakewood Hospital; 7,000-8,000 Lakewood Hospital inpatient emergency department visits will be moved to Fairview Hospital; 1,315-1,773 inpatient surgeries per year will be moved from Lakewood Hospital to Fairview Hospital; Lakewood Hospital physicians will be moved to Fairview Hospital and other CCF wholly-owned hospitals; 12 geropsych beds will be moved from Lakewood Hospital to Lutheran Hospital; Lakewood Hospital's vascular laboratory will be moved to Fairview Hospital; some Lakewood Hospital inpatient beds will be moved to Fairview Hospital; and inpatient surgery and the catheterization laboratory at Lakewood Hospital will be moved to Fairview Hospital. (Ex. 1). All of these services, employees, and equipment that have been moved and will continue to be moved away from Lakewood Hospital are City-owned assets. More importantly, those assets belong to a charitable trust for the charitable purpose of providing high quality health care to the third party beneficiaries of the trust: City taxpayers and residents, Lakewood Hospital employees, and the general public. The need for these medical services, including inpatient surgery, is demonstrated by CCF's Master Plan for Fairview Hospital showing Lakewood Hospital's 1,773 surgery cases being transferred (i.e. decanted) to CCF's wholly-owned Fairview Hospital.

Defendant Subsidium was hired by LHA and CCF in approximately 2014, and paid using Lakewood Hospital funds in excess of $500,000.00. This "Blue Ribbon Consultant" was hired to provide consulting services related to the future of Lakewood Hospital. Subsidium concluded that LHA should release a request for proposal ("RFP") to seek proposals from hospital systems offering future plans for the management and operation of Lakewood Hospital. Despite an RFP(s) being sent to potential partners for the long-term sustainability of Lakewood Hospital, CCF and LHA have known since at least 2012 that Lakewood Hospital will be closed, razed, and sold to CCF for an outpatient wellness center. CCF has been pursuing its decanting of

Lakewood Hospital for years and its documentation indicates the "decanting plan" was 100% completed by September 2012. (Ex. 4). However, the first public announcement of LHA and CCF's proposal to close Lakewood Hospital was not made until January 2015. That is a breach of contract and further a breach of fiduciary duty, let alone all of Plaintiffs' other meritorious claims.

With LHA's acceptance of CCF's diminished services proposal, Defendants announced publicly in January 2015 that they intended on closing Lakewood Hospital, razing it at LHA and LHF's expense, selling a portion of the "clean" land to CCF, and CCF building a new outpatient family health center with an emergency room. The Fairview Hospital Master Plan detailing the Lakewood Hospital decanting plan refers to this new Lakewood Family Health Center as a "Medical Office Building" or "MOB." Defendants have touted the proposed family health center as innovative and meeting the demands of today's health care market. However, the City already has a family health center operated by CCF on Madison Avenue.

Defendants provided the public with a copy of the Letter of Intent ("LOI") signed and approved unanimously by CCF, Lakewood Hospital Foundation ("LHF"), and LHA (which includes the Mayor and two City council members sitting ex-officio on LHA's Board of Trustees, supposedly to represent the City's best interests). Defendants argue that the LOI is not binding and has expired; therefore, Plaintiffs have no standing. This argument ignores Plaintiffs' claims in the Complaint of past and continuing misconduct in violation of the Lease, DA, LHA's and LHF's Articles of Incorporation, and City laws and ordinances.

Defendants' argument also ignores the allegations in the Complaint of continuing and proposed future wrongful conduct, which needs to be enjoined regardless of the status of the LOI. Since the announcement of the proposed closure of Lakewood Hospital, LHF has sent notification to all past donors that it is canceling its annual summer fund-raising event "Starry

Night." Starry Night is LHF's biggest fundraiser historically and directly supports Lakewood Hospital as a going concern. It is important to note that LHF and LHA are deemed to be financially interrelated organizations (see Affiliations section of LHA's annual audited financial statements). LHF is a not-for-profit organization whose purpose is to seek private gifts and donations to support the work and activities of Lakewood Hospital as a going concern. The City also is still considering the expired LOI as a valid proposal and holding "executive session" meetings without oversight and transparency to the public and City taxpayers and residents, the intended beneficiaries.

Notably, despite Defendants' argument otherwise, the five Plaintiffs are not merely a small group of rogue citizens in the City community attempting to usurp the power of the rest of the City population and enforce their own personal agendas upon everyone else. Rather, Plaintiffs represent a large and growing group of City residents and Lakewood Hospital employees who are disgruntled by the lack of diligence by the City to enforce its rights against LHA, CCF, and LHF under the Lease and DA. (*See* Harkness Affidavit). For example, Plaintiff Marguerite Harkness is the chairperson of Save Lakewood Hospital, an organization of more than 3,000 (and growing) City residents trying to save Lakewood Hospital from decay, sale, and destruction. (*Id.*). The need for Lakewood Hospital's inpatient medical services is demonstrated by CCF's 2012 Master Plan that outlines approximately $200 million of improvements to Fairview Hospital over an eleven (11) phase development plan through 2025. (Ex. 5).

ARGUMENT

I. THE COURT MUST GRANT PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION TO PRESERVE LAKEWOOD HOSPITAL

The Court will "consider whether (1) the movant has shown a strong or substantial likelihood or probability of success on the merits, (2) the movant has shown irreparable injury,

(3) the preliminary injunction could harm third parties, and (4) the public interest would be served by issuing the preliminary injunction." *Sinoff v. Ohio Permanente*, 146 Ohio App.3d 732, 741, 767 N.E.2d 1251, 1257-1258 (8th Dist. 2002). Granting a "preliminary injunction is an extraordinary remedy and, as such, [Plaintiffs] ha[ve] a substantial burden to meet in order to be entitled to a preliminary injunction." *Id.* at 740. However, "the interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of [the United States Supreme Court]." *Mellon* at 486. The policy supporting "the extension of the equitable remedy to a single taxpayer in such cases [is] based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation." *Id.* at 487 (Emphasis added). The facts and public policy establishing taxpayers suits support a preliminary injunction in this matter.

