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Court of Appeals

APPELLANT'S BRIEF FILED
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By: CHRISTOPHER M. DEVITO 0047118

Confirmation Nbr. 1219548

EDWARD GRAHAM, ET AL. CA 17 106094

vs.

Judge:

CITY OF LAKEWOOD, ET AL.

Pages Filed: 104

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

EDWARD GRAHAM, et al.	)	CASE NO. CA-17-106094
	)	
Relators-Plaintiffs-Appellants	)	On Appeal from Cuyahoga County
	)	Court of Common Pleas
v.	)	Case No. CV-15-846212
	)	
CITY OF LAKEWOOD, et al.	)	Regular Calendar
	)	
Respondents-Defendants-Appellees	)	(Oral Argument Requested)

APPELLANTS' MERIT BRIEF

Christopher M. DeVito (0047118)
Morganstern, MacAdams & DeVito Co., L.P.A.
623 West Saint Clair Avenue
Cleveland, Ohio 44113-1204
216-687-1212 Telephone
216-621-2951 Facsimile
ChrisMDeVito@gmail.com

-and-

A. Steven Dever (0024982)
A. Steven Dever Co., L.P.A.
13363 Madison Avenue
Lakewood, Ohio 44107
216-228-1166 Telephone
216-228-3484 Facsimile
astevendever@aol.com

Attorneys for Relators-Plaintiffs-Appellants

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ASSIGNMENTS OF ERROR

Assignment of Error No. I: The trial court erred as a matter of law by dismissing Relators' statutory taxpayers law suit claims under Counts 1A, 1B, and 1C.

Assignment of Error No. II: The trial court erred as a matter of law by dismissing Plaintiffs' breach of contracts claims under Count 2.

Assignment of Error No. III: The trial court erred as a matter of law by dismissing Plaintiffs' breach of fiduciary duty claims under Count 3.

Assignment of Error No. IV: The trial court erred as a matter of law by dismissing Plaintiffs' express and constructive charitable trust claims under Counts 4 and 5.

Assignment of Error No. V: The trial court erred as a matter of law by dismissing Plaintiffs' unjust enrichment claim under Count 10.

Assignment of Error No. VI: The trial court erred as a matter of law by dismissing Counts 11, 12A, 12B, 13, and 15 for alleged lack of standing.

Assignment of Error No. VII: The trial court erred as a matter of law by dismissing Plaintiffs' alternative claim of CCF's alter ego under Count 14.

Assignment of Error No. VIII: The trial court abused its discretion by not allowing Relators to file a second amended complaint pursuant to Civ.R. 15.

ISSUES PRESENTED FOR REVIEW

ISSUE A: Did the Relators properly plead statutory taxpayer claims for an injunction, specific performance, and writ of mandamus?
(Assignment of Error No. I)

ANSWER: **Yes.**

ISSUE B: Did the Plaintiffs properly plead breach of contract claims as intended third-party beneficiaries as residents of the City of Lakewood, patients of Lakewood Hospital, and employees of Lakewood Hospital?
(Assignment of Error No. II)

ANSWER: **Yes.**

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ISSUES PRESENTED FOR REVIEW

ISSUE C: Did the Plaintiffs properly plead a claim for breach of fiduciary duty regarding the municipally-owned and charitable trust of Lakewood Hospital?

(Assignment of Error No. III)

ANSWER: **Yes.**

ISSUE D: Did the Plaintiffs properly plead a claim for an express charitable trust, or in the alternative, a constructive charitable trust regarding Lakewood Hospital?

(Assignment of Error No. IV)

ANSWER: **Yes.**

ISSUE E: Did the Plaintiffs properly plead a claim for unjust enrichment against The Cleveland Clinic Foundation?

(Assignment of Error No. V)

ANSWER: **Yes.**

ISSUE F: Did the Plaintiffs properly plead a claim of action for promissory estoppel, fraud, civil conspiracy, and tortious interference in the First Amended and Verified Complaint?

(Assignment of Error No. VI)

ANSWER: **Yes.**

ISSUE G: Did the Plaintiffs properly plead that The Cleveland Clinic Foundation was the alter ego of the Lakewood Hospital Association after entering into the Definitive Agreement and becoming its sole member with control during the 1996 Amended and Restated Lease?

(Assignment of Error No. VII)

ANSWER: **Yes.**

ISSUE H: Did the Relators properly move and provide sufficient notice of intervening facts and new causes of action to warrant a Second Amended and Verified Complaint after the City of Lakewood approved the Master Agreement between The Cleveland Clinic Foundation, Lakewood Hospital Association, Lakewood Hospital Foundation, and the City?

(Assignment of Error No. VIII)

ANSWER: **Yes.**

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INTRODUCTION

This is a taxpayers' lawsuit contesting the fraudulent sale and closure of the publicly-owned Lakewood Hospital (the "Hospital") to The Cleveland Clinic Foundation ("CCF"). In 1986, the City of Lakewood ("City") leased the Hospital to the Lakewood Hospital Association ("LHA"). LHA is a non-profit corporation created specifically for the purpose of operating the Hospital for the City and its residents. In 1996, the City entered into an Amended and Restated Lease ("Lease") to allow LHA to enter into a Definitive Agreement ("DA") with CCF to operate the Hospital as a full service medical facility until 2026. At the conclusion of the Lease, LHA and CCF were obligated to return the Hospital to the City as a viable "going concern." CCF also became the sole member of LHA pursuant to the Lease and DA approved by the 1996 City ordinance.

In 2015, LHA, through its consultant Subsidium Healthcare, LLC ("Subsidium"), sent a Request for Proposals ("RFP") to selected healthcare providers to solicit proposals for the future operation of the Hospital. The RFP specified that the Hospital must continue to operate as an acute care inpatient hospital, with the enumerated Required Services set forth in the Lease. CCF was the current operator of the Hospital through the Lease, DA, and the sole member of LHA. A competing hospital system, MetroHealth, submitted a proposal for the continued operation of the Hospital. MetroHealth's proposal met all of the requirements of the RFP, as per LHA's obligations and according to the Lease terms.

Despite the satisfactory response from MetroHealth, LHA chose to issue a second, secret RFP to only CCF. The second RFP eliminated the inpatient hospital and other medical services requirements contained in the Lease and City ordinances. CCF thereupon responded to the second, secret RFP with a proposal for the construction of an outpatient medical office building and the closure of Lakewood. This rigged bidding process was contrary to City Ordinances and

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express contract terms (i.e. Lease and DA), as well as the City Charter and state law. The end result was that the City illegally entered into an agreement to close the Hospital, and to sell valuable City property to CCF at grossly undervalued terms, without proper independent appraisals and without required public advertising and bidding procedures. First, LHA, CCF, and Lakewood Hospital Foundation ("LHF") entered into a Letter of Intent ("LOI") in January 2015. Then the City, LHA, and CCF signed a Master Agreement ("MA") in December 2015. Both actions were <u>premature</u> and failed to follow the Lease and City Ordinance requirements to maintain, operate, and return the Hospital in 2026, <u>unless</u> a prior City ordinance authorizes such a drastic change at the Hospital.

CCF, LHA, Subsidium, and the City officials <u>failed</u> to follow the process and procedures established by Ordinances and express contract terms that required a <u>prior</u> City Council Ordinance before proposing to close the Hospital. The end does <u>not</u> justify the means. The Defendants, including the City, are required to follow the Lease and City Ordinance procedures to ensure the publicly-owned and charitable trust Lakewood Hospital remained an ongoing concern, with inpatient and required medical services, until 2026.

<u>STATEMENT OF THE CASE</u>

The within matter was instituted by five (5) concerned City of Lakewood residents ("Relators") to prevent the improper closing of the city-owned Lakewood Hospital (the "Hospital") and to enforce existing municipal ordinances and contract terms. On August 5, 2015, the Relators filed their First Amended and Verified Complaint ("FAC") setting forth relevant facts, exhibits (Exs. 10-22), and incorporating by reference the original Complaint exhibits (Exs. 1-9) filed on May 28, 2015. The FAC is primarily a taxpayers' law suit on behalf of the City of Lakewood to enforce city ordinances and existing contracts with various nonprofit corporate entities obligated to operate, maintain, and then return the Hospital to Relators in 2016 as a going concern with required medical services enumerated in the Lease.

On August 21, 2015, Defendants the City of Lakewood and its Mayor Michael Summers (collectively "City"), The Cleveland Clinic Foundation and its Chief Executive Officer Delos Cosgrove, M.D. (collectively "CCF"), Defendant Lakewood Hospital Association and its Chairman Thomas Gable (collectively "LHA"), and Defendants Lakewood Hospital Foundation and its President Kenneth Haber (collectively "LHF") filed a Motion to Dismiss pursuant to Civ.R. 12(B)(6). Separately, but on the same day, Defendant Subsidium Healthcare, L.L.C. ("Subsidium") filed a Motion to Dismiss pursuant to Civil Rule 12(B)(6). Defendant Mike DeWine, as the Attorney General for the State of Ohio, is a required party pursuant to R.C. 109.25 because this matter involves the nonprofit health care entity, the City-owned Hospital, the charitable trust LHF, and their proposed termination or distribution, which requires the Attorney General's review and approval pursuant to R.C. 109.35.

The Relators filed responses in opposition to the two (2) Motions to Dismiss, the Defendants filed replies, and the Relators filed rejoinders.

On December 17, 2015, the trial court granted Defendant Subsidium's Motion to Dismiss the civil conspiracy claim against it through a one-sentence journal entry stating "granted."

On December 22, 2015, based upon subsequent events that culminated on December 21, 2015, the Defendants City, CCF, and LHA moved to dismiss taxpayer claims alleging mootness and that the trial court lacked subject matter jurisdiction pursuant to Civ.R. 12(B)(1). Relators filed a response in opposition and a reply was submitted by the Defendants City, CCF, and LHA.

On March 20, 2016, Relators moved to file a Second Amended Complaint because of Defendants' intervening actions on December 21, 2015, without a prior city ordinance authorization, to secretly negotiate and then enter into a contract to close the Hospital. The proposed Second Amended Complaint was filed on April 12, 2016, pleading the continuing improper actions of the Defendants and additional causes of action.

Over one (1) year after all dispositive briefing, on July 11, 2017, the trial court issued its 38-page Judgment Entry ("JE") granting the remaining Defendants' Motion to Dismiss the First Amended and Verified Complaint ("FAC") based on Civ.R. 12(B)(6) and 12(B)(1). (App. p. 1). The trial court also denied Relators' Motion to File a Second Amended Complaint in separate order that is also being appealed.

This appeal was timely commenced on all journal entries granting Defendants' motions to dismiss and the other contemporaneous and prior orders that became final and appealable.

STATEMENT OF FACTS

The City is a chartered municipality bound by its Second Amended Charter, the Ohio Revised Code, and City Ordinances. (FAC, ¶ 2; Ex. 10).

The Hospital opened its doors in 1907 as a private non-profit entity. During the Great Depression in 1930, the City acquired ownership of the Hospital as the residents of the City sought to ensure access to public health and jobs for the employees. (FAC, ¶ 13; Ex. 1). In 1956, the Lakewood Hospital Foundation ("LHF") was established to encourage and raise funds exclusively for the Hospital's continued operation as an inpatient, acute care, and medical/surgical hospital for City residents. (FAC, ¶ 13; Ex. 13).

In 1985, through a Charter Amendment, and a subsequent amendment in Chapter 907 of Lakewood Ordinances in 1987, the Hospital changed its status from a public-operated hospital to a private, non-profit governance structure. (FAC, ¶ 14; Ex. 11). The Lakewood Hospital Association ("LHA"), a nonprofit hospital agency as defined in Ohio Rev. Code Sec. 140.01, was formed to lease and operate the Hospital from the City. (FAC, ¶ 14; Ex. 12). In 1996, the City entered into an Amended and Restated Lease ("Lease") of the Hospital with LHA. (FAC, Ex. 5) (App. p. 42). The agreement was for a term of 30 years (through the end of 2026) as a lease of the real and personal property for the operation of the public Hospital from the City to the Lessee LHA through an affiliation with CCF. The agreement provided and authorized the transfer from the City to the Lessee of all liabilities, debts, monies, accounts, and inventories of the Hospital. At the end of the term of the Lease, in 2026, the Lessee LHA was required to retire all of the Lessee's indebtedness and pay all of its liabilities and to relinquish the real and personal property of Hospital and all monies, accounts, and inventories then back to the City. (*Id.*).

<u>Beginning of the End</u>

Through the Lease amendment in 1996, CCF became the sole member of LHA through the Definitive Agreement ("DA"), which also amended LHA's Code of Regulations. (FAC, Ex. 3, DA, Section 1.1, p. 2) (App. p. 52). Sitting on LHA's Board of Trustees were ex-officio members of the City's government. The Mayor and two City council members, serving as LHA Board Members, were to be liaisons between the City and LHA and were obligated to protect the City's interests. (FAC, ¶ 23). Thus, the 1996 Lease identified an approved the DA so CCF could operate the Hospital and become the sole member of LHA. (FAC, Ex. 4) (App. p. 40).

Since 1996, the Hospital has been recognized as a CCF hospital for marketing purposes, although City-owned. The City's Lease with LHA and CCF had a term of 30 years, ending in 2026, and CCF was bound by the terms of the Lease through the DA. (FAC, Ex.3, DA, Section 1.8, p. 7) (FAC, Ex. 5, Lease, p. 2). In 1996, CCF made a long-term commitment to the City, LHA, LHF, and Taxpayers to provide the highest quality hospital services and employment with the Hospital serving at the centerpiece of that commitment. Section 14.1 of the Lease provides: "<u>Upon the expiration of the Lease Term</u> or the termination of this Lease, the <u>Lessee [LHA and CCF] covenants and agrees to surrender the Leased Premises to the City</u> [. . .], together with all appurtenances thereto and all assets and obligations of the Lessee including movable equipment, furnishings and other personal property in or on the Leased Premises, <u>in as good condition as prevailed at the time the Lessee was put in full possession thereof</u>." (FAC, ¶ 24; Ex. 5).

LHA and CCF promised in the Recitals of the Lease that they would "continue to provide health care services in accordance with this Lease to residents of the City without regard to their ability to pay." (FAC, ¶ 25; Ex. 5, Lease, p. 3) (App. p. 44). Moreover, LHA and CCF were required to continue to provide residents of the City <u>from facilities located within the City</u> acute care medical/surgical services (including for children and adolescents), obstetrical/gynecological services, 24-hour-a-day emergency room providing trauma services, intensive care services and rescue squad/paramedic services as required by the Lease." (*Id.*) (Emphasis added).

<u>The Definitive Agreement (i.e. DA) between LHA and CCF incorporated by direct reference the Lease and provided the City the right to enforce the Lease obligations against CCF</u>. (FAC, Ex. 3, DA, Section 1.2, p. 5) (App. p. 53). Further, the DA requires that CCF operate the Hospital "in a fiscally prudent manner, consistent with Lakewood's [LHA] charitable purpose and LHA obligations under the lease . . . in order to preserve the operation of Lakewood [LHA] <u>as *a going concern*</u>, as defined under generally accepted accounting principles." (FAC, Ex. 3, DA, Section 1.1.4, p. 5) (App. p. 53) (Emphasis added).

<u>CCF's Strategic Plan to Close Lakewood Hospital</u>

On February 11, 2010, the LHA Board's Executive Committee adopted a plan called *Vision for Tomorrow* for the Hospital, which was a multi-year strategic plan adopted in 2008 by the LHA Board and CCF directed to better meet the changing needs of the community. CCF presented a proposal to LHA and the public to make the Hospital a "center of excellence" in four (4) medical specialties (i.e. "centers of excellence") in exchange for the City agreeing to transfer pediatric and trauma medical services (i.e. Required Services) to other CCF wholly-owned hospitals located in close proximity and competitors of the Hospital. (FAC, ¶ 43).

In an April 6, 2010, letter from CCF to then City Mayor Ed Fitzgerald, CCF wrote: "Lakewood Hospital is committed to the Lakewood community and will continue to maintain its status as the city's major employer. The CCF Plan will address the sustainability of Lakewood Hospital, while simultaneously making available the finest services typically provided by hospitals in communities similar to Lakewood." (FAC, Ex. 6). The letter also stated that the CCF April 6, 2010, letter also provided: "We believe our pediatric patients will be best served just 3.5 miles away at Fairview Hospital for inpatient care." (*Id.*).