A. Plaintiffs' Claims Are Meritorious

First, movants Plaintiffs have shown a likelihood of success on the claims in their Complaint. Defendants continue to divert attention away from the primary harm from which all of Plaintiffs' claims arise: breach of the 1996 DA, breach of the 1996 Lease, and breach of the City laws governing the City's most prized asset for more than 100 years—Lakewood Hospital. More significantly, CCF's Lakewood Hospital decanting plan in conjunction with LHF raising funds to support Lakewood Hospital from the unknowing public is evidence and raises questions of fraud. Dr. Terence Kilroy's affidavit along with Plaintiffs' verified pleadings are sufficient to prove past harm and the looming threat of future harm. CCF's "decanting" plan under CCF's "Master Plan" for Fairview Hospital proves that CCF and LHA have known about and have been planning for the closure of Lakewood Hospital for at least the past three years, three years before

it was announced publicly. Beside breach of contract, Plaintiffs also bring very strong claims of breach of fiduciary duty owed to Plaintiffs as a class of beneficiaries of the Lakewood Hospital charitable trust. Plaintiffs have standing to bring a taxpayers suit under R.C. 733.59, the Second Amended Charter of Lakewood, and Ohio common law. Moreover, based on Ohio statutory law, common law, City laws, and documents pertaining to the establishment, operation and management of LHA and Lakewood Hospital, there is more than enough evidence to prove that a charitable trust exists in Lakewood Hospital with Plaintiffs (citizens and employees) being the beneficiaries of that trust. In the Answer of Defendant Ohio Attorney General Mike DeWine in response to Plaintiffs' Complaint, the Attorney General admitted that he should be joined as a necessary party to this judicial proceeding as it involves a charitable trust. The operation of a hospital by a "nonprofit" entity creates a charitable trust, whether express or implied.

The seminal case in this area of law involving the sale and closure of charitable hospitals is *Manhattan Eye, Ear & Throat Hosp. v. Spitzer* ("MEETH"). In *MEETH*, the New York Supreme Court held that a charitable hospital filing a petition seeking court authorization of a transaction that would result in the sale of its real estate and assets and closure of the nonprofit hospital was (1) not fair and reasonable to the corporation and (2) did not promote the original charitable purposes of the corporation. *Manhattan Eye, Ear & Throat Hosp. v. Spitzer*, 715 N.Y.S.2d 575, 186 Misc.2d 126 (N.Y. 1999).[1]

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1 *See MEETH* at 597 (holding that "[t]he terms of the transaction are not fair and reasonable to the corporation, inasmuch as no consideration was given to the value of MEETH as a going concern; rather, this value was disregarded. Moreover, evaluating the transaction at the time of the petition, it is clear that there has not been a showing that the sale will promote the purposes of the corporation. To the contrary, MEETH decided to sell, and then evolved its new or 'reprioritized mission.' There has been no reasoned determination that MEETH cannot continue to operate an acute care, specialty research and teaching hospital, as other medical institutions are proposing to do, and are willing to invest substantial sums to accomplish. MEETH instead chose to sell its real estate, to seek DOH approval to close its hospital, and then apply for judicial imprimatur of this plan. [The court] conclude[d] that this sale transaction should be disapproved.") (Emphasis added).

Overseeing the management and operation of the charitable trust Lakewood Hospital, the LHA Board of Trustees' fiduciary duties are threefold:

> the duty of care, the duty of loyalty, and the duty of obedience. The duty of care requires directors to act in an informed, careful manner in their decisionmaking. The duty of loyalty commands directors to act without self-interest, in good faith, and in the best interest of the corporation at all times. The duty of obedience obliges directors to ensure that the charitable mission of the corporation is carried out and to obey laws relevant to the organization.

Nicole Huberfeld, *Tackling the "Evils" of Interlocking Directorates in Healthcare Nonprofits*, 85 Neb. L. Rev. 681, 684 (2007) (Emphasis added)[2]. Further, "the duty of obedience, perforce, must inform the question of whether a proposed transaction to sell all or substantially all of a charity's assets promotes the purposes of the charitable corporation [. . .]." *MEETH* at 593.

In this case, the LHA Board is not promoting the purposes of the charitable corporation. Moreover, LHA, LHF, CCF, and the City did not exercise the fullest due diligence possible in selecting a buyer and all other possible options of running Lakewood Hospital as a going concern before resorting to a sale and closure.[3] Long before informing the rest of LHA's Board, LHF, and the City, CCF made up its mind that it got into a bad deal and needed to find a way out of that deal (i.e. Lakewood Hospital decanting plan). With the onset of LHA and CCF's

2 *See also Id.* at 595 (concluding "[w]hile it may be appropriate, in certain cases, to solve financial difficulties by eliminating the organization's mission by selling its assets and then undertaking a new mission, [attention is properly focused] upon the duty of obedience, which mandates that a Board, in the first instance, seek to preserve its original mission. Embarkation upon a course of conduct which turns it away from the charity's central and well-understood mission should be a carefully chosen option of last resort. Otherwise, a Board facing difficult financial straits might find sale of its assets, and 'reprioritization' of its mission, to be an attractive option, rather than taking all reasonable efforts to preserve the mission which has been the object of its stewardship.") (Emphasis added).

3 *See Id.* at 594 ("[L]egislation in one state [Nebraska] requires that the attorney general examine the transaction to determine '(2) Whether the nonprofit hospital exercised due diligence in deciding to sell, selecting the purchaser, and negotiating the terms and conditions of the sale; (3) Whether the procedures used by the seller in making its decision, including whether appropriate expert assistance was used were fair; (4) Whether conflict of interest was disclosed, including, but not limited to, conflicts of interest of board members and experts retained by the seller; and (5) Whether the seller will receive reasonably fair value for its assets.")

diminishing of Lakewood Hospital services and implementation of the decanting plan in violation of both the DA and Lease, Lakewood Hospital's financial sustainability became nonexistent while revenues plummeted. However, Defendants continue to direct the Court's attention to the red herring blaming this all on the allegedly changing forces and demands in the health care industry today. Further, CCF has offered to purchase City-owned real estate connected to Lakewood Hospital for less than fair market value. To make matters worse, the City is not protecting its constituents and the beneficiaries of the Lakewood Hospital trust by voting in favor of CCF's LOI and agreeing to speak only in positive terms to the public about the proposed deal. This is a clear conflict of interest of those City officials' duties as ex-officio members of LHA's Board.

B. There Is Irreparable Injury

Second, Plaintiffs have shown irreparable injury. Plaintiffs are "required to establish actual irreparable harm or the existence of an actual threat of such injury when the equitable remedy of an injunction is sought." *e2 Solution v. Hoelzer*, 6th Dist. Lucas No. L-08-1295, 2009 WL 426426; *see also Universal Health Services, Inc. v. Thompson, M.D.*, 24 S.W.3d 570 (Tex.App. 2000) ("doctors adduced evidence of the requisite probable right of recovery and irreparable harm necessary to obtain injunction [. . .].").

CCF has stripped, and will continue to strip, Lakewood Hospital of its medical programs, services, equipment which has not become obsolete yet, and employees in an effort to strengthen its position that Lakewood Hospital should be sold to CCF, closed, and razed in favor of building a new outpatient family health center. All signs point to this occurring no matter what the City says. CCF planned Lakewood Hospital's decanting as early as 2012 and has been stripping profitable services from the hospital ever since while arguing that the hospital has become unviable because of national health care trends. The irreparable injury that already has occurred

and will continue to occur is the loss of tax revenue, loss of lease payments, significant loss of employment as Lakewood Hospital as an inpatient hospital currently is the City's largest employer (even if employees get jobs at other CCF hospitals, the City will lose those employees working within its borders), and the loss of City-owned assets, which are being managed poorly, for the benefit or lack thereof of the public, including Plaintiffs, as beneficiaries. The biggest loss of all will be the loss of an 85-year-old City-owned hospital providing taxpayers and residents convenient access to needed health care services.

C. No Third Parties Will Be Harmed

No third parties will be harmed by the issuance of a preliminary injunction. Moreover, the intended third-party beneficiaries of Lakewood Hospital already have been harmed by CCF and LHA's actions. Closing Lakewood Hospital, selling it to CCF, razing it, and building a family health center while forcing City residents, including indigent patients, to travel even further outside of the City (i.e. Avon, Ohio) to seek health care currently is the only other proposed option beside the option of keeping Lakewood Hospital at its *status quo* until this case is resolved or settled. Defendants cannot claim reasonably that by delaying the plan ultimately to build a family health center Plaintiffs are causing the City harm. The City already has a CCF family health center operating on Madison Avenue. It is important to note that CCF is contractually obligated to fund Lakewood Hospital losses and keep the hospital at a 1:1 cash-to-debt ratio. What the Court in this case needs to determine is which of those two options is the least detrimental to the third-party beneficiaries of the Lakewood Hospital trust. The least detrimental option is to GRANT Plaintiffs' motion and issue a preliminary injunction, enjoining Defendants from any more harmful future conduct in regards to Lakewood Hospital until this case has been decided on the merits.

D. A Preliminary Injunction Will Best Serve The Public Interest

Fourth, and finally, the public interest absolutely would be served by issuing Plaintiffs' preliminary injunction because the public is the beneficiary of the Lakewood Hospital charitable trust. Denying Plaintiffs' preliminary injunction and allowing Lakewood Hospital eventually to be closed in favor of an outpatient family health center would be a tragedy whether or not every member of the City community realizes it. LHA and the City established a charitable trust as is evidenced by LHA's Articles of Incorporation, the Lease, City laws and ordinances, and even the Ohio Revised Code (i.e. Chapter 140). As Lakewood Hospital is a charitable trust, "the public or the community is the 'real beneficiary of [the] charitable trust.'" *In re Trust of Brooke*, 82 Ohio St.3d 553, 561, 697 N.E.2d 191 (1998) (quoting Bogert, Trusts & Trustees (2 Ed. Rev. 1991) 19-20, Section 362 at 27); *see Three Bills, Inc. v. Parma*, 111 Ohio App.3d 740, 745, 676 N.E.2d 1273 (8th Dist. 1996) & *McCall v. W.J. Schoenberger Co.*, 29 Ohio N.P.(N.S.) 456, 462, 1931 WL 2251; *see also State. ex rel. Lee v. Montgomery*, 88 Ohio St.3d 233, 236, 724 N.E.2d 1148 (2000) (("'Not only is a charitable trust permitted by law to have vague, undefined, uncertain beneficiaries, but *** it is required to have such beneficiaries; and *** the very essence of a charitable or public trust lies in the indefiniteness of the charitable trust beneficiaries.'") (quoting *In re Trust of Brooke* at 561)) & *Gearhart v. Richardson*, 109 Ohio St. 418, 432, 142 N.E. 890 (1924) ("[T]he uncertainty of the persons to be relieved by a charitable fund should never be called into effect for the purpose of destroying the charitable trust."). As explained under the third prong of the preliminary injunction test (above), granting Plaintiffs' preliminary injunction is the least detrimental option of all currently available options in preserving the public's interest in the eighty-five (85) year old charitable community asset.