In a formal letter to Kevin Butler, then the president of City Council, the former president of Fairview and Lakewood Hospitals Jan Murphy made representations on behalf of LHA and CCF in response to City Council questions, which included: "We remain committed to the Lakewood community and to the patients who entrust us each and every day to provide the best care possible to them." (FAC, Ex. 7, CCF to City Letter Responding to Council Questions Regarding Lakewood Hospital, May 24, 2010). CCF also made oral representations on May 24, 2010, to the LHA Task Force regarding the City's rights to these new centers of excellence without having to amend the existing Lease.

Based upon specific representations and reliance on these and other CCF promises and representations, the City Council passed Resolution No. 8429-10 supporting CCF's and LHA's *Vision for Tomorrow* plan and its focus on centers of excellence at the Hospital. The resolution specified that the City and CCF both aspire and commit to provide appropriate services suitable for the City community and to maintain the near- and long-term viability of the Hospital. Moreover, the resolution promised City residents, through their elected officials, *assurances of continued, active participation in key decisions impacting the plan and the Hospital for the duration of the Lease*. (FAC, ¶ 46). The resolution granted CCF permission to remove and transfer pediatric care and trauma services to a competing hospital wholly owned by CCF.

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The Slow Demise at the Hands of CCF

With the dawn of new plans to help the Hospital adapt to CCF's claim of *alleged* changes in health care, a series of events contrary to the best interests of the Hospital occurred, consisting of the slashing of vital Hospital medical services, questionable financial practices, and the disappearance of full and transparent communication between LHA, CCF, LHF, and the public. Certain of the Hospital medical services, pursuant to CCF's strategic plan, were gradually and purposefully diminished to nothing. Reports were made of the Hospital turning away patients or sending them to other CCF wholly-owned competing hospitals. Regional private ambulatory and public EMS services had been directed to transport patients to Fairview Hospital instead of Lakewood Hospital. (FAC, ¶ 47).

As early as 2010, CCF has been secretly planning for the transfer of the Hospital services, programs, equipment, and employees to other CCF wholly-owned and competing hospitals. 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 for Fairview Hospital, which was commissioned in 2011, a covert scheme was created to "Decant" the Hospital. (FAC, ¶ 57; Ex. 18, Decanting Plan). The "Decanting Plan" specified that medical services, equipment, and employees would be transferred gradually from the Hospital to Fairview Hospital (and other CCF wholly-owned hospitals) in preparation for the closure and razing of the Hospital as an inpatient acute care medical/surgical hospital. (*Id.*). Meanwhile the LHF, with the support of CCF, continued to solicit, campaign, and raise funds and donations from the public for the support of the Hospital. None of the donors were alerted or advised that their intended contributions for the support of the Hospital would never be a reality as the Hospital would soon cease to exist. In addition, the public continued to be misled by CCF and its *Vision for Tomorrow* because it was simultaneously planning to decant (i.e. close) the Hospital.

On June 21, 2012, three (3) years before the plan to close and raze the Hospital was revealed to the public and beneficiaries of the charitable trust, CCF representatives met to discuss the decanting plan of the Hospital. All of the services and equipment moved from the Hospital were publicly 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, the Hospital employees, and the general public. The need for these medical services, including inpatient surgery, was demonstrated by CCF's master plan for Fairview Hospital showing the Hospital's 1,773 surgery cases being transferred to CCF's wholly-owned Fairview Hospital, a direct and the nearest competing hospital. (FAC, ¶ 59; Ex. 20).

CCF's Plan for Market Domination

In November 2012, the LHA Board of Trustees agreed to CCF's request to establish a Select Committee, which was charged to identify and recommend a qualified, independent health care consultant for the purpose of evaluating strategic options and identifying the best strategy to consider for planning the Hospital's future. (FAC, ¶ 60).

In 2013, the Select Committee engaged a medical consultant, Subsidium, to assist in planning for the future of the Hospital. Subsidium received proposals from two hospitals, CCF and MetroHealth (in consultation with an independent doctor group, Premier Physicians) for the purpose of selecting a future partnership with the City to maintain and ensure a sustainable and viable Hospital. (FAC, ¶ 61).

LHA's Request for Proposal ("RFP")[1] sent to some, but not all bidders provided in part:

1 In Subsidium's answers to written discovery requests, it avers that there were two RFPs. However, the "second" RFP was never provided to the public, until after this litigation was instituted. (FAC, Ex. 22, Second RFP).

"That the following criteria reflect the minimum elements that the Hospital considers essential to this Transaction. [. . .] Proposal must set forth the Respondent's operational plan and strategic vision for the Hospital following the completion of the Transaction, including the Respondent's overall plan to meet the condition that the Hospital continue to be operated as an acute care hospital [. . .]." (Emphasis added). (FAC, ¶ 62).

In 2015, Subsidium released its overview report concerning the future of the Hospital and outlined its evaluations of CCF's and MetroHealth's proposals. Page 65 of that overview indicates that the CCF proposal will build a family health center while closing the Hospital and inpatient services whereas the MetroHealth proposal planned to keep the Hospital open, including inpatient care. The CCF's proposal failed to meet LHA's minimum required criteria outlined in the publicly disclosed RFP whereas the MetroHealth's proposal agreed to meet those requirements. The Subsidium report falsely claimed that all proposals expressed no interest for outpatient services. Evidence uncovered during discovery showed that MetroHealth agreed to maintain inpatient care, acute care, and abide by the existing Lease terms and DA conditions currently obligating CCF's operation of the Hospital to the City and LHA. (FAC, ¶ 64).

At a confidential special meeting of the LHA Board on January 14, 2015, Subsidium discussed and assisted in the refinement of CCF's proposal in response to a second, secret RFP. Subsidium then selected CCF's proposal, despite the fact that it did not meet the public RFP's minimum requirement to maintain inpatient medical care at an acute care hospital. Subsidium's recommendation put CCF in the position to control City-owned property, to close and demolish the Hospital at LHA and the City's expense, and to open a medical office building that would not include inpatient services. CCF's proposed family health center would feed patients to other CCF wholly-owned hospitals outside of Lakewood. In addition, it would prohibit any other health care competitor from providing medical services on the Hospital property. (FAC, ¶ 65).

Section 3.11 of the LHA Code of Regulations, as amended and then adopted as an exhibit to the DA, provides that "[a] Trustee having a conflict of interest or conflict of responsibility on any matter involving [LHA] and any other business entity or person shall disclose such conflict and shall refrain from voting on such matter." (FAC, Ex. 14, LHA Code of Regulations). It should be noted that multiple conflicts existed that required certain restrictions from the LHA and LHF Boards. (FAC, ¶ 70). These conflicts of interest also applied to the Mayor and one member of City Council.

Article XXIII, Section 3 of Lakewood's Second Amended Charter reads: "This Section shall not prohibit the Mayor, members of Council and the directors of departments and other officials or employees of the City from serving as a member or an official in any other nonprofit corporation where their service is in the capacity of representing the City." City Ordinance No. 63-86 also requires the Mayor and Council members in the LHA Board to serve "in their official capacity . . . and instructed to represent the city and its interests . . ." while on the LHA Board. (FAC, Ex. 11, City Ordinance 63-86). (FAC, ¶ 72).

Finally, the Lease, Section 14.15. <u>Matters Relating to the Definitive Agreement</u>, provides: "Without limiting the generality of the foregoing, the Lessee [LHA and CCF] agrees that it will not <u>terminate or purport to terminate</u> the Definitive Agreement, in both cases pursuant to Section 10.2 of the Definitive Agreement [(*infra*)], <u>without the prior approval of the City evidence by an ordinance or resolution of the City</u>." (FAC, ¶ 73; Ex. 5, Lease, Section 14.15, p. 52) (App. p. 51) (Emphasis added). LHA and CCF violated this express Lease term with the secret Fairview Hospital decanting plan, the LOI, and then the MA—all three (3) proposing to close the Hospital before <u>prior</u> approval by the City through an ordinance. This express Lease prohibition cannot be evaded by LHA, CCF, and the City. Relators have the right and standing to enforce this contract term and applicable City ordinances.

STANDARD OF REVIEW

The Eighth District has recently set forth the applicable standard of review for an appellate court when reviewing a motion to dismiss for failure to state a claim as follows:

> A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim tests the sufficiency of the complaint. In deciding whether a complaint should be dismissed pursuant to Civ.R. 12(B)(6), the court's review is limited to the four corners of the complaint along with any documents properly attached to or incorporated within the complaint. The court accepts as true all the material factual allegations of the complaint and construes all reasonable inferences to be drawn from those facts in favor of the nonmoving party. To prevail on a Civ.R. 12(B)(6) motion, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling the plaintiff to relief. If there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss. A court cannot dismiss a complaint under Civ.R. 12(B)(6) merely because it doubts the plaintiff will prevail.
>
> An appellate court conducts a de novo review of a trial court's ruling on a Civ.R. 12(B)(6) motion to dismiss. Under this standard of review, the appellate court must undertake an independent analysis without deference to the lower court's decision.

Windsor Realty & Mgt., Inc. v. Northeast Ohio Regional Sewer Dist., 2016-Ohio-4865, 68 N.E.3d 327, ¶¶ 23-24 (8th Dist.) (Internal citations and quotations omitted).

Similarly, an appellate court conducts a de novo review of trial court's ruling on a Civ.R. 12(B)(1) motion to dismiss for lack of subject matter jurisdiction. *In re R.M.R.*, 2016-Ohio-303, 59 N.E.3d 540, ¶ 9 (8th Dist.). The appellate court independently determines the legal issue, without any deference to the trial court ruling, and the question is whether any cause of action cognizable by the forum has been raised in the complaint. (*Id.*).

LEGAL ARGUMENT

Assignment of Error No. I: The trial court erred as a matter of law by dismissing Relators' statutory taxpayers law suit claims under Counts 1A, 1B, and 1C.

The Relators' first cause of action in the First Amended and Verified Complaint ("FAC") is for a taxpayer law suit under R.C. 733.59: Count 1A for an injunction pursuant to R.C. 733.56, Count 1B for specific performance pursuant to R.C. 733.57, and Count 1C for mandamus pursuant to R.C. 733.58.

The goal of a statutory taxpayer action is "to enforce a public right regardless of any personal or private motive or advantage." *State ex rel. Fisher v. Cleveland,* 109 Ohio St.3d 33, 2006-Ohio-1827, 845 N.E.2d 500, ¶ 12. The United States Supreme Court has opined that municipal taxpayer suits are unique as compared to any other form of taxpayer's suit because of the intimate relationship between a taxpayer and a municipal corporation, akin to a shareholder and a corporation. *Commonwealth of Mass. v. Mellon,* 262 U.S. 447, 487, 43 S.Ct. 597 (1923).

A. Injunctive Relief was Properly Pled Under Count 1A

Relators' injunction claim under R.C. 733.56 pled that "the City has engaged in a series of improper activities that constitute an abuse of corporate powers regarding the execution or performance of contracts related to Lakewood Hospital and the existing contractual rights the City established through the Lease and Definitive Agreement ("DA") governing LHA, LHF, and CCF's requirement to operate Lakewood Hospital's medical facility for the taxpayers, employees, and public benefit through the year 2026." (FAC, ¶ 86). Relators identified Charter Section 907.03 (Passed 12-1-30) establishing "it necessary and conducive to the public health and general welfare to establish and hereby does establish a municipal hospital of the City to be known as the Lakewood Hospital." (FAC, ¶ 95). Further, Ordinance No. 51-96 (1996) authorized an Amended and Restated Lease ("Lease") between the City and LHA allowing for the DA affiliation between LHA and CCF to continue the operation of the Hospital for the intended benefit of the taxpayers, employees, and the pubic. (FAC, ¶ 96) (App. p. 40).

The FAC at ¶ 97 enumerated the multiple breaches that occurred or were occurring which required an injunction under R.C. 733.56 to prevent the unlawful closing of the Hospital:

> The obligations and duties under the DA and Lease, as authorized by City ordinances No. 51-96 and 63-86, have been and are currently being evaded and/or violated. This includes, but is not limited to, the following: Lakewood Hospital facilities are not being maintained; medical services have been significantly diminished or eliminated; LHA (in conjunction with its sole member CCF) has assented to the referral and diversion of patients to other hospital facilities wholly-owned and operated by CCF, which has undermined the financial viability of Lakewood Hospital; LHA, CCF, and LHF have entered into a LOI to close Lakewood Hospital for inpatient and acute medical care and to prohibit competitive bidding while the LOI is in place and a second definitive agreement is being drafted; the LOI and proposed second definitive agreement is facially deficient and legally invalid because it fails to provide inpatient hospital care for an acute medical/surgical care hospital as required by the DA and Lease; the LOI and proposed second definitive agreement also violate LHA's 2014 RFP, through Subsidium, for maintaining and operating Lakewood Hospital with inpatient care as a minimum requirement set forth in the RFP on behalf of LHA and the City; wasting of City assets through the sale of land and buildings $5.5 million **well below** fair market value, <u>without</u> any appraisal or competitive bidding process; and other nonfeasance, misfeasance, malfeasance, and negligence regarding various other duties and obligations under the Lease and DA, including over $11 million in future rent payments and ensuring a cash-to-debt ratio of 1:1 through the year 2026, when Lakewood Hospital is required to be returned to the City as a going concern.

This specific paragraph, along with the numerous additional factual allegations contained in ¶¶ 10-84 of the FAC, set forth sufficient specificity and notice of the abuse of corporate powers.

R.C. 733.56 allows the Relators to apply for an injunction because of "the abuse of its corporate powers, or the execution and performance of any contract made on behalf of the municipal corporation in contravention of the laws or ordinances governing it or which was procured by fraud or corruption."

The allegations pled in the FAC established Relators' taxpayer claim for an injunction under R.C. 733.56 to <u>prevent</u> LHA, Mayor Summers, and City Council from moving forward on the signed Letter of Intent ("LOI") because it "purport[s] to terminate the Definitive Agreement or permit CCF to terminate or purport to terminate the Definitive Agreement… <u>without the prior approval of the City evidenced by an ordinance or resolution of the City</u>, which breaches the Lease contract terms." (FAC, Ex. 4-Lease, Section 14.15. **<u>Matters Relating to Definitive</u>**

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Agreement) (App. p. 51) (Emphasis added).

However, the trial court improperly made an assumption "that only Summers is alleged to have abused the City's corporate powers." (JE, p. 7). To the contrary, the Relators identified not only Mayor Summers, but also the City Council, for having abused their corporate powers. The FAC specifically alleges that the "Mayor, Council members, and the City have failed their constituents by not representing the City and enforcing the DA and lease rights, but rather by favoring the CCF, LHA, and LHF proposals to close Lakewood Hospital. The Mayor and Council members are also improperly ignoring City ordinances requiring the operation of Lakewood Hospital for the 'health and welfare of the people of this City and by enhancing the availability, efficiency, and the economy of [Lakewood] hospital facilities and the services rendered….' " (FAC, ¶ 74). Thus, the trial court's "assumption" that the FAC was limited to Mayor Summers is incorrect. The Relators identified City Council as also abusing their power by not enforcing City ordinances and existing Lease and DA contract terms and obligations against LHA and CCF.

The FAC pled that Mayor Summers and City Council abused their corporate powers by not following the City's Second Amended Charter (Nov. 2000) at Article XV, City Ordinance No. 63-86 (1987), and the Amended and Restated Lease in 1996 ("Lease"), which was approved by the City Council and required CCF to perform all the obligations required by LHA under the Lease pursuant to the DA. The Lease identifies the DA and gave the City the right to enforce CCF's obligations in Article 2 to LHA through an injunction. (FAC, Ex. 4-Lease, Section 14.15. **Matters Relating to Definitive Agreement**) (App. p. 51).

The FAC also established that the Mayor and two (2) City Council members, sitting *ex officio* on the LHA Board, must only act in the interest of the City and comply with the Charter, ordinances, and existing contracts. (FAC, ¶¶ 23, 140, and 199). The trial court acknowledged

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this duty imposed on these three (3) City officials. (JE, p. 12). Thus, sufficient facts were pled in the FAC to establish Relators' claim for a taxpayer suit and injunction under R.C. 733.56. The Mayor and two (2) Council sitting *ex officio* on the LHA Board abused their corporate powers by approving the LOI and failing to enforce the City's Charter, ordinances, and contractual obligations to have a community hospital operate through the year 2026, with certain required medical services (i.e. inpatient hospital care) and then return the Hospital as an ongoing concern to the taxpayers of the City of Lakewood.

B. Specific Performance was Properly Pled Under Count 1B

Relators' specific performance claim under R.C. 733.57 pled City contracts were being evaded or violated. Specifically, the FAC alleges at Paragraph 57 that the obligations and duties under the Lease and DA have been or are currently being evaded and are violated by LHA and CCF for failing to maintain the Hospital facilities; eliminating available medical services, sending patients to other CCF hospitals to weaken the Hospital's financial viability; planning to eliminate inpatient care while preventing the City from making alternate plans to preserve Lakewood Hospital as an inpatient facility, and other nonfeasance, misfeasance, malfeasance, and negligence regarding various other duties and obligations under the two (2) contracts. (JE, p. 9). The Relators' specific performance would include, but is not limited to, the Hospital maintaining "Required Services" (a defined term in the Lease) until 2026; maintaining a 1:1 cash-to-debt ratio through 2026; providing indigent healthcare; accounting for administrative expenses from 1996 until the present, disgorgement of excessive administrative expenses; and returning the Hospital as an ongoing concern to the City of Lakewood and its residents in 2026. (JE, p. 9).

The trial court correctly held that "LHA is undisputedly a party to the contract with Lakewood [City], LHA's motion to dismiss the claim in Count 1A under R.C. 733.57 for specific performance of a lease is denied." (JE, p. 11). However, the trial court held that CCF was not a party to the Lease and that the City had no ability to enforce the Lease against CCF or any of the DA's terms against LHA and CCF. (JE, p. 11). The trial court's holding is erroneous.

The Lease and DA are *interrelated* contracts that refer to each other, define each other, attach each other as exhibits, and grant rights to the City to enforce both documents against LHA *and* CCF. (FAC, Exs. 3-Definitive Agreement and 5-Lease). For example, the Lease at Section 14.15. **<u>Matters Relating to Definitive Agreement</u>** expressly states that the Lessee [LHA] has entered into a DA with the Member [CCF] and the Lessee agrees that it will enforce its rights against the Member given to it in Article 2 of that DA and in the event that Member should fail to observe its obligations to the Lease under that Article 2, the Lessee shall promptly notify the City of that failure. (FAC, Ex. 5-Lease) (App. p. 51). Further, the Lease expressly states in the same Section "that the City may utilize any legally available remedy, including, without limitation, injunctive relief to compel the Lessee [LHA] to enforce its rights and entitlements under Article 2 of the Definitive Agreement" against CCF. (*Id.*). Thus, the Lease expressly identifies and provides the City rights and remedies to enforce the Definitive Agreement, Article 2, including the relief of an injunction, to compel CCF to perform the DA obligations that benefit the City and Relators.

Further, the Lease at Section 14.15. **<u>Matters Relating to Definitive Agreement</u>** requires that "the Lessee [LHA] agrees that it will not terminate or purport to terminate the Definitive Agreement *or permit CCF to terminate or purport to terminate the Definitive Agreement*, in both cases pursuant to Section 10.2 of the Definitive Agreement, *without the prior approval of the City evidenced by an ordinance or resolution of the City*." (FAC, Ex. 5-Lease, Section 14.15, p. 52) (App. p. 51) (Emphasis added). Both LHA and the CCF violated this express prohibition in the Lease by entering into a LOI in January 2015 that proposed to close Lakewood Hospital,

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remove inpatient care, and stop providing the enumerated Required Services. The LOI's proposal to close the Hospital would further violate the Lease and the DA's requirements to operate the Hospital through the year 2026, with Required Services (including inpatient care), and then return it to the City of Lakewood as an ongoing concern. Thus, Relators' specific performance claim, to enforce the Lease and DA's express terms against <u>both</u> LHA and CCF, was properly pled and should proceed forward.

C. Writ of Mandamus was Properly Pled Under Count 1C

Relators' writ of mandamus claim, pursuant to R.C. 1733.58, pled the City and its officials failed to perform their duties under Lakewood's Charter and ordinances to "ensure the preservation and operation" of the Hospital, pursuant to the terms of the Lease and DA, "for the benefit of the public, employees, and Taxpayers." (FAC, ¶ 100). The trial court correctly understood that the "clear legal right sought is the enforcement of the Lease and the Definitive Agreement." (JE, p. 12).

The trial court also correctly found that "Ordinance No. 63-A6 does dictate that the Mayor and Council members on LHA's governing board are obligated to 'represent the City and its interests.' That creates a legal duty." (JE, p. 12). However, the trial court then improperly held that the duty to represent the City interests is not "sufficiently clear to permit an order via mandamus to compel its performance." (*Id.*). The trial court's legal conclusion is erroneous.

The LHA Board (which includes the Mayor and two (2) City Council members *ex officio*) approved the LOI to close the Hospital and terminate inpatient care, Required Services, and other obligations contained in the Lease and DA. Clearly, the Mayor and the two (2) Council members did **NOT** represent the City and its interests by agreeing to close Lakewood Hospital and terminate the Lease and DA **WITHOUT** a duly executed and <u>prior</u> City ordinance. In fact, the Mayor and the two (2) Council members *ex officio* violated the specific Lease, Section 14.15,

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<u>Matters Relating to Definitive Agreement</u> prohibition that LHA may not "terminate or purport to terminate the Definitive Agreement or permit CCF to terminate or purport to terminate the Definitive Agreement" unless there exists "prior approval of the City evidenced by an ordinance or resolution of the City." (FAC, Ex. 5-Lease, Section 14.15) (App. p. 51). Thus, a judge could reasonably fashion an order compelling the Mayor and City Council to comply with their clear legal duty to abide by existing City ordinances to maintain the Hospital, which prohibits voting as LHA Board members to terminate the Lease, discontinue the DA, and shutter the Hospital in violation of ordinances and existing contracts, <u>until</u> there is a valid City ordinance authorizing such action.

D. The Trial Court has Jurisdiction Over Relators' Taxpayer Claims

In December 2015, four (4) months after the FAC was filed, the Defendants City, LHA, and CCF entered into a new contract known as the Master Agreement ("MA"). The trial court correctly summarized that the MA's intention to replace the inpatient Lakewood Hospital facility with a family health center, without any of the Required Services set forth in the Lease. (JE, p. 36). Further, the MA executed between the City, LHA, and CCF had the following pertinent terms relevant to this matter: (1) termination of the DA between LHA and CCF, (2) amendment of the 1996 Lease between the City and LHA to allow elimination of the "Required Services," inpatient hospital care, and then terminate the Lease once the family health center is operational, (3) waiver and release of the City's claims against LHA **and CCF** under the 1996 Lease in the DA, and (4) restrict the use of the former Hospital site so that no other healthcare system could provide medical services at the Lakewood Hospital location. (JE, p. 36 and Ex. A to Defendants' December 22, 2015, Motion to Dismiss Pursuant to Civ.R. 12(B)(1)).

The City, LHA, and CCF's new "Master Agreement" was executed behind closed doors and without any knowledge to the public, including the Relators and City Council. Furthermore,

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the MA violated City ordinances by failing to follow mandatory bidding processes and existing contract terms preventing termination of the Lease and DA, unless prior approval through a City ordinance. (See proposed Second Amended Complaint). The MA also imposed an illegal restrictive covenant, which makes the proposal void as a matter of public policy. Public contracts not entered into in accordance with the legal requirements which govern them are "void, not merely voidable." *Kraft Constr. Co. v. Cuyahoga Cty. Bd. of Commrs.,* 128 Ohio App. 33, 44-45, 713 N.E.2d 1075 (8th Dist. 1998). (See also, Relators' Supplemental Memorandum for Leave to File Second Amended Complaint, filed April 1, 2016).

The MA undeniably purports to terminate and seeks to terminate the Lease and the DA **BEFORE** there exists a valid City ordinance authorizing the City, LHA, and CCF to terminate the Lease and DA. (FAC, Ex. 5, Lease, Section 14.15. **Matters Relating to Definitive Agreement** [LHA and CCF will not "terminate or purport to terminate the Definitive Agreement… *without the prior approval of the City evidenced by an ordinance or resolution by the City.*"]). Thus, the City's proposal and execution of the MA is an abuse of corporate power because there did not exist a prior valid City ordinance authorizing the termination of the Lease or the DA. Furthermore, LHA and CCF were in violation of Section 14.15 of the Lease, which prohibits both of them from terminating or purporting to terminate the DA without prior approval by the City evidenced by a prior valid City ordinance. (Ex. 5-Lease, Section 14.15) (App. p. 51).

Nevertheless, the trial court improperly held that the City "settled the claims of the Plaintiffs purported to bring on Lakewood's behalf on Counts 1A, 1B, and 1C of the Amended Complaint." (JE, p. 37). The trial court failed to review or analyze the case law submitted by the Relators demonstrating that the actions by the City, LHA, and CCF were improper and void because they violated existing City ordinances, ignored express contract terms, and disregarded public policy to maintain healthcare through a city-owned hospital. Furthermore, the restrictive

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covenant is void because it undermines Ohio's public policy, which also provides jurisdiction to the trial court to review the proposed restriction against healthcare services on the Hospital site.

The trial court relied upon an unreported and inapplicable case of *Hirsch v. TRW Inc.,* 8th Dist. Cuyahoga No. 83204, 2004-Ohio-1125, for its legal holding that the underlying matter was moot and that the court lacked jurisdiction. (JE, p. 37). However, *Hirsch v. TRW* involved a petition for attorney fees, <u>after</u> the underlying shareholders' lawsuit was dismissed as being moot because of the merger between the two the companies was approved by the stockholders. *Hirsch* is not applicable to this matter.

In *Village of West Unity v. Merillat,* 6th Dist. Williams No. WM-03-016, 2004-Ohio-2682, a taxpayer brought an action for an injunction pursuant to R.C. 733.56 to restrain corporate officers from entering into any contract or perform construction on a storage building that would violate Ohio's prevailing wage law. (*Merillat,* at ¶ 4). The evidence was undisputed that at the time of the trial court hearing on the taxpayer's cause of action, the storage facility was 98% complete and only the gutters and a little trim work remained to be done. Nonetheless, courts retain jurisdiction to address issues in cases if it involves a matter of public or great general interest. *In re Suspension of Huffer,* 47 Ohio St.3d 12, 546 N.E.2d 1308 (1989), Paragraph 1 of the Syllabus. In *Merillat,* the court of appeals held that the taxpayers' lawsuit was of great general and public interest; therefore, the trial court retains jurisdiction to consider and answer the question raised. The *Merillat* court explained that the storage building is a public improvement funded by taxpayers; the decision will affect not only taxpayers residing within that village, but will also affect taxpayers throughout Ohio; and that wage law is a matter of statewide concern. (*Merillat* at ¶ 17).

In this matter, when the City, LHA, and CCF filed their motion to dismiss for mootness, no implementation had been taken regarding the MA to close the Hospital. To the contrary, Defendants' motion was filed one (1) day after City Council voted to approve the secretly negotiated and unlawful MA. Further, the trial court admitted that the MA only proposed the "imminent termination" of the Lease and DA, but that had not yet occurred. (JE, p. 37). Relief could and should have been provided by the trial court.

Even if the Defendants had actually demolished the Hospital and terminated the Lease and DA, this matter involves issues of public and great general interest that allows the trial court and courts of appeal to resolve the matter on the merits. *Danis Clarko Landfill Company v. Clark Cty. Solid Waste Mgt. Distr.,* 73 Ohio St.3d 590, 598, 1996-Ohio-301, 653 N.E.2d 646. For example, the MA also attempts to impose a deed restriction preventing other hospital organizations from providing medical services, which is against Ohio's public policy. Medical services involve the public health and welfare and cannot be restricted by the City through an unauthorized and improper contract with a private party, CCF, that competes to provide medical services.

The Ohio Supreme Court has held that a deed restriction on real estate sold to a private party by a city school board, disallowing the opening and operation of a public charter school, was unenforceable and against Ohio's public policy. *Cincinnati School District Board of Education v. Conners,* 132 Ohio St.3d 468, 974 N.E.2d 78 (2012). "Public policy is the community common sense and common conscience extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. Again, public policy is that principle of law which holds that no one can lawfully do that which is a tendency to be injurious to the public or against the public good." *Conners* at ¶ 17. The *Conners* court held that the deed restriction on the property to prevent a charter school from opening sought "to thwart competition" regarding education and was unlawful. *Conners* at ¶ 21.

Similarly, and of even greater public policy concern, is the City's attempt to place a restrictive covenant to prevent medical services on the Hospital facility pursuant to a term within the MA for the benefit of CCF. Undeniably, inpatient medical services involve the public's health, welfare, and safety that cannot be restricted by a municipality to thwart competition. Relators' taxpayers lawsuit is one of general interest and involves Ohio's public policy that allows a trial court to maintain jurisdiction. The City-owned Hospital was improperly contracted by the MA to be terminated by the City, LHA, and CCF <u>before</u> there was a City ordinance authorizing its termination or purported closing as required by the Lease, Section 14.15. (App. p. 51). Further, the restrictive covenant to prohibit medical services violates Ohio's public policy, is unenforceable and void. Finally, the City's attempt to enter into a release to shield itself, LHA, and CCF from the abuses of corporate power and contract breaches of the Lease and DA terms violate public policy and is unenforceable. To hold otherwise would allow municipalities and tort feasors to circumvent statutory taxpayer suits, which is against Ohio's public policy, by allowing the perpetrators to release themselves.

<u>Assignment of Error No. II</u>: The trial court erred as a matter of law by dismissing Plaintiffs' breach of contracts claims under Count 2.

A party to a contract or an intended third-party beneficiary of a contract may bring an action on a contract in Ohio. *Thornton v. Windsor House, Inc.,* 57 Ohio St.3d 158, 161 (1991). Plaintiffs, as citizens and taxpayers of the City of Lakewood, are intended third-party beneficiaries to the Lease and DA, which grants them standing as intended third-party beneficiaries to enforce the contracts to lease and operate the Hospital.

The Ohio Supreme Court has held that for a "third party to qualify as an intended third-party beneficiary under a written contract, the contract must indicate an intention to benefit that third party." *Huff v. FirstEnergy Corp.,* 130 Ohio St.3d 196, 2011-Ohio-5083, 957 N.E.2d 3,

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Syllabus. Further, "the party's intention to benefit a third party will be found in the language of the agreement." *Huff v. FirstEnergy Corp.,* ¶ 12.

The Supreme Court of Wisconsin has held that the primary purpose of a city ordinance requiring an owner to have liability insurance was to provide assurance that injured persons would not be left without a meaningful remedy, and thus, citizens of the city were intended third-party beneficiaries and had standing to sue under the insurance contract. *Mercado v. Mitchell,* 83 Wis.2d 17, 264 N.W.2d 532 (1978). The Supreme Court of Idaho has held that a municipal contract with a cable company intended that all residents that subscribe to television cable service were third-party beneficiaries and had standing to sue. *Bush v. Upper Valley Telecable Co.,* 96 Idaho 83, 524 P.2d 1055, 1057. Similar to this matter, the Supreme Court of South Dakota has held that hospital patients and employees were "intended third-party beneficiaries of the Agreements and therefore have standing to enforce the Agreements." *Jennings v. Rapid City Regional Hosp., Inc.,* 802 N.W.2d 918, 2011 S.D. 50, ¶ 19.

In this matter, the City's Charter, Ordinances, Lease, and the DA all identify that the intended third-party beneficiaries are the citizens of Lakewood and its employees. First, the Lakewood Charter, Chapter 907, Section 907.03. **LAKEWOOD HOSPITAL ESTABLISHED**, clearly states that "Council hereby declares it necessary and conducive to the public health and general welfare to establish and it hereby does establish a municipal hospital for the city to be known as The Lakewood Hospital." (FAC, Ex. 1-Ord. 907.03, Passed 12-1-30). Second, Article XV of the Amended Charter expressly states that the City-owned Hospital lease "shall include such terms and provisions as Council reasonably believes necessary to provide **for the health and welfare of the residents of the city, the protection of the employees of the hospital**," which demonstrates that the residents of the City and Hospital employees are the intended third-party beneficiaries of leases authorized by Council. (FAC, Ex. 2-Amended Charter).