II. THERE IS PRECEDENT SUPPORTING THE COURT'S PREVENTION OF THE CLOSURE, RAZING, AND SALE OF LAKEWOOD HOSPITAL UNTIL THIS CASE HAS BEEN DECIDED ON THE MERITS

While the Court has discretion and power to grant an order for a preliminary injunction and fashion the order and its enforceability as it so pleases, this Court would be more inclined to grant a motion for a preliminary injunction regarding the operations of a hospital if Plaintiffs provide precedent. In fact, there is precedent in the State of Ohio and other jurisdictions involving the granting of preliminary injunctions and TROs to prevent the closure, acquisition, or merger of hospitals until the merits of a case have been resolved or settled.

In 2011, the United States District Court in the Northern District of Ohio, Western Division granted to the movant Federal Trade Commission a preliminary injunction, which prevented the further consolidation of hospital operations between Toledo-based health care system ProMedica Health System, Inc. and St. Luke's Hospital until a resolution could be reached on the merits of an anti-trust suit. *See F.T.C. v. ProMedica Health System, Inc.*, N.D.Ohio No. 3:11 CV 47, 2011 WL 1219281 (March 29, 2011).

Outside of Ohio, a Texas appellate court affirmed plaintiffs' doctors granted "temporary injunction to prevent owners [of a women's health care hospital] from closing [the] hospital pending trial on the merits" on breach of contract and fraud claims where the trial court "held that: (1) injunction was a prohibitive injunction, not a mandatory injunction; (2) injunction preserved the status quo; (3) doctors adduced evidence of the requisite probable right of recovery and irreparable harm necessary to obtain injunction; [and] (4) language of injunction was sufficiently specific as to the status quo to be maintained [. . .]." *Thompson.* Similarly, the Supreme Court of Alabama affirmed a granting of a motion for preliminary injunction seeking to preserve the *status quo* until a suit by a hospital board challenging the hospital's management company's assignment of its lease to another company was resolved on the merits or settled.

Health Care Management Group of Camden, Inc. v. Health Care Management Group, Inc., 522 So.2d 280 (Ala. 1988) (holding "that hospital board was entitled to preliminary injunction preventing management companies from transferring funds out of state and from converting hospital into substance abuse rehabilitation facility, pending determination of merits of board's claim against management companies.").

In this case, CCF has proposed since 2011 and has begun implementation in 2012 of the consolidation (i.e. decanting) of Lakewood Hospital into Fairview Hospital and other CCF wholly-owned hospitals. Likewise, in Georgia, a United States district court granted a TRO in an anti-trust suit brought by the Federal Trade Commission against a Georgia health care system trying to consolidate two hospital systems. *See F.T.C. v. Phoebe Putney Health System, Inc.*, M.D.Ga. No. 1:11-CV-58, 2013 WL 2553626 at *1 (May 15, 2013) ("Plaintiff's TRO Motion [. . .] GRANTED and Defendants are ENJOINED from taking any further steps to consolidate Palmyra and Phoebe Putney [hospitals].").

Further, in this case, Defendants argue that Plaintiffs' claims are not ripe for review because the LOI and consequent proposal to sell Lakewood Hospital to CCF, which would close and raze Lakewood Hospital, is a non-binding proposal being considered and has not been implemented, yet. There is precedent in another jurisdiction mimicking this case in the sense that it involved a United States district court granting a motion for preliminary injunction in a case involving a proposal to close and transfer hospital facilities. In *Seafarers Int'l Union of North America, AFL-CIO v. Weinberger*, the United States District Court in the District of Columbia "held that the union had standing and had shown a strong likelihood of success of the merits entitling it to a preliminary injunction against proposed implementation of [a] plan" by the officials of the Department of Health, Education and Welfare to close and transfer facilities of

Public Health Service hospitals. *Seafarers Int'l Union of North America, AFL-CIO v. Weinberger*, 363 F. Supp. 1053 (D.D.C. 1973) ("Preliminary injunction issued.") (Emphasis added).

Finally, there is precedent in other cases not involving hospitals, but rather involving businesses seeking to enjoin other businesses from further breaching contracts to support Plaintiffs' motion for preliminary injunction in this case. The Superior Court of Pennsylvania affirmed a preliminary injunction granted by a trial court, providing that "the [plaintiff] casket manufacturer was entitled to a preliminary injunction as to its breach of contract cause of action against [defendant] casket distributor to prevent distributor from further breaching the parties' distribution agreement [. . .]." *The York Group, Inc. v. Yorktowne Caskets, Inc.*, 924 A.2d 1234 (Pa. 2007). Plaintiffs have properly plead and will most likely prevail on their breach of the Lease and DA contracts in this matter.

For the foregoing reasons, there is plenty of precedent involving preliminary injunctions being granted in relation to hospitals and contract breaches to bolster Plaintiffs' argument in support of their motion for preliminary injunction. Plaintiffs' motion should be GRANTED and this Court should issue a preliminary injunction, enjoining Defendants from future misconduct until the Court and jury have decided the merits of this case.

III. PLAINTIFFS PROPOSE A NARROWLY DRAWN, SPECIFIC ORDER THAT IS PROHIBITORY

The Court further expressed reservations about Plaintiffs' motion for TRO because the proposed judgment entry was too broad (i.e. it did not fashion a narrowly drawn, specific remedy). Plaintiffs did request the maintenance of the *status quo* of medical services, equipment, and employees currently at Lakewood Hospital and prevention of Lakewood Hospital's sale, closure, and razing until the case has been resolved on the merits or settled, which is specific, prohibitory, not mandatory in nature, and enforceable on the part of the Court. Plaintiffs also

originally requested in the TRO a return of services improperly removed. However, Plaintiffs have now drafted a new proposed judgment entry for preliminary injunction encompassing a narrow, prohibitory, and enforceable order. (See attached).

The Supreme Court of Ohio has elaborated on the distinction between a prohibitory injunction and a mandatory injunction:

> A prohibitory injunction preserves the status quo by enjoining a defendant from performing the challenged acts in the future. A mandatory injunction, however, is an extraordinary remedy that compels the defendant to restore a party's rights through an affirmative action. The distinction between these two categories of injunctive relief can best be summed up as follows: a prohibitory injunction is used to prevent a future injury, but a mandatory injunction is used to remedy past injuries.

State ex rel. Gen. Motors Corp. v. Indus. Comm., 117 Ohio St.3d 480, 2008-Ohio-1593, 884 N.E.2d 1075, ¶ 12 (2008) (citing *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 50 (2005) & *Gratz v. Lake Erie & W. RR. Co.*, 76 Ohio St. 230, 233, 81 N.E. 239 (1907)).

Further, precisely in line with what Judge O'Donnell requested from Plaintiffs in this case, an appellate court in Texas defined the specificity requirement of temporary injunctions:

> as definite, clear and precise as possible and *when practicable* [they] should inform the defendant of the acts he is restrained from doing, without calling on him for inferences or conclusions about which persons might well differ and without leaving anything for further hearing. But obviously the injunction must be in broad enough terms to prevent repetition of the evil sought to be stopped, whether the repetition be in form identical to that employed prior to the injunction or (what is far more likely) in somewhat different form calculated to circumvent the injunction as written.

Thompson at 580 (quoting *San Antonio Bar Ass'n v. Guardian Abstract & Title Co.*, 156 Tex. 7, 291 S.W.2d 697, 702 (Tex. 1956)). The law in Ohio is nearly the same as in Texas regarding the specificity requirement of preliminary injunctions, though a little bit more vague. *See Adkins v. Boetcher*, 4th Dist. Ross No. 08CA3060, 2010-Ohio-554, 2010 WL 571987; *M.P.C. Plating Inc.*

v. Local 507, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 8th Dist. Cuyahoga No. 50973, 1986 WL 11517 (Oct. 2, 1986). Ohio's Civil Rule 65(D) provides for the form and scope of a restraining order or injunction: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained [. . .]." Civ. R. 65.

Plaintiffs request a prohibitory injunction, which is specific enough under Ohio law and in relation to what this Court wants. The proposed order is prohibitory in the sense that it would prevent LHA, CCF, the City, and even LHF from further diverting non-obsolete equipment to other CCF wholly-owned hospitals or selling to third parties such as Select Health; prevent them from permanently moving CCF full employees (not people who merely have privileges at CCF hospitals) away from Lakewood Hospital; prevent them from permanently moving offered programs and services away from Lakewood Hospital (not including referrals that would occur in the normal course of business if Lakewood Hospital were being operated and managed as a going concern); prevent them from selling Lakewood Hospital to CCF; prevent them from closing Lakewood Hospital; prevent them from razing Lakewood Hospital upon its sale and closure; and prevent them from building an outpatient hospital on the real estate on which Lakewood Hospital rests. Not only are those prohibitory requests connected and specific enough to prevent future conduct effectively until the merits of this case have been decided, but they also are just broad enough to prevent *repetition* of the evil sought to be stopped, specifically, the perpetuated and permanent removal of non-obsolete equipment, Lakewood Hospital employees who are CCF employees, and Lakewood Hospital medical programs and services.

For the foregoing reasons, Plaintiffs' motion for preliminary injunction should be GRANTED and an injunction issued by this Court because Plaintiffs do have a narrowly drawn, specific, and prohibitory proposed judgment entry as an order.

IV. THE COURT CAN ENFORCE PLAINTIFFS' PROPOSED JUDGMENT ENTRY

The Court expressed reservation over how to enforce Plaintiffs' proposed order for TRO and suggested to Plaintiffs' counsel that Plaintiffs also should be more specific about how the Court could enforce a preliminary injunction should it be granted.

In the State of Ohio, as courts have the inherent power to issue injunctions in their discretion, they also "may punish disobedience of their orders or enforce them in contempt proceedings." *KLN Logistics Corp. v. Norton*, 174 Ohio App.3d 712, 718, 2008-Ohio-212, 884 N.E.2d 631 (8th Dist.); *see also State ex rel. Bitter v. Missig*, 72 Ohio St.3d 249, 252, 648 N.E.2d 1355 (1995) & *State ex rel. Adkins v. Sobb*, 39 Ohio St.3d 34, 35, 528 N.E.2d 1247 (1988). Moreover, "[t]he court that issued the order sought to be enforced is in the best position to determine if that order has been disobeyed." *KLN Logistics Corp.* at 636, 718; *see also Denovchek v. Trumbull Cty. Bd. of Commrs.*, 36 Ohio St.3d 14, 16, 520 N.E.2d 1362 (1988).