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Third, Ordinance No. 5196 expressly states that "Council has determined that it is in the **best interest of the residents and taxpayers of the City of Lakewood, and LHA and its patients**, that the current Lease" be amended to allow LHA's "affiliation with The Cleveland Clinic Foundation." (FAC, Ex. 4-Ord. No. 51-96 (1996)) (App. p. 40) (Emphasis added). Thus, the 1996 ordinance allowing the Hospital lease with LHA to be amended to include the DA with CCF specifically delineates "the residents and taxpayers of the City of Lakewood" as intended third-party beneficiaries of the contracts.

Fourth, the 1996 Amended and Restated Lease ("Lease") between the City and LHA expressly has a "STATEMENT OF INTENT" that identifies the intended third-parties: "to continue the services and traditions" of the Hospital; "continue healthcare services to residents of the City;" "to continue healthcare services in accordance with the Lease for residents of the City without regard to their ability to pay;" "to continue to provide within the City healthcare services in accordance with the terms of this Lease;" "to continue to provide to residents of the City from facilities located within the City acute care medical/surgical services, obstetrical/gynecological services, 24-hours a day emergency room providing trauma services, intensive care services, and rescue squad/paramedic services;" and "to provide the City and its residents a full disclosure of its finances through an annual audit, which will be available to the public." (FAC, Ex. 5-Lease, pp. 1-3) (App. pp. 42-44). From the above unambiguous and express language, it is clear that the Lease between the City and LHA, allowing the affiliation with CCF through the DA, intended that the City residents, City taxpayers, Relators, and Plaintiffs are intended third-party beneficiaries to the Lease and DA.

In addition to the above Lease sections setting forth the "STATEMENT OF INTENT," the following specific sections of the Lease also demonstrate that Plaintiffs were intended third-party beneficiaries: Section 1.5. **<u>Public Purpose for Lease</u>**, that the Lease "will promote the public

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purposes as stated in Section 140.02, Ohio Revised Code, and that the City will be duly benefited thereby."[2]; Section 2.2. **Purpose**, holding that the terms of the Lease are for the service of the general public; Section 9.11. **Operation of the Leased Premises**, requiring that Lakewood Hospital shall maintain and operate Lakewood Hospital during the length of the term of the Lease of 30 years and provide the Required Services "to patients who are residents of the City and all members of the general public;" and Section 14.15. **Matters Relating to the Definitive Agreement**, granting the City the contractual right and remedy to use injunctive relief to compel LHA to enforce its rights and entitlements under Article 2 of the Definitive Agreement with CCF in order to fulfill its duties and comply with the Lease for the benefit of the residents of the City of Lakewood. (FAC, Ex. 5-Lease) (App. pp. 42-51).

Fifth, the Definitive Agreement between LHA and CCF expressly states the following: **RECITALS** explaining that the integration of LHA and CCF will best "serve the healthcare needs of the residents of the community served by CCF and Lakewood;" Section 1.2. **Rights of the City**, the City shall have the right to set forth in the Lease, which was annexed as an exhibit to the DA; Section 1.8.1. **City Lease**, that CCF and the DA will not cause LHA to breach or fail to perform or observe any obligation under the Lease; and Section 5.3. **Lease Agreement**, the City and LHA shall enter into a Lease, which is identified in the DA and attached as an exhibit. (FAC, Ex. 3-DA) (App. pp. 52-58).

Based upon the above express provisions of the City's Charter, Ordinances, Lease, and DA, the residents, taxpayers, employees, Relators, and Plaintiffs were identified and intended third-party beneficiaries with standing to pursue their breach of contracts claims to enforce the

2 R.C. 140.02 holds that a hospital agency is established for "the public purpose of providing for the health and welfare of the people of the state by enhancing the availability, efficiency, and economy of hospital facilities" by allowing the operation of hospital facilities through leasing the hospital to nonprofit agencies to facilitate financing.

contracts' terms.

<u>Assignment of Error No. III</u>: The trial court erred as a matter of law by dismissing Plaintiffs' breach of fiduciary duty claims under Count 3.

A fiduciary relationship is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of the special trust. *Belvedere Condominium Unit Owner's Ass'n. v. R.E. Rork Cos.,* 67 Ohio St.3d 274, 282 (1993). A fiduciary relationship may arise from a written agreement, including the statute, or from an informal relationship, but in both cases only where both parties understand that special trust or confidence has been reposed. (*Id.,* at 283).

The FAC cited to the City's Charter, Ordinances, Lease, and DA as the written agreements and statutes demonstrating the parties' understanding of the special trust or confidence regarding the maintenance and operation of the Hospital for the citizens and taxpayers through the year 2026, and then requiring it to be returned as an ongoing concern. Further, the FAC cited R.C. 140.02 regarding the public purposes of hospital agencies and the ability to lease to nonprofit corporations for the benefit of the health and welfare of the citizens by enhancing the availability, efficiency, and economy of hospital facilities and services rendered by them. (FAC, ¶¶ 21 and 154). Clearly, the Ohio legislature identified the public purpose and fiduciary duty of city-owned hospitals for the benefit of citizens and residents. This is a fiduciary duty by an express statutory provision.

Further, despite the trial court's conclusory assertion otherwise, the City Charter, Ordinances, Lease, and DA are written documents that impose a fiduciary duty upon the City, LHA, and CCF. For example, the Charter and Amended Charter specifically require that each Hospital lease entered into by the City "shall include such terms and provisions as Council reasonably believes necessary to provide for the health and welfare of the residents of the city, the protection of employees of the hospital" and include representatives of the City on the governing body of the lessee. (FAC, Ex. 2-Charter, Article XV, Section 4, and Ex. 11-Amended Charter, Article XX, Section 4).

Ordinance No. 51-96 furthermore creates a fiduciary duty upon the City, LHA, and CCF. Specifically, the Ordinance states that "Council has determined that it is in the best interest of the residents and taxpayers of the City of Lakewood, and LHA and its patients, that the current lease dated June 26, 1987 be amended …" so that "LHA may meet the conditions of its entering into a Definitive Agreement with CCF." (FAC, Ex. 4-Ordinance No. 51-96) (App. p. 40). Further, the Ordinance explains that the amended Lease and affiliation with "The Cleveland Clinic Foundation will provide LHA with greater resources and more flexibility to gain financial and competitive advantages necessary to continue and thrive as both a healthcare provider and major employer in the City of Lakewood." (*Id.*). Ordinance No. 51-96 is a written document that further imposes a fiduciary duty upon the City, LHA, and CCF.

The Lease and DA also identify and delineate that the operation, maintenance, and return of the Hospital as an ongoing concern in 2026 is for the benefit of its citizens of the City of Lakewood, employees of Lakewood Hospital, and pursuant to R.C. 140.02. The Lease specifically states in its "STATEMENT OF INTENT" that the purpose is to "continue healthcare services to residents of the City;" "to continue to provide within the City healthcare services in accordance with the terms of the lease and, so long as effective, the Definitive Agreement between the lessee [LHA] and CCF;" "to continue to provide residents of the City from facilities located within the City acute care and medical/surgical services (including for children and adolescents), obstetrical/gynecological services, 24-hours a day emergency room providing trauma services, intensive care services and rescue squad/paramedic services as required by this Lease;" and "to provide healthcare services in accordance with this Lease to residents of the City without regard to their ability to pay." (FAC, Ex. 5-Lease, pp. 1-3) (App. pp. 42-44). This written document is another example of the fiduciary duty imposed upon the City, LHA, and CCF for the benefit of City residents, Hospital patients, and Hospital employees.

The DA is also a written agreement that imposes a fiduciary duty upon CCF for the benefit of the City residents, City taxpayers, and employees of Lakewood Hospital. Specifically, the recitals in the DA state that "CCF will assure that Lakewood [Hospital] will have the authority to maintain and support the mission which currently defines the operation of Lakewood [Hospital]." (FAC, Ex. 3-DA, p. 2). Further, the DA acknowledges that the "City shall have the rights its set forth in the Lease referred to in Section 1.8, below and annexed hereto as Exhibit 1.8 (the "Lease")." (FAC, Ex. 3-DA, Section 1.2. **Rights of the City**) (App. p. 53). The DA also includes references to the City Lease and that the DA with CCF will not violate any terms of the Lease. (FAC, Ex. 3-DA, Section 1.8. **City Lease**) (App. p. 54). Finally, the City retains the right and injunctive remedy to enforce Article 2, POST-CLOSING COMMITMENTS by CCF. (FAC, Ex. 3-DA, Article 2) (App. pp. 54–57). Thus, the DA also imposes fiduciary duties upon CCF for the benefit of City residents, patients of the Hospital, provides rights and remedies to the City to enforce the DA provisions through the Lease, and follow the mission statement of the Hospital pursuant to the Charter, Ordinances, and R.C. 140.02.

Assignment of Error No. IV: The trial court erred as a matter of law by dismissing Plaintiffs' express and constructive charitable trust claims under Counts 4 and 5.

There is a surplus of documents providing that the Hospital, LHA, and LHF are trusts, making them express trusts. City Ordinance Chapter 907.01 and 907.03, DeGrandis' Ohio Ethics Letter from 1986, the Lease and DA, R.C. 140.02, LHA's and LHF's Articles of Incorporation, City Ordinance 63-86, and the Amended Charter all provide the fact that Lakewood Hospital is a public charitable trust with the City taxpayers and residents, Lakewood Hospital employees, and

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general public being the beneficiaries and LHA the trustee. LHF is undeniably a charitable trust to financially support the Hospital.

"When construing the provisions of a trust, the court's primary duty is to ascertain, within the bounds of the law, the intent of the settlor. If the language of the trust agreement is unambiguous, the settlor's intent can be determined from the trust's express language." *Puhl v. U.S. Bank, N.A.*, 34 N.E.3d 530, 2015-Ohio-2083, ¶ 19, quoting *In re Trust U/W of Brooke*, 82 Ohio St.3d 553, 557, 697 N.E.2d 191 (1998); *Pack v. Osborn*, 117 Ohio St.3d 14, 2008-Ohio-90, 881 N.E.2d 237, ¶ 8.

All one needs to do to know that there is a public charitable trust in the Hospital, and who it benefits, is to look at City Ordinance No. 63-86 authorizing the lease of the Hospital to LHA in 1987. The language in Ordinance No. 63-86 could not be any clearer, let alone every other statute and contract, that the Hospital is a trust and Relators the beneficiaries. This was the first time since 1930 that the Hospital was not run by the City. The settlor City's intent is clear. "It is in the best interests of Lakewood Hospital, their patients, and the taxpayers and residents of this" City to lease Lakewood Hospital to LHA. (FAC, Ex. 11-Ordinance No. 63-86). Further, LHA is organized for "charitable purposes" according to the Ordinance. (*Id.*). City Ordinance No. 63-86 provides that "this City will be duly benefited by the Lease" and that the City ex-officio trustees on LHA's Board of Trustees "are serving in their official capacity and are hereby designated to represent the City and instructed to represent the City and its interests and shall continue to be so designated and instructed through their term as such." (*Id.*). The Amended Charter reiterates the "residents of the City" and further expressly identifies the "employees" of the Hospital as intended beneficiaries. (FAC, Ex. 10-Amended Charter). The Hospital is an express trust as supported by numerous documents or written trust instruments. Similarly, the express terms of LHF's regulations establish it as a charitable trust.

Additionally, Plaintiffs' breach of constructive trust claim is proper because (1) there is, in the alternative an implied trust, and (2) imposing a constructive trust over the Hospital is an appropriate equitable remedy recognized under Ohio law.

Plaintiffs can request the declaration of a constructive trust on a breach thereof because "[a] constructive trust is an equitable remedy that must be imposed on particular assets, not on a value." *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, ¶ 25. Further, "Constructive trusts should be placed over the property of the party who wrongfully obtained the property. When [. . .] the property was subsequently transferred to third parties, a constructive trust can be imposed." *Id.* at ¶ 26.

Plaintiffs seek the alternative claim and remedy of having a constructive trust imposed on the Hospital and all assets relating thereto because LHA and CCF have been transferring, or rather diverting, the Hospital employees, medical equipment, programs and services, and patients to other CCF wholly-owned hospitals that have nothing to do with the Hospital and to other outside providers as is expressed in both Subsidium's overview report and CCF's secret decanting plan <u>within</u> the Master Plan for Fairview Hospital. This is City-owned property, which creates value for the City. LHA and CCF have coveted City-owned property in a covert and wrongful manner.

<u>Assignment of Error No. V</u>: The trial court erred as a matter of law by dismissing Plaintiffs' unjust enrichment claim under Count 10.

Plaintiffs pled their unjust enrichment claim in the <u>alternative</u> against CCF, as if the Lease agreement did not apply to CCF as a party, but rather as an implied contract or lease between CCF and the City. CCF argued it was not a signatory to the Lease with the City and could not be bound by the Lease's express contract terms governing LHA.

The Eighth District has explained that "a claim for unjust enrichment lies whenever a benefit is conferred by a plaintiff upon a defendant with knowledge by the defendant of the benefit and retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *Guardian Technology, Inc. v. Chelm Properties, Inc.*, 8th Dist. Cuyahoga No. 80166, 2002 WL 31087415, ¶ 7 (internal citations and quotation marks omitted). Moreover, "[t]his implied obligation (i.e., quasi contract) is derived from the equitable principle based on the moral obligation to make restitution which rests upon a person who has received a benefit which, if retained by him, would result in inequity and injustice. In order to prevent such unjust enrichment *the law implies a promise to pay* a reasonable amount for services *in the absence of a specific contract*." *Id.* (internal citations and quotation marks omitted).

It is telling that Section 14.15 **Matters Relating to Definitive Agreement** in the Lease and Section 1.2 **Rights of the City** in the DA *cross-reference* each contract and provide the City rights and remedies in the Lease to enforce the DA. (App. pp. 51 and 53). Plaintiffs believe this creates an express contract between the City and CCF, not just LHA, regarding the Lease terms.

However, in the alternative to that theory, there is at least an implied contract between the City and CCF. The City conferred a benefit upon CCF in granting it the ability to operate and manage the Hospital and all related assets and become the sole member of LHA. CCF wants to discontinue Lease payments through 2026 for purposes of pursuing its self-serving strategic plan to close and raze Lakewood Hospital and instead build a lesser family health center. Moreover, CCF has been coveting City-owned assets and City-owned prospective profits (what may even be referred to as opportunity cost) by transferring the Hospital employees, medical equipment, and programs and services to other CCF wholly-owned hospitals for CCF's sole benefit (i.e. Fairview and Avon), without paying the City an appropriate amount. In fact, CCF has not paid the City in any amount for these transfers of medical equipment and must pay restitution

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regardless of whether CCF wants to remain in the Lease through 2026.

Assignment of Error No. VI: The trial court erred as a matter of law by dismissing Counts 11, 12A, 12B, 13, and 15 for alleged lack of standing.

The trial court dismissed the FAC's Count 11-Promissory Estoppel, Count 12A-Fraud Against LHA, CCF, and Cosgrove, and Count 12B-Fraud Against LHA, CCF, and LHF; Count 13-Civil Conspiracy Among LHA, CCF, and Subsidium; and Count 15-Tortious Interference by CCF (pled in the alternative, if CCF was not a party to the Lease) based upon Relators' alleged lack of standing. (JE, pp. 32-35). The trial court erred as a matter of law. The trial court failed to cite to one case supporting its conclusory statement that the Relators or Plaintiffs cannot pursue causes of action, as intended third-party beneficiaries, residents of the City, patients of the Hospital, employees of the Hospital, and/or standing in the shoes of the City.

Count 11 is an equitable claim for promissory estoppel and the Relators properly pled the cause of action against LHA and CCF by standing in the shoes of the City. Although there does exist the statutory taxpayer claims, the Relators or Plaintiffs can also pursue a common law taxpayers' cause of action for common law claims and remedies as pled in the FAC.

Count 12A properly pled fraud claims on behalf of the Relators, for the City, by the improper actions and misrepresentations by LHA, CCF, and Cosgrove. Similarly, Count 12B properly pled a fraud claim against LHA, CCF, and LHF for improperly and secretly planning to close the Hospital and allowing the charitable trust LHF to abandon its mission of financially supporting the Hospital for inpatient care and with the enumerated Required Services.

Count 13 for civil conspiracy and Count 15 for tortious interference also were properly pled causes of action and were improperly dismissed for alleged lack of standing. The Relators sufficiently gave notice that Subsidium conspired with LHA and CCF to secretly put forth a request for proposal for the Hospital that did not include inpatient healthcare services, which violates the Lease, DA, and ordinances. Simultaneously, Subsidium set forth a second public request for a proposal to MetroHealth Hospital that required it to meet the Lease and DA terms and provide inpatient medical services at the Hospital. MetroHealth's proposal, to follow the contract terms of the Lease and DA by continuing inpatient care and Required Services at the Hospital, should have been accepted and not the legally <u>im</u>proper proposal by CCF, which was in response to Subsidium and LHA's secret request to CCF to close the Hospital and only provide a family health center in the City.

Finally, Count 15 properly pled CCF's tortious interference with the known contract between LHA and the City regarding the Lease and its requirement to operate and then return the Hospital in 2026 to the Relators as a "going concern." Thus, the trial court erroneously dismissed all these counts without a legal basis to do so and these claims should proceed with discovery and a trial on the merits.

> **<u>Assignment of Error No. VII</u>: The trial court erred as a matter of law by dismissing Plaintiffs' alternative claim of CCF's alter ego under Count 14.**

The trial court summarily dismissed Count 14 for CCF's liability as the alter ego of LHA because it had previously dismissed the remainder of the FAC for failure to state a claim and for lack of subject matter jurisdiction. (JE, p. 37). However, because there does exist valid causes of action and substantive claims, with subject matter jurisdiction by the trial court, there exists a validly pled alternative claim against CCF as the alter ego of LHA. Thus, the trial court's ruling should be reversed.

> **<u>Assignment of Error No. VIII</u>: The trial court abused its discretion by not allowing Relators to file a second amended complaint pursuant to Civ.R. 15.**

The trial court, in a separate one-sentence judgment entry, denied Relators' proposed Second Amended Complaint in this matter. However, the subsequent events and facts that gave rise to two (2) new causes of action. Furthermore, the intervening events provided additional facts to substantiate the various claims set forth in Counts 1 through 15 of the FAC. Thus, the Eighth District should hold the trial court abused its discretion and allow the Relators to file the proposed Second Amended Complaint to include intervening facts and the additional causes of action regarding the improper failure to publicly bid the medical services contract of the Hospital and the failure to hold open meetings before signing the MA to shutter the Hospital and include a restrictive covenant to prevent future medical services from that site.

CONCLUSION

For all the foregoing reasons, the trial court's orders below dismissing the FAC and prohibiting a second amended complaint should be reversed and all of Relators' assignments of error sustained.

Respectfully submitted,

/s/ Christopher M. DeVito
Christopher M. DeVito (0047118)
Morganstern, MacAdams & DeVito Co., L.P.A.
623 West Saint Clair Avenue
Cleveland, Ohio 44113-1204
216-687-1212 Telephone
216-621-2951 Facsimile
ChrisMDeVito@gmail.com

-and-

/s/ A. Steven Dever
A. Steven Dever (0024982)
A. Steven Dever Co., L.P.A.
13363 Madison Avenue
Lakewood, Ohio 44107
216-228-1166 Telephone
216-228-3484 Facsimile
astevendever@aol.com

Attorneys for Relators-Plaintiffs-Appellants

CERTIFICATE OF SERVICE

A copy of the foregoing **Appellants' Merit Brief** 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 8th day of November, 2017, to the following:

Kevin M. Butler
kevin.butler@lakewoodoh.net
Jennifer L. Swallow
jennifer.swallow@lakewoodoh.net
City of Lakewood Law Department
12650 Detroit Avenue
Lakewood, Ohio 44107

Attorneys for Respondents-Defendants-Appellees City of Lakewood, Ohio and Mayor Michael Summers

-and-

Robert E. Cahill
rcahill@sutter-law.com
Sutter O'Connell Co.
1301 East 9th Street
3600 Erieview Tower
Cleveland, Ohio 44114

James R. Wooley
jrwooley@jonesday.com
Tracy K. Stratford
tkstratford@jonesday.com
Katie M. McVoy
kmmcvoy@jonesday.com
Mariam Keramati
mkeramati@jonesday.com
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114

Attorneys for Respondents-Defendants-Appellees The Cleveland Clinic Foundation and Dr. Delos Cosgrove

Jennifer D. Armstrong
jarmstrong@mcdonaldhopkins.com
McDonald Hopkins LLC
600 Superior Avenue, E., Suite 2100
Cleveland, Ohio 44114

Attorney for Respondents-Defendants-Appellees Lakewood Hospital Association and Thomas Gable

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Walter F. Ehrnfelt
walter@healthlaw.com
Thomas M. Ehrnfelt
tehrnfelt@healthlaw.com
Waldheger Coyne
1991 Crocker Road, Suite 550
Westlake, Ohio 44145

Attorneys for Respondents-Defendants-Appellees Lakewood Hospital Foundation and Kenneth Haber

David C. Olson
dolson@fbtlaw.com
Aaron M. Bernay
abernay@fbtlaw.com
Katherine A. Klaeren
kklaeren@fbtlaw.com
Frost Brown Todd LLC
3300 Great American Tower
301 East Fourth Street
Cincinnati, Ohio 45202

Attorneys for Respondent-Defendant-Appellee Subsidium Healthcare, LLC

Kristine Hayes
Kristine.Hayes@OhioAttorneyGeneral.gov
Joseph Schmansky
Joseph.Schmansky@OhioAttorneyGeneral.gov
Ohio Attorney General's Office
Charitable Law Section
150 E. Gay Street, 23rd Floor
Columbus, Ohio 43215

Attorneys for Respondent-Defendant-Appellee The Ohio Attorney General Mike DeWine

/s/ Christopher M. DeVito
Christopher M. DeVito (0047118)
Morganstern, MacAdams & DeVito Co., L.P.A.
Attorney for Relators-Plaintiffs-Appellants

APPENDIX TABLE OF CONTENTS

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

2017 JUL 11 A 10: 16

CLERK OF COURTS
CUYAHOGA COUNTY

EDWARD GRAHAM, ET AL
Plaintiff

CITY OF LAKEWOOD, ET AL
Defendant

Case No: CV-15-846212

Judge: JOHN P O'DONNELL

JOURNAL ENTRY

THERE ARE SEVERAL TYPOGRAPHICAL ERRORS IN THE JUDGMENT ENTRY GRANTING THE MOTIONS TO DISMISS JOURNALIZED ON JULY 10, 2017. THE PURPOSE OF THE ATTACHED SUBSTITUTE ENTRY IS TO CORRECT THOSE ERRORS. ACCORDINGLY, THAT JUDGMENT ENTRY IS VACATED AND REPLACED, NUNC PRO TUNC, WITH THIS JUDGMENT ENTRY.

JUDGMENT ENTRY GRANTING THE DEFENDANTS' MOTIONS TO DISMISS THE FIRST AMENDED AND VERIFIED COMPLAINT.

O.S.J.

Judge Signature Date

7/11/2017

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EDWARD GRAHAM, *et al.*	)	**CASE NO. CV 15 846212**
	)	
	)	
Plaintiffs,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JUDGMENT ENTRY GRANTING THE DEFENDANTS' MOTIONS TO DISMISS THE FIRST AMENDED AND VERIFIED COMPLAINT**
	)	
THE CITY OF LAKEWOOD, *et al.*	)	
	)	
	)	
Defendants.	)	

John P. O'Donnell, J.:

This is a lawsuit by five Lakewood residents to prevent the closing of Lakewood Hospital. According to the plaintiffs there "is no reason to close and demolish Lakewood Hospital" and its closing "violates contract terms, city ordinances and the economic facts."[1] The defendants have moved under Rule 12(B)(6) and Rule 9 of the Ohio Rules of Civil Procedure to dismiss every claim in the lawsuit on the basis that the plaintiffs have failed to state a single claim upon which relief under law can be granted.

The parties

Plaintiffs Edward Graham, Marguerite Harkness, William Grulich, Deborah Meckes and Amy Dilzell all live in Lakewood, and Dilzell works at Lakewood Hospital.

Defendant Michael Summers is a Lakewood resident and mayor of the defendant City of Lakewood. The city owns the real estate and a building at 14601 Detroit Avenue known as Lakewood Hospital. The property is leased by the city to defendant Lakewood Hospital

[1] First amended and verified complaint, page 18, ¶55.

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Association, and LHA contracted in 1996 with defendant The Cleveland Clinic Foundation to operate the hospital.

Defendant Lakewood Hospital Foundation is a charitable trust corporation established to raise money to support the hospital.

Defendant Thomas Gable is the chairman of LHA, defendant Delos Cosgrove, M.D. is the chief executive officer of CCF, and defendant Kenneth Haber is the president of LHF.

Mike DeWine is Ohio's attorney general. The first amended and verified complaint includes a claim that the hospital is held by the defendants LHA, LHF and CCF as a charitable trust, and DeWine is included as a defendant under section 109.25 of the Ohio Revised Code, which makes the attorney general a necessary party to any lawsuit intended to construe the provisions of an instrument with respect to a charitable trust or to terminate a charitable trust or distribute its assets.

The amended complaint includes a tenth named defendant, Subsidium Healthcare, LLC. Subsidium served as a consultant for Lakewood in 2014 to request proposals from parties who might be interested in taking over the hospital. Subsidium's motion to dismiss was granted on December 17, 2015, and it is no longer a party.

Summary of the defendants' relationships

Lakewood is a municipal corporation bound by its charter. The charter includes Article XV allowing the city council to establish, by ordinance, a municipal hospital. The charter also provides for the composition of the hospital's board of trustees and permits the council to pass an ordinance authorizing a lease of the hospital.

Section 907.03 of the Lakewood Codified Ordinances, effective December 1, 1930, established the Lakewood Hospital. On January 5, 1987, Lakewood's council passed an ordinance approving the transfer of the operation, management and assets of Lakewood Hospital from the hospital's board to LHA. The ordinance also authorized the city to lease the hospital to LHA, and a lease was given in 1987 then amended and restated in 1996. At about the same time the city enacted an ordinance giving it the right to appoint seven people to LHA's governing board, two of whom must be members of the city council.

In 1996, LHA and CCF entered into a contract known as the definitive agreement. The general import of the agreement was to "integrate" Lakewood Hospital into CCF's network of regional hospitals and operate it as if it were one of CCF's own. The agreement also made CCF the sole member of LHA with the ability to exercise a great deal of control over LHA's board. The other important aspect of the definitive agreement obligated LHA to enter into a new 30-year lease of the hospital from the city.

Summary of the defendants' alleged wrongdoing

The operative pleading is the plaintiffs' first amended and verified complaint filed on August 5, 2015. It includes 15 separate causes of action listed after 29 pages of factual allegations. The amended complaint is 242 paragraphs long plus 85 pages of exhibits, not including the exhibits from the original complaint that have been incorporated into the amended complaint by the parties' agreement. A succinct but thorough paraphrase of the facts alleged in the amended complaint is thus elusive. Instead, this entry will address each of the amended complaint's causes of action in order and refer to specific factual allegations as needed in connection with a given cause of action. In the meantime, to give context to the defendants' motion to dismiss and this entry, I offer the plaintiffs' own words:

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The definitive agreement and the lease "have created an unusual and complex love triangle among CCF, LHA" and Lakewood.[2] LHA is caught between CCF and the city, two "competing interests that were supposed to share power and work together for"[3] the plaintiffs' benefit. As for CCF, it "has been terminating or redirecting high margin medical services for years with the intended effect of crippling Lakewood Hospital's financial viability and moving these services to its wholly-owned hospitals" and now "wants to close Lakewood Hospital in breach of" the definitive agreement and lease.[4] As for the city, it "has failed to adequately represent the best interests of the city and the general public by [not] enforcing its rights to maintain Lakewood Hospital as an acute care community hospital in good working order and [by failing to prevent] the closure of Lakewood Hospital."[5]

The motions to dismiss

All of the defendants (except the attorney general, a nominal defendant) jointly moved to dismiss every claim in the amended complaint for failure to state a claim upon which relief can be granted. The plaintiffs opposed the motion and the defendants replied to that opposition, after which the plaintiffs filed a surreply brief.

Later, the defendants filed a separate motion to dismiss the first three causes of action in the amended complaint – all labeled as taxpayer suits where the plaintiffs, as taxpayers, stand in for Lakewood to enforce rights they allege the city has declined to enforce – on the grounds that the court lacks subject matter jurisdiction over those claims because they are moot by virtue of a

[2] Am. comp., page 28, ¶ 82.
[3] *Id.*
[4] *Id.*, p. 28, ¶81.
[5] *Id.*, p. 29, ¶82.

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contract executed on December 21, 2015, while the lawsuit was pending. That motion also has a brief in opposition, a reply to the brief in opposition and a surreply to the reply.

Both motions are fully briefed and this entry follows.

Civil Rule 12(B)(6) and Civil Rule 9

Civil Rule 12(B)(6) allows a defendant to move to dismiss a lawsuit where the complaint fails to state a claim upon which relief can be granted. A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). The motion may only be granted if, taking the factual allegations in the complaint as true, it appears that the plaintiff can prove no set of facts that would justify a court granting relief. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St. 2d 242 (1975), syllabus. In reviewing the complaint, every reasonable inference from the factual allegations must be made in favor of the plaintiff. *Salyer v. Eplion*, 4th Dist. No. 08CA18, 2009-Ohio-1623, ¶21. But unsupported conclusions are not taken as admitted by a motion to dismiss and are not sufficient to withstand the motion. *Mitchell v. Lawson Milk Co.*, 40 Ohio St. 2d, 190, 193.

Claims of fraud are additionally subject to Civil Rule 9(B), which requires that the circumstances constituting fraud shall be stated with particularity. But the requirement of particularity in the pleading of fraud must be applied in conjunction with the general directives in Civil Rule 8 that the pleadings should contain a "short and plain statement of the claim" and that each averment should be "simple, concise, and direct." Where it is apparent that even though the pleadings may be vague the defendant does in fact have notice of the matters of which plaintiff complains, a strict application of Civil Rule 9(B) can serve no useful purpose. *F & J Roofing Co. v. McGinley & Sons, Inc.*, 35 Ohio App. 3d 16, syllabus 2 (9th Dist. 1987).

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The plaintiffs' taxpayer claims

The plaintiffs' first cause of action, labeled in the amended complaint as **count 1A**, is a taxpayer lawsuit under R.C. 733.59. That statute provides:

> If the . . . city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation.

On April 14, 2015, the plaintiffs, all five of whom are Lakewood taxpayers, through counsel, corresponded to Lakewood's law director with a demand that the city file a lawsuit "to preserve and ensure the continued operation of Lakewood Hospital for the benefit of the Lakewood community."[6] The letter asks the law director to "bring an action in the name of the city of Lakewood" against "the city of Lakewood, its officials, the Lakewood Hospital Association, the Cleveland Clinic Foundation and the Lakewood Hospital Foundation."[7] According to the plaintiffs, a lawsuit by Lakewood against these parties – including itself – was necessary to 1) enjoin abuses of Lakewood's corporate power by the mayor and city council members, 2) obtain specific performance of the lease and definitive agreement, and 3) compel the mayor and city council to perform their duties to the city.

The law director, Kevin Butler, Esq., declined the demand on May 1, 2015.[8] This lawsuit was filed less than a month later.

Statutory taxpayer lawsuits are permitted only for the reasons specified in R.C. 733.56 through 733.58. Section 733.56 allows actions for an injunction to restrain the abuse of the

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[6] Complaint, Exhibit 8. The parties have agreed that the exhibits attached to the original complaint are incorporated into the amended complaint.
[7] *Id.*
[8] Comp., Ex. 9.

city's corporate powers or to restrain the execution or performance of any contract made on behalf of the city either in violation of its laws or through fraud or corruption. Section 733.57 permits a lawsuit for specific performance of a contract made on behalf of the city that is being evaded or violated, and section 733.58 authorizes an action in mandamus against a city officer who fails to perform his legal duty.

The only proper goal of a statutory taxpayer action is to enforce a public right, regardless of any personal or private motive or advantage. *State ex rel. Fisher v. Cleveland*, 109 Ohio St. 3d 33, 2006-Ohio-1827, ¶12. A taxpayer action is properly brought only when the right under review in the action is one benefiting the public. *Id.*, ¶10. In other words, for the taxpayer causes of action in this case, the plaintiff, in all but name, is the City of Lakewood, and the named plaintiffs' factual allegations must be examined to determine whether they state one or more of the permissible claims under R.C. 733.56 through 733.58.