The Court has the power to issue a preliminary injunction, which would be a court order (enforceability of which would be done in a contempt proceeding and disobedience of which would be punishable). While the Court has suggested appointing a trustee to overlook compliance with a preliminary injunction, such a trustee is not necessary as Plaintiffs have Dr. Kilroy, amongst others, as their eyes and ears. Dr. Kilroy has an acute awareness of Lakewood Hospital's operations and the effect that the lack of services has on his own practice. If evidence of a violation of Plaintiffs' preliminary injunction came to light, then the Court could give a warning to Defendants or else hold a contempt proceeding and possibly punish Defendants for

their disobedience. The threat of a contempt proceeding should be enough incentive to Defendants not to breach the preliminary injunction order.

For the foregoing reasons, Plaintiffs have viable solutions at their disposal under the law to enforce compliance by Defendants with a preliminary injunction. Plaintiffs' motion should be GRANTED and this Court should issue a preliminary injunction. Other courts have fashioned preliminary injunction orders to prevent the wasting of hospital assets and preserve the *status quo*.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court GRANT Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing **Plaintiffs' Reply in Support of Preliminary Injunction** has been filed through the Court's electronic case management system ("ECM"), is available for review on-line by counsel and parties, will be provided notice of filing by the Court's ECM system, and a courtesy pdf copy is also being sent via email only on this 31st day of July, 2015, to the following:

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Attorney for Plaintiffs

Decanting Plan – Lakewood Hospital

Summary
Fairview Hospital must be prepared to assume 30-45 M/S Beds and by Mid-2013. Other programs can be integrated into current Fairview Hospital without impacting current operations.

Purpose
The decanting plan for Lakewood Hospital is included as part of this report is to determine the key impacts for space needs at Fairview Hospital as well as the schedule related to implementation.

I. Decanting Plan
Refer to Exhibit ?? entitled Lakewood Decanting plan following this summary.

II. Implementation / Phasing Plan
The decanting of the building will take place in two phases; Phase 1 will decant the A & B buildings, clearing the site for the new Family Health Center / Ambulatory Surgery Center along Detroit Avenue; once the new facility is occupied at the completion of Phase 2, Phase 3 will include the demolition of the balance of the facility. Subsequent Phase 3, opportunities exist for mixed use development that supports a 'health' district in downtown Lakewood such as a wellness center and senior housing.

Phase 1
To vacate Buildings A & B, current program will be relocated as follows:

- 4th Floor: (18) Rehab beds will be relocated within Lakewood Hospital
- 3rd Floor: OB/GYN program will be relocated to **Fairview Hospital**
- 2nd Floor: Grace LTAC and related administrative support will move to non-CC facility
- 1st Floor (30) Bed M/S volume will be relocated to **Fairview Hospital Main Building 5 & 6**

Anticipated time line: Start no sooner than December 2013
Duration of Phase: 4-6 month duration

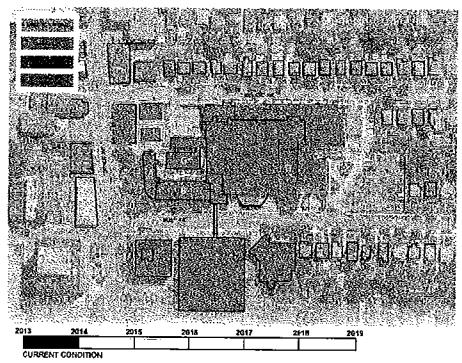
Phase 2
This Phase will include the construction and activation of the FHC/ASC.

- Emergency, Outpatient Surgery, Clinics and related Administration will move into new building
- Inpatient Surgery will move to **Fairview Hospital** (anticipated no sooner than January 1, 2015)

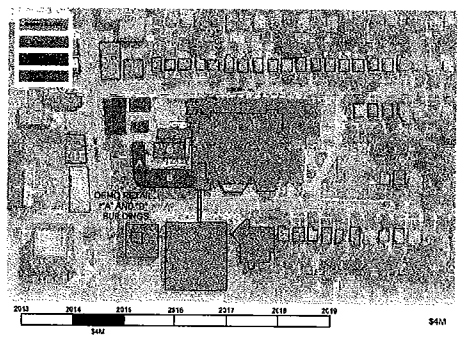
Anticipated time line: Start no sooner than December 2014
Duration of Phase: 18-21 months

Phase 3
This phase will include the demolition of the balance of Lakewood Hospital.

Anticipated time line: Start no sooner than August 2016
Duration of Phase: 4-6 months



CURRENT CONDITIONS


PHASE ONE - 2014

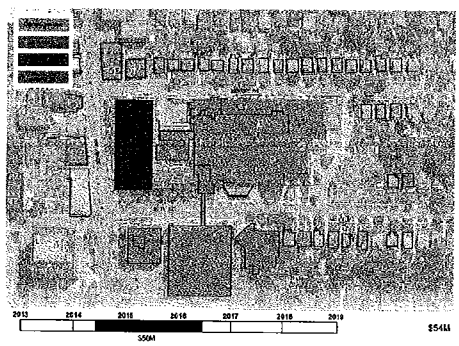
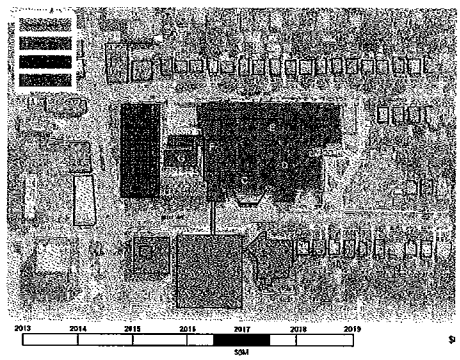