For the claim under R.C. 733.56, the plaintiffs aver that "the city has engaged in a series of improper activities that constitute abuse of corporate powers"[9] by failing to enforce the definitive agreement and the lease. Putting aside for now whether Lakewood has any legal right to enforce the definitive agreement, to which it is not a party, since Summers is the only city actor named as a defendant I must assume that only Summers is alleged to have abused the city's corporate powers.

The abuse of corporate powers within the purview of section 733.56 includes the unlawful exercise of powers possessed by the corporation as well as the assumption of powers not conferred. *Fisher*, supra, ¶19. I can find no allegation in the amended complaint to the effect that Summers has assumed powers not conferred upon him as Lakewood's mayor. This leaves only the question of whether Summers has unlawfully exercised Lakewood's corporate powers.

[9] Am. comp., p. 30, ¶ 86.

Court decisions have carefully restricted taxpayer actions involving an alleged abuse of corporate powers by establishing that public officials who act in good faith, and in the absence of fraud or collusion, have a range of discretion which courts respect, and courts will not substitute their judgment for that of the public official. *Columbus ex rel. Willits v. Cremean*, 27 Ohio App. 2d 137, 149 (10^{th} Dist.1971).

A thorough examination of the amended complaint, construed most favorably toward the plaintiffs, reveals no allegations sufficient to support a claim that the mayor has abused the city's corporate powers. On page 4 the plaintiffs allege that the city is failing to enforce valuable contractual rights and remedies. On that same page they claim that "City leadership" has misled residents about the real reasons the hospital must close. On page 24 and 25 they complain that the mayor, as an *ex officio* member of LHA's board, fully supported plans to diminish or close the hospital contrary to the city's best interests and, in doing so, violated LHA's own rules against attempting to influence legislation. All of these actions, if true, fall within the wide range of discretionary lawful conduct conferred on the mayor by virtue of his position as the city's executive. Accordingly, **count 1A** of the amended complaint fails to state a claim under R.C. 733.56 and 733.59 for an injunction to restrain the abuse of Lakewood's corporate powers.

Count 1A also purports to set out a claim under R.C. 733.56 *et seq.* to enforce the definitive agreement and lease. The first part of this claim is to restrain "the execution or performance of any . . . contract in contravention of the existing [definitive agreement] and lease."[10] This claim does not fall within the ambit of claims permitted under section 733.56, which allows an application for an injunction to restrain only the execution or performance of any contract in the city's name that was procured in contravention of *the laws or ordinances governing* the city. There is no provision allowing a taxpayer to seek to restrain the performance

[10] *Id.*, p. 32, ¶98.

or execution by the city of one contract on the basis that to do so would violate a different contract. Since the plaintiffs are claiming just that, **count 1A** of the amended complaint fails to state a claim under R.C. 733.56 and 733.59 for an injunction to restrain the execution or performance of any contract made on behalf of Lakewood in contravention of its laws and ordinances.

The next part of **count 1A** is a claim under R.C. 733.57. That section provides, in pertinent part:

> When an obligation or contract made on behalf of a municipal corporation, granting a right, . . . is being evaded or violated . . . [the] city director of law shall apply for the forfeiture or the specific performance thereof as the nature of the case requires.

For this claim, at paragraph 97 of the amended complaint, the plaintiffs' allege that "[t]he obligations and duties under the [definitive agreement] and lease . . . have been and are currently being evaded and/or violated" by LHA and CCF for: failing to maintain the facility; eliminating available medical services; sending patients to other CCF hospitals to weaken the hospital's financial viability; planning to eliminate inpatient care while preventing the city from making alternate plans to preserve the hospital as an inpatient facility; and "other nonfeasance, misfeasance, malfeasance and negligence regarding various other duties and obligations" under the two contracts. The plaintiffs demand specific performance of both contracts. According to the amended complaint, specific performance, by both LHA and CCF, would include: maintaining the hospital's "Required Services" (a defined term in the lease) until 2026; providing indigent health care; maintaining a 1:1 cash-to-debt ratio through 2026; accounting for all administrative expenses from 1996 until now; and disgorgement of excessive administrative expenses and other excess charges.

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The lease is undoubtedly a contract made on behalf of a municipal corporation granting to LHA a right to the hospital and the taxpayers made a presuit demand to the law director that the city enforce it. That demand was rejected and security for costs has been proffered, thus R.C. 733.59 gives the taxpayers the right to institute suit in their own names.[11]

That leaves the question of whether they have sufficiently pled a violation, or breach, of the contract. The defendants claim the plaintiffs have not alleged any actionable breach of the particular terms of the lease.[12]

Section 6.1 of the lease obligates the lessee to keep and maintain the premises in good repair and in good operating condition. Under sections 9.11(b) and 9.16, LHA agrees to provide "Required Services," defined at section 1.2 to include "(i) obstetrical/gynecological services, (ii) 24 hour a day emergency-room providing trauma services, (iii) rescue squad/paramedic services, (iv) intensive care services and (v) acute care medical/surgical services . . . of the nature then generally provided by a community hospital in communities comparable to" Lakewood. Paragraph 47 of the amended complaint alleges the defendants have slashed and "diminished to nothing" vital medical services at the hospital. Paragraph 49 alleges that many "Required Services" have been terminated. Paragraph 53 alleges that the defendants are selling or moving medical equipment subject to the lease. Paragraph 57 alleges that valuable medical services and equipment have been "siphon[ed]" by the defendants, an allegation expanded on in Paragraph 59. The allegation of terminated medical services is repeated in Paragraph 81 and again in Paragraph 97.

[11] R.C. 733.59 refers to a demand on the law director by "any taxpayer" and subsequent suit by "the taxpayer . . . in his own name" provided that "the taxpayer" gives adequate security. That statute thus appears to authorize a lawsuit by only one taxpayer, not five. The defendants have not raised the issue so it need not be decided now and I will proceed, for the time being, as if all five plaintiffs have the right to institute a single suit in all of their names.
[12] Plaintiffs' 8/21/2015 motion to dismiss, pp. 19-22.

Civil Rule 8(A) requires a complaint to contain (1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled. This rule means only that the complaint must give a defendant fair notice of the nature of the action. *DeVore v. Mutual of Omaha Ins. Co.*, 32 Ohio App. 2d 36, 38 (7th Dist. 1972). Civil Rule 8(A) opens the courthouse door wide and Civil Rule 12(B)(6) is not intended to slam that door shut, especially in a taxpayer action since the taxpayer will not always possess the detailed knowledge of a city officer, yet may be generally aware that a city contract is being evaded or violated. Although the number of detailed factual allegations in the amended complaint is inversely proportional to the quantity of words in the pleading, the factual allegations are sufficient to give the defendants fair notice of the nature of the lawsuit, and since LHA is indisputably a party to the contract with Lakewood, LHA's motion to dismiss the claim in **count 1A** under R.C. 733.57 for specific performance of the lease is denied.

But CCF is not a party to the lease, and Lakewood is not a party to the definitive agreement, and **count 1A** under R.C. 733.57 alleges a right of the city to enforce the lease against CCF and the definitive agreement against both defendants. I will address that question in the discussion of **count 2** for breach of contract.

The third statutory taxpayer claim in **count 1A** is made under R.C. 733.58, which says:

> In case an officer or board of a municipal corporation fails to perform any duty expressly enjoined by law or ordinance, the . . . city director of law shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of the duty.

To support this claim, at Paragraph 100 of the amended complaint the plaintiffs demand a "writ of mandamus to compel the City to perform their (*sic*) official duties" under Lakewood's charter and ordinances to "ensure the preservation and operation" of the hospital through the term of the lease. But the city itself cannot be both the plaintiff, through the taxpayers, and the defendant. The statutory action is to compel "an officer or board" of the city to perform his duty. Since Summers is the only officer of the city named as a defendant I will consider this as a claim to compel Summers to perform his duty.

To be entitled to a writ of mandamus a relator must establish a clear legal right to the requested relief, a clear legal duty on the part of the respondent to provide it, and the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Brown v. Lemmerman*, 124 Ohio St.3d 296, 2010-Ohio-137, ¶ 9. The clear legal right sought is the enforcement of the lease and definitive agreement. That is the exact relief sought in the R.C. 733.57 claim. The clear legal duties are 1) the mayor's obligation under Ordinance No. 63-86 to execute the 1987 lease with LHA, 2) his duty under that same ordinance to represent the city's best interests as an LHA board member and 3) his obligation under Ordinance No. 51-96 to execute the 1996 lease with LHA.[13] Two of these duties – executing the 1987 and 1996 leases – have been performed, leaving the mayor's alleged legal duty to represent the city's best interests as an LHA board member.

Ordinance No. 63-86 does dictate that the mayor and council members on LHA's governing board are obligated to "represent the City and its interests." That creates a legal duty. But it is not a duty that is sufficiently clear to permit an order via mandamus to compel its performance. Given the number of issues that likely arise in the board's oversight of the hospital – hiring, retaining and terminating employees; contracting for maintenance and other services; approving capital expenditures; negotiating with suppliers; prosecuting and defending lawsuits; planning for an uncertain future; etc. – acting in the city's interests presupposes a broad range of

[13] It is difficult to piece together through a reading of the amended complaint the legal duties the performance of which the plaintiffs seek to compel, but the plaintiffs identify the ordinances they want enforced on page 36 of their brief in opposition to the motion to dismiss.

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discretion. Discretion is a square peg that does not fit in the round hole of mandamus. It would be one thing to command the mayor to execute an already identified contract; that is a sufficiently clear legal duty. It is quite another to command him, as an LHA board member, to "represent the City and its interests." Such an order would be impossible to enforce because it could never contain an unambiguous statement of what is, and is not, in the city's interest.

Even if the plaintiffs, acting in the name of the city, have articulated a legal duty that is sufficiently clear to be commanded by a court through mandamus, they have an adequate legal remedy, namely their R.C. 733.57 claim for enforcement of the 1996 lease. For both of these reasons – the lack of an unambiguous legal duty and the availability of an adequate remedy at law – **count 1A** fails to state a claim for relief under R.C. 733.58.

Count 1B of the amended complaint is a taxpayer action under Article VII, Sections 1(D) through 1(G) of Lakewood's charter. Those sections are coextensive with R.C. 733.56 through 733.59 and the claims in **count 1B** are the same as those in **count 1A** so the same analysis applies and a separate discussion is not needed.

Count 1C of the amended complaint is an alternative common law taxpayer action seeking the same three remedies as in counts 1A and 1B: an injunction, specific performance and a writ of mandamus. Where statutory relief is afforded and clearly applies to the circumstances giving rise to a common law taxpayer action, the statute constitutes the exclusive avenue for seeking redress. *Westbrook v. Prudential Ins. Co.*, 37 Ohio St. 3d 166, 170 (1988). Since the taxpayers have instituted actions under the Ohio Revised Code and the Lakewood charter they may not seek redress under the common law too.

Even if they could, they have not pled facts that support standing to bring a common law taxpayer action. Unless a taxpayer has some special interest in a public contract by reason of which his own property rights are put in jeopardy he may not bring a common law taxpayer action. *State ex rel. Masterson v. Ohio State Racing Com.*, 162 Ohio St. 366, 368 (1954). In other words, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally. *Id.* The plaintiffs claim they have a special interest in the lease and definitive agreement, and the property those agreements affect – namely, Lakewood Hospital assets[14] - because 1) the hospital has been supported by public funds through taxation, 2) they have all used the hospital and its services and 3) plaintiff Dilzell works at the hospital. None of these qualify as interests that are distinct from every other taxpaying resident of Lakewood. The burden of taxes falls more or less equally on every taxpayer and using, or working at, the hospital may create some rights and obligations between the patient and the hospital or employee and the hospital, but those relationships do not create the right to participate in decisions about the hospital's operation and management through a taxpayer lawsuit.

Accordingly, the motion to dismiss **count 1C** is well-taken.

Count 2 of the amended complaint is for breach of contract: or, more accurately, breach of *contracts*, namely the lease and the definitive agreement. Here, the cause of action is asserted on behalf of the named plaintiffs themselves as intended third-party beneficiaries to the two contracts. The gist of this count is that LHA, LHF and CCF have breached contractual duties to provide medical services (including indigent care), maintain the hospital and its equipment, continue the current level of service through the end of the contract, minimize administrative expenses, and fund any deficit between expenses and income. The defendants have moved to dismiss count 2 on the grounds that the plaintiffs are not parties to either contract and therefore have no standing to sue for a breach.

[14] Br. in opp., p. 38.

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The elements of a breach of contract claim include the existence of a contract, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff. *Doner v. Snapp*, 98 Ohio App. 3d 597, 600 (2d Dist. 1994). But only a party to a contract or an intended third-party beneficiary of a contract may bring an action on a contract in Ohio. *Thornton v. Windsor House, Inc.*, 57 Ohio St. 3d 158, 161 (1991). Since the plaintiffs concede they are not signatory parties to either contract they only have standing to bring count 2 for themselves if they are intended third-party beneficiaries.

A person who benefits from a contract's promises is an intended beneficiary with standing to enforce the contract only if: 1) recognition of a right of the beneficiary to performance is appropriate to effectuate the intention of the parties and 2) either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. *Hill v. Sonitrol of Southwestern Ohio, Inc.*, 36 Ohio St. 3d 36, 40 (1988). Performance of a contract will often benefit a third person, but unless the third person is an intended beneficiary as here defined, no duty to him is created. *Id.*

Ohio courts use the "intent to benefit" test to determine whether a third party is an intended beneficiary. Under this analysis, if the promisee (the party entitled to performance under the contract) intends that a third party should benefit from the contract, then that third party is an "intended beneficiary" who has enforceable rights under the contract. *Id.* If the promisee has no intent to benefit a third party, then any third-party benefiting from the contract is merely an "incidental beneficiary" with no enforceable rights under the contract. *Id.* The mere conferring of some benefit on the supposed beneficiary by the performance of a particular

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promise in a contract is insufficient; rather, the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary. *Id.*

The relationships in *Hill* provide a practical illustration. That case involved defendant Sonitrol's sale of a security system to Today's Adult Entertainment Center, an adult bookstore. Hill was a cashier at the bookstore. Before leaving the store she activated the security system – which was on only when the store was closed and unoccupied – by calling Sonitrol, who affirmed that the system was active. Upon her departure she was accosted by a person who forced her at the point of a knife back into the store, and soon kidnapped Hill's husband when he arrived to pick her up from work, terrorizing both with the knife and a gun for nearly an hour and raping Hill in the process. Eventually Sonitrol detected something out of the ordinary and called the store. Hill was able to alert Sonitrol's representative that there was a problem and the police were finally called.

The Hills ultimately sued Sonitrol for its failures, essentially alleging negligence, product liability and breach of warranty. The trial court dismissed the lawsuit because the Hills were neither express parties to the contract to provide the security services nor were they intended beneficiaries. The Ohio Supreme Court affirmed, holding that the only potential source of a legal duty to Hill was the contract with the bookstore and Hill was not an intended beneficiary of the contract, i.e. a person intended by the bookstore to benefit from the contractual rendition of the security service.

Here, the plaintiffs must demonstrate that Lakewood entered into the lease with LHA, and that LHA entered into the definitive agreement with CCF, intending to benefit them.

Generally, the intention of contracting parties to benefit a third party will be found in the language of the agreement. *Huff v. FirstEnergy Corp.*, 130 Ohio St. 3d 196, 200 (2011). In the

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case of contracts entered into by governmental entities, such as the lease in this case, private citizens have no right to enforce government contracts on their own behalf, unless a different intention is "clearly manifested" in the contract. *Duncan v. Cuyahoga Cmty. College*, 8th Dist. No. 101644, 2015-Ohio-687, ¶32.

In the amended complaint the plaintiffs aver that taxpayers "were identified in [the definitive agreement and the lease] and in City Ordinance No. 63-86 as the parties" to benefit from the hospital's services.[15] But the plaintiffs do not point to specific portions of the lease and definitive agreement that would clearly manifest an intention to make all Lakewood residents beneficiaries of the contracts. In their brief in opposition to the motion to dismiss they do cite to the "Provision for Indigent Care" section of the lease, on page 3, whereby LHA agrees to "continue to provide healthcare services in accordance with this Lease to *residents* of the City without regard to their ability to pay," and to the "Operation and Services of the Hospital" section on that same page where LHA agrees "to continue to provide *residents* of the City" with the services required by lease. (Emphasis in italics added.)

Both of these terms are in a section of the lease captioned "Statement of Intent." It is worth noting that, according to the lease, the Statement of Intent provisions are qualified by Articles I through XIV of the lease, which "shall control and be determinative of the interpretation of this Lease."[16] Nowhere else in the lease's 53 single-spaced pages (not including signature pages and exhibits) is there any term that evidences an intent to create a contractual obligation enforceable by the taxpayers of Lakewood. In fact, the opposite is true: the lease names Lakewood as the sole lessor and LHA as the sole lessee and the lease's definition of "Required Services" does not limit those services to Lakewood residents. The lease does have

[15] Am. comp., p. 42, ¶137.
[16] 1996 lease, p. 3.

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the stated purpose of operating a hospital "for the service of the general public, without discrimination by reason of race, sex, creed, color or national origin."[17] But the same could likely be said for any other hospital in the United States and this provision does not reveal an intent to make the general public – much less Lakewood taxpayers alone – beneficiaries of the lease with legally enforceable rights under it. Finally, the lease says that it "shall inure to the benefit of and shall be binding upon the City [and] the Lessee"[18] without mentioning the taxpayers.

The plaintiffs also rely on Ordinance No. 63-86 and Lakewood's charter as evidence that the lease was intended to benefit them. The 1986 ordinance authorized the first lease to LHA, which is not the lease to which the plaintiffs claim they are beneficiaries, so it can hardly be said to create an enforceable right in the public to benefits from the 1996 lease. The charter simply empowers Lakewood to establish a municipal hospital and to lease it under whatever terms the city believes are necessary to "provide for the health and welfare of the residents."[19] Presumably all municipal governments, acting in good faith, intend their actions to advance the welfare of their residents: indeed, that's a definition of good government and public servants should hardly need explicit laws to remind them of that obligation. But a municipality is a separate legal entity that enters into contracts creating enforceable rights and obligations apart from its residents, yet with the purpose – implied or explicit – of serving the residents' good. So language in a city's charter or a municipal contract's authorizing legislation to the effect that the city's contracts are for the benefit of its residents is redundant and individual residents or taxpayers get the right to enforce such contracts in their own names only where the contracts creating those rights and

[17] *Id.*, p. 14. By Section 9.11 of the lease, LHA essentially repeats the same promise by agreeing to provide services to "patients who are residents of the City and all members of the general public."
[18] *Id.*, p. 50.
[19] Exhibit 10 to the amended complaint, Lakewood charter, Article XX, section 4.

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obligations clearly demonstrate a specific intent to give that right. The lease here falls short of demonstrating such an intent.

As with the lease, the definitive agreement does not clearly reveal an intention to make Lakewood's residents or its taxpayers beneficiaries of the contract. First, it is unambiguously a contract between only LHA and CCF as named parties, contrary to the plaintiffs' assertion that Section 1.8 gives the city the right to enforce it. Section 1.8 simply provides that LHA must enter into a lease with the city on terms that are acceptable to CCF. It also gives CCF the right to cure any default of the lease by LHA, but it does not include any provision to the effect that Lakewood may enforce the definitive agreement against either LHA or CCF. But even if Lakewood were an intended third-party beneficiary of the definitive agreement that would still leave the plaintiffs as strangers to the agreement without other evidence of an intention to make them third-party beneficiaries. That evidence is missing from the amended complaint and its exhibits.

The definitive agreement, in the "Recitals" portion, acknowledges that the parties intend to integrate their medical services to best "serve the health care needs of the residents of the communities served by CCF and"[20] LHA. If this acknowledgment demonstrates an intention to make Lakewood's residents third-party beneficiaries of the definitive agreement then the residents of every other community served by the Cleveland Clinic Foundation also stand as parties with the right to sue for a breach of the agreement, and a thorough reading of the contract reveals no such intention. Instead, this and other statements of the principles behind, and broad goals of, the definitive agreement – e.g., Page 2's recitation that the goal of integration is to "benefit the community through the promotion, expansion and support of community front line physician practices" – are simply expressions of the general purposes of the agreement that do

[20] Definitive agreement.

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not create enforceable obligations and rights between the named parties, much less obligations enforceable by every resident of Lakewood or any other community getting services because of the definitive agreement.

The plaintiffs oppose the motion to dismiss count 2 not only because the pleadings and their attachments, construed most strongly in favor of the plaintiffs, demonstrate that they can prove a set of facts justifying relief, but also on the grounds that the question of whether a party not named in a contract is an intended third-party beneficiary is not the proper subject of a motion to dismiss since the use of the "intent to benefit test" of whether a party is an intended beneficiary of the contract necessitates a finding of fact upon a full evidentiary record. But construction of written contracts is a matter of law. *DVCC, Inc. v. Medical College*, 10th Dist. No. 05AP-237, 2006-Ohio-945, ¶48. A court presumes that the intent of the parties to a contract is within the language used in the written instrument. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus. If a court is able to determine the parties' intent from the plain language of the agreement, then there is no need to interpret the contract. *Saunders v. Mortensen*, 101 Ohio St. 3d 86, 88 (2004). In this case the lease and definitive agreement are part of the record as attachments to pleadings and neither side has questioned the contracts' authenticity. Evidence beyond the terms of the contract may be considered in an effort to give effect to the parties' intentions only when the language of a contract is unclear or ambiguous, or when the circumstances surrounding the agreement invest the language of the contract with a special meaning. *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St.3d 635 (1992), syllabus. The terms of the contracts here clearly and unambiguously exclude an intention to make Lakewood's taxpayers or residents beneficiaries to the contracts with the right to enforce them, thus evidence beyond the current record is not necessary to decide whether the first amended

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complaint and its attachments state a claim in favor of the plaintiffs at Count 2 for breach of contract. They do not.

Count 3 alleges the defendants breached a fiduciary duty owed to the plaintiffs. Specifically, the plaintiffs claim that a fiduciary duty for LHA and CCF to act at all times in the best interest of the plaintiffs was created by the lease, the definitive agreement, an express and constructive trust, and R.C. 140.02.

A fiduciary relationship is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust. *Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos.*, 67 Ohio St. 3d 274, 282 (1993). The person in whom the special confidence and trust are reposed, the fiduciary, has a duty to act for someone else's benefit, while subordinating his or her personal interests to that of the other person. *Id.* A fiduciary relationship may arise from a written agreement, including a statute, or from an informal relationship, but in both cases only where both parties understand that a special trust or confidence has been reposed. *Id.*, at 283; *Umbaugh Pole Bldg. Co. v. Scott*, 58 Ohio St. 2d 282, 286 (1979).

The plaintiffs do not cite in the amended complaint to the particular passages in the lease and definitive agreement that create the alleged fiduciary duty. But both of those contracts are part of the record and my examination of them has failed to uncover an express undertaking by the parties to those agreements to act primarily for the benefit of the five plaintiffs, or any of them, much less for the benefit of all of the residents and taxpayers of Lakewood. Whether a fiduciary duty arose through a trust will be addressed in the discussion of Count 4 later in this opinion. That leaves R.C. 140.02 as the only other possible source of the fiduciary duty alleged.

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R.C. Chapter 140 authorizes public and nonprofit hospital agencies to engage in certain business practices that might otherwise be considered anticompetitive or beyond the usual services allowed to a hospital, such as joint agreements: to acquire and operate a hospital (R.C. 140.03); to provide extended care services (R.C. 140.04); or to lease a hospital (R.C. 140.05). R.C. 140.02 provides that the

> authorizations granted in this chapter . . . [a]re granted for the public purpose of better providing for the health and welfare of the people of the state by enhancing the availability, efficiency, and economy of hospital facilities and the services rendered thereby, by providing for cooperation of hospital agencies in the utilization of shared facilities and services to obtain economies in operation and more effective health service, facilitating participation of hospital agencies in federal financial assistance provided by . . . [federal law] . . . , providing efficient operation of hospital facilities through leasing to hospital agencies and facilitating the financing of hospital facilities to be available to or for the service of the general public.

This section is simply a statement by the Ohio General Assembly of its policy reasons for allowing the activities permitted in Chapter 140. The legislature believes the cooperation allowed by the provisions of Chapter 140 will achieve economies and efficiencies that aren't otherwise being accomplished, ultimately resulting in the delivery of better health care. But there is nothing in R.C. 140.02 that places a fiduciary duty on the hospital agencies who choose to combine their efforts in ways allowed under the rest of the chapter to subordinate their own interests in favor of always acting in the interest of the five plaintiffs in this case, or even in favor of, to use the language of R.C. 140.02, the people of the state.

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The plaintiffs go on to allege that "[a]s a party to the Lease, the City, including Mayor Summers"[21] owes a fiduciary duty to "the Taxpayers and City community it represents."[22] Yet again, the plaintiffs do not point out the language of the lease that creates a fiduciary duty and I can find none upon an independent review. The same can be said for the claim that LHF has a fiduciary duty to "the Taxpayers and the City community"[23] by virtue of its articles of incorporation.

The amended complaint itself alleges no other source of a fiduciary duty owed to the plaintiffs by defendant Summers, but the plaintiffs argue in their brief in opposition to the motion to dismiss that the mayor owes them, as "citizens (*sic*) of the City," a fiduciary duty created by the language in Ordinance 63-86 requiring Lakewood's mayor to represent the City and its interests in his position as a member of LHA's board. Putting aside that this particular duty – to each plaintiff as a member of LHA's board – is not alleged in the amended complaint, whether such a duty exists is a question that needs to be resolved and can be determined from the pleadings.

If Summers was bound to act as a fiduciary for the plaintiffs, that duty arose from one of two places: his membership on the LHA board of trustees or his position as mayor.

As a nonprofit hospital agency, LHA is a nonprofit corporation organized under R.C. Chapter 1702. Its code of regulations is of record as Exhibit 14 to the amended complaint. Section 3.2(a) of the code of regulations makes Lakewood's mayor an *ex officio* member of the 23-person board of trustees. Section 3.11 prohibits a trustee from voting on any matters where the trustee has a conflict of interest or responsibility.

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[21] Am. comp., p. 47, ¶159.
[22] *Id.*
[23] *Id.*

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R.C. 1702.30(B) requires a director[24] of a nonprofit corporation to perform his duties in good faith and in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. This is a fiduciary duty. See *Kleemann v. Carriage Trace, Inc.*, 2d Dist. No. 21873, 2007-Ohio-4209, ¶43. It is the equivalent duty that directors of a for profit corporation owe under R.C. 1701.59(B). In turn, R.C. 1702.30(E) says a director is liable for a breach of this duty only where the harmful act or omission of the director was one undertaken with a deliberate intent to cause *injury to the corporation* or was one undertaken with a reckless *disregard for the best interests of the corporation.* (Emphasis added.) In other words, the director's duty is to the corporation and, continuing the analogy to the rules applicable to for profit corporations, a breach of the duty is actionable only by the corporation itself or its shareholders through a derivative lawsuit brought for the benefit of the corporation. In this case, the "shareholder" of LHA is its member, CCF. The residents or taxpayers of Lakewood are not the equivalent of "shareholders" for whose benefit the corporation is operated and thus have no standing to sue a director of LHA for a breach of the fiduciary duty the director owes to the corporation.

That leaves Summers's status as Lakewood's mayor as the only other possible origin of a fiduciary duty to the plaintiffs.

As noted here already, a fiduciary is required to act at all times in the best interests of someone else. A fiduciary is a trustee. There is little doubt that a public official – especially in the executive branch of government – must act at all times in the best interests of the public. A public officer owes an undivided duty to the public whom he serves and is not permitted to place

[24] Nonprofit boards of trustees became known, by statute, as boards of directors after the 1997 amendment to LHA's code of regulations.

himself in a position that will subject him to conflicting duties or cause him to act other than for the best interests of the public. *City of Alexandria v. Cleco Corp.*, 735 F. Supp. 2d 448, 457 (W.D. La. 2010). The questions in this case are whether the plaintiffs have sufficiently alleged a breach by Summers of that duty and, if so, whether they have standing to sue for it.

The factual allegations against Summers are uncomplicated. The plaintiffs claim that as a member of LHA's board the mayor is "obligated to protect the City's interests."[25] They allege that a "lack of oversight by LHA and City trustees"[26] allowed CCF to eliminate services provided by Lakewood Hospital and weaken it to the point that closing the hospital and putting a family health center in its place was recommended in 2015 by LHA's own health care consultant, Subsidium. Summers then "fully supported [the new plan] despite the City's best interests,"[27] instead favoring CCF over Lakewood's residents. In particular, the plaintiffs assert that Summers agreed to sell real property at 850 Columbia Road in Westlake that Lakewood owns for only about 60% of its market value but they do not allege that Summers somehow personally benefited from the deal. In general, the plaintiffs say that Summers has "failed to adequately represent the best interests of the City and the general public by [not] enforcing [rights under the lease and definitive agreement] to maintain Lakewood Hospital as an acute care community hospital in good working order and to prohibit the closure of"[28] the hospital.

The mayor of Lakewood is vested with the executive and administrative powers of the city.[29] He must supervise the administration of the affairs of the city, see that all ordinances of the city are enforced, recommend to the council such measures as he may deem necessary or expedient, keep council advised of the financial condition and future needs of the city, exercise

[25] Am. comp., p. 8, ¶23.
[26] *Id.*, p. 24, ¶69.
[27] *Id.*
[28] *Id.*, p. 29, ¶82.
[29] Lakewood's charter, Article II, Section 1.

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such powers and perform such duties as are conferred or required by the charter, by ordinance or resolution of council, or by general law.[30] These are broad powers necessarily entailing broad executive discretion; in essence, he is entrusted with the management of the city guided only by his informed perception of its best interests.

The manner in which the authority conferred upon a mayor or other public official is to be exercised is left to the discretion of the official. *Butler v. Karb*, 96 Ohio St. 472, 480 (1917). The general principle is well established that in the absence of fraud or gross abuse of discretion the courts will not interfere with the discharge of such duties. *Id.* Difference in opinion or judgment is never a sufficient ground for interference. *Id.*

In this case the city leased Lakewood Hospital to LHA. Summers, in the exercise of his discretion, believes the lease should be terminated and that the city should enter into a new arrangement for the Lakewood Hospital property that essentially closes the hospital but keeps some health care services at the location. And he believes this is a good alternative despite, according to the plaintiffs, the fact that Lakewood Hospital would continue to thrive as a full service hospital if CCF had not sabotaged it in favor of its own interest. Assuming the plaintiffs are correct and the deal is bad for Lakewood, they have alleged nothing more than a difference of opinion with Summers. But poor judgment by a mayor in the good faith performance of his discretionary executive duties does not amount to a breach of fiduciary duty enforceable in court and the plaintiffs have not alleged facts demonstrating a gross abuse of discretion, bad faith or criminal conduct, all of which are beyond the vast boundary of non-actionable discretion afforded to decision makers in the executive branches of government.

[30] *Id.*, Article II, Section 6.

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Since the plaintiffs did not set forth enough facts to support a breach of fiduciary duty it is not essential to decide whether they are parties with standing to sue for such a breach. But their lack of standing gives a separate basis to find that count 3 fails to state a claim.

It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue. *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 469 (1999). Where the ability to file a lawsuit has not been granted by a statute, standing is typically conferred only where a plaintiff seeking redress has incurred a unique injury. Standing depends upon whether the party has alleged a personal stake in the outcome of the controversy. *Sierra Club v. Morton*, 92 S. Ct. 1361, 1364 (1972). A party has standing where the party demonstrates an injury in fact. *Wilmington City Sch. Dist. Bd. of Educ. v. Board of County Comm'rs*, 141 Ohio App. 3d 232, 238 (12th Dist. 2000). An injury in fact requires a showing that the party has suffered or will suffer a specific injury, that the injury is traceable to the challenged action, and that it is likely that the injury will be redressed by a favorable decision. *Id.* Private citizens may not sue for official acts when they fail to allege damage to themselves different in character from that sustained by the public generally. *Masterson*, supra.