PHASE TWO – 2015-2016

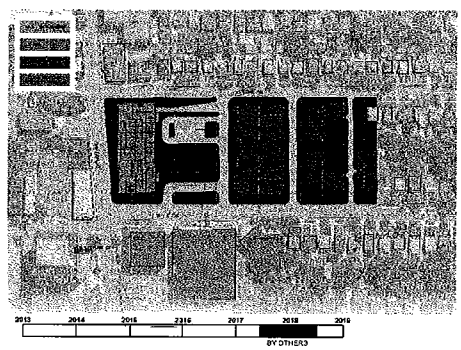
EXHIBIT 1

Notes

1. Program Assumptions and volumes were provided by CC Lakewood Hospital and Fairview Hospital and Regional Admin. team



PHASE THREE – 2016-2017



PHASE FOUR – POST 2017

Exhibit 2 -
Decanting Plan

Cleveland Clinic
Lakewood Hospital

	Function/Department	Location / Floor Area	Beds	Current Location @ Lakewood G	1	2	3	4	R/PH	Proposed Location New MOB	Fairview	CHB	PB	TBD	Not Moved	Comments
1.00	Administration															
1.01	HR	1,700		C												
1.02	Medical Library	1,900		C												
1.03	Medical Records	5,300		D												
1.04	Admin	6,600		AT												
1.05	FEDS	10,600		A												
1.06	Lobby/Entrance	5,000			C											
1.07	Admin	4,700			A											
1.08	Patient Accounting	4,200			C											
1.09	Grace Admin	4,800				A										
	Subtotal	46,800														
2.00	Nursing Units															
2.01	Oncology M/S	8,300	30 (2X)		B											
2.02	Grace LTAC	8,200	30 (2X)			B										
2.03	Gero Psych	6,700				C										
2.04	OB/LDR/PP	13,000					A-B							LH		Moves to Lutheran
2.05	M/S	7,200					C									700-800 births/7 year absorbed by FH
2.06	Step Down	10,800					D									30-45 beds move to FH 5 & 6
2.07	CCU	5,100					D									
2.08	ICU	5,200					D-E									16 beds move to FH ICU Mid 2013
2.09	Neuro ICU	4,100					D-E									
2.10	Rehab + IP PT	20,900						A-B-F			35 Beds					16 Beds will stay in LH
2.11	Rehab + OT	7,500						C								
2.12	Skilled Nursing Unit	13,200						D								
2.13	Ortho M/S	8,100						E								
	Subtotal	118,300														
3.00	Diagnostic/Treatment															
3.01	Endoscopy	2,000			E											
3.02	Emergency	16,700				E					17K to Other					7-8K to FV
3.03	Rehab Gym	10,300			D-E											
3.04	Laboratory	9,500				F										
3.05	MRI	3,600				D										
3.06	Imaging	7,200				AT										
3.07	IP Dialysis	3,800					E									
	Subtotal	53,100														
4.00	Interventional															
4.01	Surgery	18,500					E				IP to FH					FV OP to FV OP or LW ASC
4.02	Invasive Cardio (Cath Lab)	8,800				D										Hybird Room
4.03	Peri-Op	11,200				E										
	Subtotal	38,500														
5.00	Services															
5.01	Kitchen Cafeteria	21,000			F											
5.02	Surgery Support	3,800					F									
5.03	Pharmacy	3,000		E												
5.04	Material Management															
5.05	General Store															Verify FV Capacity
5.06	Mail Room															
5.07	Central Sterile (CSSD)	5,700		F												Verify FV Capacity
5.08	Server Room (ITD)	780		C												
5.09	Maintenance															
6.00	Ambulatory Care/Clinics															
6.01	Biometrics	6,600			D											
6.02	Lakeland Eye	1,000			D											
6.03	Cardiopulmonary	2,600			D											
7.00	Education															
7.01	Teaching-Seminar	5,000			D											
8.00	Miscellaneous															
8.01	Retail	1,700			C											
9.00	Central Plant															
9.01	Mechanical	9,000		CP												
9.02	Mechanical/Dock	7,200			CP											
9.03	Mech	3,600				CP										
10.00	Unaccounted															
	Circulation - Atrium-Other			40,020	12,900	24,300	22,400	3,300								
	Totals by Floors			86,600	92,500	104,600	93,900	53,000								
	Total Building GSF			430,600												

Lakewood Questions
1. What about Columbia Road?

WRL 200

Westlake
Reed
Leskosky

MEETING NOTES

Client: Fairview Hospital
Project: Master Plan
Comm. No.: 12096
File No.: B-3

Purpose: Kickoff Meeting
Location: Admin Conf Room
Meeting Date: June 21, 2012 **Time:** 4:30 pm – 6:00 pm
Date of Notes June 25, 2012

Present	Distribution	Name	Company/Department	Email
		Fairview Hospital		
X	X	John Mills	COO – Admin.	jomill@ccf.org
X	X	Paul Slebodnik	VP - Facilities	psaleb@ccf.org
X	X	Ankit Chhabra	Sr. Dir. Finance	chhabra@ccf.org
		WRL		
X	X	Phil LiBassi	Principal	pliba@wrldesign.com
		Cleveland Clinic		
X	X	Joe Strauss	Director Planning	strausj2@ccf.org
	X	Randy Geise	Planning	geiser@ccf.org

AUTHOR: Phil LiBassi

NOTE: The following meeting notes constitute our understanding of the items discussed. Unless Author is notified of any additions and/or corrections within five (5) days after receipt, the following is assumed complete and correct.

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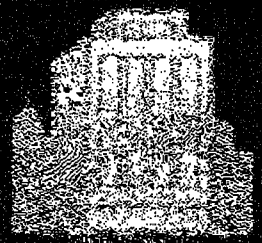
Phoenix One East Camelback Road Suite 690 Phoenix, Arizona 85012 F 602.212.1020 T 602.212.0451
Washington 1634 Eye Street NW Suite 900 Washington, DC 20006 F 202.296.6116 T 202.296.4344
Cleveland 925 Euclid Avenue Suite 1900 Cleveland, Ohio 44115 F 216.522.1357 T 216.522.1350
Los Angeles 2140 Hyperion Avenue Los Angeles, CA 90027 F 323.664.3566 T 213.804.4531
www.WRLdesign.com

EXHIBIT
tabbies
2

NO.:	ITEMS DISCUSSED:	ACTION REQ'D BY	TARGET DATE
1.	Administrative a. PO is in for processing		
2.	Review of master plan objectives a. Everyone has reviewed and concurred that WRL proposal covers objectives		
	Lakewood		
1.	Decanting Plan a. Reviewed decanting plan spreadsheet b. Nursing Units i. **M/S Beds** : a total of 30-45 beds will move to Fairview Balance of existing beds will not be required. **Course of action:** complete work as planned for 6N, 6S, 5N & 5W. ii. **ICU Beds:** a total of 16 beds will move to Fairview. These beds have been addressed in the new ICU unit that is set to open in mid-2013. Balance of beds will not be required **Course of action:** in process iii. **Rehab beds:** Approximately 18 beds (of 35) will be impacted by the decanting of the 4B unit. An interim solution may be available by re-purposing beds within existing facility. Long term - TBD **Course of action:** Develop a plan iv. **OB Beds:** Fairview can absorb the 700-800 births/year without any physical improvement **Course of action:** None needed v. Grace LTAC, SNU will not be replaced Course of action: Establish termination date (assume mid-2013?) c. Diagnostic / Treatment i. ED: Current volume of 34K visits per year. Proposed FHC will be sized for 17K visits per year. Of the balance, it is assumed 8K visits will move to FH, with 9K visits being distributed to non-CC facilities. FH ED scheduled to open in Mid 2013 is design to handle this volume. **Course of action:** in process ii. Other D/T will move to proposed FHC. d. Interventional i. OP Surgery will move to proposed FHC. ii. IP Surgery and Cath Lab will move to FH Course of action: 1. A more comprehensive review of FH Surgery will be undertaken as part of FH Masterplan 2. Related core processes (eg Central Sterile and Materials management) will be evaluated as part of FH Masterplan		

	Fairview Hospital		
1.	OR Volumes a. WRL and A. Chhabra to review current volumes, etc b. Distribution of surgeries to be considered as a regional approach (eg can FH OP surgery move to LW ASC) c. Consider if current Peri-vasc cases can be moved from current cath lab into new hybrid room		
2.	For all planning, keep growth in mind		
3.	Backfill of ED and ICU spaces a. ED: Discussed possible uses as 'quick-peds (hydration), clinical decision unit, or non-chemo infusion b. ICU : Discussed possible uses as expansion of OR / Peri-op		
4.	Other a. Center for Family Health to move from Moll Center to basement of FH.		
5.	Next Steps a. WRL to finalize base mapping with: i. M. Kish for department boundaries ii. P. Slebodnik of properties owned by FH iii. WRL will set meetings b. Complete building assessment		
6.	Next Meeting (s) a. Project Calendar (attached). Meetings will be coordinated and blocked in calendars b. Focus Group Conference call: Ad Hoc Fridays 3:00-3:30 pm c. Focus Group No. 3: July 12, 2012 7:00 – 8:30 am @ FH d. Steering Group No. 1: July 16, 2012 8:30- 10:00 am @ FH		

Annual Inpatient Surgery Cases



Avon FHC
Current: 0

120

Fairview Hospital
Current: 5,422
Proposed: 7,315
Δ: + 1,893
Earliest Date: 1st Q 2015

1,773
Including Endo

Lakewood Hospital
Current: 1,773 Including Endo
Proposed: 0

tabbies
EXHIBIT
3

Cleveland Clinic

Fairview Hospital Master Plan Steering Meeting No. 2

September 12, 2012

Westlake Reed Leskosky

Phil LiBassi Principal

CONFIDENTAL - PROTECTED

Goals of the Master Plan

Status Report

	Activity	% Complete
Both	Assemble Current Information	
	Site and Floor Plans	100%
	Building & Systems Assessment	50%
	Regulatory Requirements	50%
Part 1	Decanting Plan	100%
Part 2	Fairview Master Plan	
	Program	95%
	Master Plan Options	80%
	Implementation	50%
	Next Steps	0%

Cleveland Clinic

Fairview Hospital Master Plan
Dr. Bronson Meeting

December 14, 2012

Westlake Reed Leskosky

Phil LiBassi Principal

CONFIDENTAL - PROTECTED

Executive Summary

1. Lakewood program can be absorbed into Fairview with minor renovations
2. Fairview improvements:
   a. Backfill / Improve First Floor
   b. Consolidation of Surgery
   c. Single occupancy beds by 1/1/16
   d. Replacement of Parking Garage
3. Phased Implementation Approach over 9 years @ $5M-14.5M / Year = $60M - $90M
4. Recommend Re-Zoning & Property Acquisition to allow for future growth

Summary

- **Phase 1 – Phase 6**
  - 4 Years - 2013-2016
  - $9.5M - $14.4M / Year = $37M - $58M
  - Single Occupancy Rooms; Backfill of vacant space; Consolidation of Surgery
- **Phase 7 – Phase 9**
  - 5 Years - 2017-2021
  - $5M - $8M / Year = $20 M - $33 M
  - Build new parking; demo old garage

(Estimates assumes a contingency of 10%)

Summary

- Phase 10 – Phase 11
  - 5 Years - 2021-2025
  - $15M- $22M / YR = $ 75 M - $110M
  - New MOBs