These five plaintiffs have not alleged damages to them different in kind to those claimed to have been sustained by every other Lakewood taxpayer and do not have standing to sue for a breach of fiduciary duty. All of the damages alleged by the plaintiffs – injury to Lakewood Hospital assets[31] owned by the city – were sustained by the city and only Lakewood may sue the mayor for a breach of his fiduciary duty where the breach did not cause specific injury to a third party. To see why, a return to the corporate analogy is appropriate. A corporation is owned by, and operated for the benefit of, its shareholders. A city is "owned" by its residents and

[31] Am. comp., p. 47, ¶161.

municipal government manages the city's affairs for the residents' benefit. In the corporate context, it is well-settled that only a corporation and not its shareholders can complain of an injury sustained by, or a wrong done to, the corporation. *Adair v. Wozniak*, 23 Ohio St. 3d 174, 176 (1986). Accordingly, a plaintiff-shareholder does not have an independent cause of action where there is no showing that he has been injured in any capacity other than in common with all other shareholders as a consequence of the wrongful actions of a third party directed towards the corporation. *Id.*, syllabus. Just as a pecuniary interest to a corporation as a whole does not give a shareholder a right to sue for the damage, an injury to Lakewood by Summers's breach of his fiduciary duty does not give any one resident (or five of them) standing to sue individually for a breach. The only exceptions are those cases allowed for by statute or charter, i.e. taxpayer suits under R.C. 733.56 *et seq.* or Article VII, Sections 1(D) through 1(G) of Lakewood's charter. Those exceptions are cousins to the shareholder derivative lawsuit provided for by Civil Rule 23.1, and have already been discussed in an earlier part of this opinion.

Count 4 of the amended complaint alleges a breach of an express trust and **count 5** alleges breach of a constructive trust.

A trust is the legal relationship created when one party holds property for the benefit of another. To constitute an express trust there must be an explicit declaration of trust, or circumstances which show that a trust was intended to be created, accompanied with an intention to create a trust, followed by an actual conveyance or transfer of lawful, definite property or estate or interest, for a definite term, vesting the legal title presently in the trustee for the benefit of a cestui que trust, or a retention of title by the owner under circumstances which clearly and unequivocably disclose an intent to hold for the use of another. *Mock v. Bowen*, 1992 Ohio App. LEXIS 3768, *13-14, 6th Dist. No. L-91--210.

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In the plaintiffs' version of events, the lease of the hospital was intended to serve as the transfer of property to LHA as a trustee – not a lessee – for the "benefit of the City, Taxpayers, employees and residents of this community area"[32] as the cestui que trust, or beneficiaries. But a close reading of the lease, construed most favorably to the plaintiffs, reveals no such intention. First, it is called a lease. Second, LHA is called a lessee. Third, the lease's preamble acknowledges it is made with the intention that LHA would then affiliate with CCF to make the hospital's patients eligible for coverage under the requirements of insurance companies that ultimately pay for hospitalization. Fourth, the contract's statement of intent mentions continuing health care services to Lakewood residents – and not, it is worth noting, to "residents of this community area," part of the expansive group of beneficiaries posited by the plaintiffs – as only one of several purposes of the lease. Fifth, although the plaintiffs allege that LHA and every defendant other than the city and Summers is a trustee, only LHA is a party to the lease. Sixth, the lease requires LHA to cover Lakewood's indebtedness under bonds issued to improve the hospital, a benefit that does not inure to hospital employees and "residents of this community area." Seventh, I can find no reference to a trust in the lease. Eighth, I can find no reference to trust beneficiaries. Ninth, there are no references in the lease to a trustee in connection with the hospital property itself as the corpus of any trust. Tenth, contrary to the plaintiffs' assertion that the "overriding intention"[33] of the transfer of the hospital to LHA was "the provision and maintenance of community hospital services for the Taxpayer (*sic*), employees, and residents"[34] of Lakewood, section 2.2 of the lease cites as its purpose the operation of a hospital for "the service of the general public."

[32] *Id.*, p. 48, ¶166.
[33] *Id.*, p. 48, ¶167.
[34] *Id.*

In the end, and accepting as true the claim that the operation of the hospital was for the plaintiffs' benefit, the facts alleged in the amended complaint do not demonstrate the express or implied creation of a trust enforceable by the plaintiffs. Contracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language. *Skivolocki v. E. Ohio Gas Co.*, 38 Ohio St.2d 244 (1974), paragraph one of the syllabus. A contract is to be read as a whole and the intent of each part gathered from a consideration of the whole. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361 (1997). Nothing about the 1996 lease manifests an intention to create a trust.

Count 5 of the amended complaint is labeled as "breach of constructive trust." Here the plaintiffs allege that they have demonstrated an entitlement to a declaration that the hospital is held by the defendants in trust for the benefit of the plaintiffs as a remedy for the breach of contract claims in counts 1 and 2 and the breach of fiduciary claims in count 3. They further allege that the defendants have breached the duties imposed on them by the constructive trust. To put it simply, the plaintiffs claim the defendants have breached a remedy never imposed for a claim never proved. The best that can be said for this claim is that it is premature.

Count 6 is related to count 4 in that it seeks a declaratory judgment of the rights and obligations of the parties interested in the trust alleged by the plaintiffs in count 4 to have been established by the lease of the hospital. Considering the plaintiffs have failed to state a claim that a trust exists in the first place, count 6 fails to state a claim to declare the legal relations of the participants in the nonexistent trust.

Count 7 of the amended complaint alleges an entitlement to injunctive relief. Specifically, the plaintiffs ask for an injunction: to prohibit the defendants from ending services at the hospital; to require the defendants to restore any hospital service that was already

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discontinued; and to keep the hospital open and standing. This count – set forth at paragraphs 198 through 201 of the amended complaint – is not a cause of action but a request for a remedy. To the extent that it is set forth as a stand alone cause of action, the motion to dismiss it is granted on the basis that it does not state a claim for relief.

To the extent it is a request for a remedy, the cause of action giving rise to the remedy is not explicit but it appears to be the taxpayer, breach of contract and breach of fiduciary duty claims outlined in counts 1 through 3. I have already determined that the taxpayer claims fail to sufficiently allege an abuse of corporate powers that would justify an injunction under R.C. 733.56, and most of counts 1, 2 and 3 are dismissed on separate grounds. To the extent that any of the claims surviving the motion to dismiss are properly remediable by an injunction then such a remedy will be considered once the plaintiffs have proved an entitlement to relief.

Like count 7, **count 8** is a request for a remedy – namely, a writ of mandamus ordering Lakewood to enforce the lease and definitive agreement (to which, it must be remembered, Lakewood is not a party) and ordering the other defendants to abide by the lease, definitive agreement and their own corporate bylaws – labeled as a cause of action. But to the extent that it is intended by the plaintiffs as a separate cause of action it fails to state a claim for the same reasons given in connection with the R.C. 733.58 claim of count 1A.

The analysis of **count 9** for an accounting is similar to the one for counts 7 and 8. An accounting is a remedy allowed where a plaintiff has demonstrated a right to it because of a defendant's legal liability on a distinct cause of action. It is not a stand alone cause of action and does not state a claim for relief that can withstand a motion to dismiss. Accordingly, it is dismissed. Should the plaintiffs prevail on any of their causes of action their right to an accounting can be addressed then.

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Count 10 alleges a cause of action for unjust enrichment. The elements of unjust enrichment exist when a plaintiff demonstrates that it conferred a benefit upon a defendant, the defendant is aware of the benefit, and the defendant retains the benefit under circumstances where it is unjust to do so. *Hammill Mfg. Co. v. Park-Ohio Industries, Inc.*, 6th Dist. Lucas. No. L-12-1121, 2013-Ohio-1476, ¶14. It is an equitable claim that is often, although not always, an alternative to a breach of contract claim where the parties failed to create an enforceable contractual relationship and is intended – as the name of the cause of action suggests – to prevent an injustice. But if the parties' relationship is governed by a contract then a cause of action for unjust enrichment is not available. *Booher Carpet Sales v. Erickson*, 2d Dist. No. 98-CA-0007, 1998 Ohio App. LEXIS 4643 (Oct. 2, 1998).

For this count, the plaintiffs contend that Lakewood conferred a benefit on the other corporate defendants (LHA, LHF and CCF) and that those defendants "have retained the benefit of Lakewood Hospital assets"[35] under circumstances where it would be unjust to do so. The first, and fatal, deficiency in count 10 is that the plaintiffs do not allege injury to themselves distinct from injury to Lakewood's other residents and taxpayers. Instead, they obviously seek to stand in for Lakewood as a plaintiff on this equitable claim. But this is not a claim expressly permitted under R.C. 733.56 *et seq.* or Lakewood's charter, and the failure to allege particularized damage precludes a common law taxpayer's claim.

The defendants' motion to dismiss the unjust enrichment claim is granted.

Count 11 is a claim for promissory estoppel. Like unjust enrichment, promissory estoppel is an equitable doctrine applied in circumstances to enforce a promise that does not meet the criteria of a formal contract. *Healey v. Republic Powdered Metals, Inc.*, 85 Ohio App. 3d 281, 284 (9th Dist. 1992). In plain language, promissory estoppel prevents a party from

[35] *Id.*, p. 55, ¶211.

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escaping liability where he made a promise knowing that the other party would change her position in reliance on the promise. The elements of promissory estoppel include: a promise, clear and unambiguous in its terms; reliance by the party to whom the promise is made; the reliance was reasonable and foreseeable; and the party claiming estoppel was injured by the reliance. *Id.*

This claim is asserted against LHA and CCF only. For the first element – an enforceable promise – the plaintiffs claim those two defendants "repeatedly made firm and specific promises to the City and Taxpayers"[36] before and after the execution of the lease that they would provide inpatient and other hospital services through the end of the lease period in 2026. For the second element – reliance – the plaintiffs allege that Lakewood "relied on those promises by leasing"[37] the hospital to LHA and incurred damages by not living up to the contract. Yet again, the plaintiffs seek to stand in for Lakewood to assert a claim on its behalf, and yet again the claim falls outside the ambit of permissible statutory, charter or common law taxpayer claims, so this count too fails to state a claim upon which relief can be granted.[38]

Count 12A is denominated as a fraud claim against LHA, CCF and Cosgrove. The gist of this claim is that CCF's senior general counsel said at a May 2010 LHA board meeting that the lease did not have to be amended for Lakewood's protection and that CCF promised that if it were allowed to terminate certain required services under the lease then it would replace them with four centers of clinical excellence in neurosciences, orthopedics, diabetes and geriatrics. The amended complaint goes on to allege that these misrepresentations were made "with the

[36] *Id*, p. 56, ¶214.
[37] *Id.*
[38] I recognize that this count essentially alleges that the breach of the promise is really the breach of the lease, which provides an independent basis to dismiss it for failure to state a claim. Nevertheless, I must construe the amended complaint's allegations most favorably to the plaintiffs, so I base the dismissal of this claim only on the lack of standing.

intent of misleading the City into relying upon them"[39] and Lakewood has been injured by the reliance.

Putting aside Civil Rule 9(B)'s requirement that averments of fraud shall be stated with particularity, this is another claim that the plaintiffs do not have standing to make even where the facts alleged are taken as true.

Count 12B claims fraud by the corporate defendants. The plaintiffs essentially allege that LHA, CCF and LHF all knew that they were going to "cripple"[40] then close Lakewood Hospital, but hid those plans while continuing to raise money from donors. Significantly, the amended complaint does not include an allegation that any of the five named plaintiffs were duped into making contributions. Assuming for the purpose of the pending motion the dubious proposition that the entities were legally obligated to inform prospective donors of every detail of the hospital's current and future operation, the failure of these plaintiffs to allege that they were among the members of "the public"[41] who relied on, and were individually damaged by, the fraudulent nondisclosure excludes them as parties with standing to assert the claim in the first place.

Count 13 alleges a civil conspiracy among LHA, CCF and Lakewood's consultant, Subsidium. According to the amended complaint, these defendants engaged in "bid rigging"[42] when Subsidium recommended to Lakewood that it accept CCF's proposal for the future of the hospital – and reject a competing proposal by MetroHealth – even though CCF's proposal did not meet the hospital association's minimum bid requirements.

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[39] Am. comp., p. 57, ¶219.
[40] *Id.*, p. 59, ¶226.
[41] *Id.*, p. 58, ¶225.
[42] *Id.*, p. 59, ¶230.

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Count 15 alleges that CCF tortiously interfered with the lease between Lakewood and LHA. This claim is asserted in the alternative to the claim that CCF is actually a party to the lease.

I discuss these two claims together because, even assuming the amended complaint includes factual allegations otherwise sufficient to state claims, they fail to sufficiently plead the plaintiffs as people with standing to bring the causes of action for the same basic reason several of the other claims are insufficient: the plaintiffs cannot stand in for Lakewood on this claim nor do they allege damages unique to them.

Summary of the first motion to dismiss

To this point I have found merit to the defendants' motion to dismiss every count except the taxpayer claim at count 1A under R.C. 733.57 for specific performance of the 1996 lease between Lakewood and LHA and I have not addressed count 14 alleging that CCF is the alter ego to LHA and should be legally liable for the performance of the lease even though it is not a named party to the contract.

But the remaining viable claim under R.C. 733.57 is the subject of the defendants' separate motion to dismiss on the grounds that events occurring since the amended complaint was filed have eliminated the subject matter jurisdiction of this court. If that claim is correct then the taxpayer cause of action for specific performance must be dismissed and the alter ego claim of count 14 will be moot, so I will first address the second motion to dismiss.

Second motion to dismiss

The defendants' second motion to dismiss is aimed only at the taxpayer causes of action at count 1A (statutory claims), count 1B (charter) and count 1C (common law). The motion is made under Civil Rules 12(B)(1) and 12(H)(3) on the grounds that the court lacks subject matter

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jurisdiction to hear the taxpayer causes of action because, since the filing of the amended complaint, the City of Lakewood, LHA and CCF entered into a contract known as the master agreement which includes Lakewood's release of LHA and CCF from any claims arising out of the lease or definitive agreement.

The plaintiffs oppose the motion as improper and better suited for a motion for summary judgment, not a motion to dismiss, since it requires a consideration of evidence beyond the pleadings and their attachments.

Civil Rule 12(H)(3) provides that whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction on the subject matter, the court shall dismiss the action, and Civil Rule 12(B)(1) allows for the defense of lack of jurisdiction over the subject matter to be made by motion. A trial court is not confined to the allegations of the complaint when determining its subject matter jurisdiction pursuant to a Civil Rule 12(B)(1) motion to dismiss, and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment. *Southgate Development Corp. v. Columbia Gas Transmission Corp.*, 48 Ohio St. 2d 211 (1976), paragraph one of the syllabus.

The master agreement is attached as Exhibit A to the motion. The parties to it are Lakewood, LHA and CCF. The substance of the contract is the parties' intention to replace the inpatient hospital with a family health center. Pertinent to this lawsuit, the master agreement includes 1) a termination of the definitive agreement between LHA and CCF, 2) amendment of the 1996 lease between Lakewood and LHA to allow elimination of the "Required Services" and inpatient care, and then terminate the lease once the family health center is operational, and 3) a waiver and release of Lakewood's claims against LHA and CCF under the 1996 lease and the definitive agreement.

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In short, Lakewood settled the claims the plaintiffs purported to bring on Lakewood's behalf at counts 1A, 1B and 1C of the amended complaint.

Article IV, Section 4(B) of the Ohio Constitution provides that the court of common pleas has "original jurisdiction over all justiciable matters." For a cause to be justiciable, there must exist a real controversy presenting issues which are ripe for judicial resolution and which will have a direct and immediate impact on the parties. *Hirsch v. TRW Inc.*, 8th Dist. No. 83204, 2004-Ohio-1125, ¶10. If what were once justiciable matters have been resolved to the point where they become moot, the court of common pleas no longer has subject matter jurisdiction to hear the case. *Id.*, ¶11. That is the situation here. The release and waiver of claims, combined with the amendment and imminent termination of the 1996 lease and the definitive agreement, have made the plaintiffs' taxpayer claims – which, it is worth repeating, are really Lakewood's claims – moot and there is no case or controversy for me to decide.

Accordingly, the defendants' second motion to dismiss **count 1A's** claim for specific performance under R.C. 733.57 is granted, and the lack of subject matter jurisdiction provides a basis to dismiss the rest of counts 1A, 1B and 1C in addition to the reasons given above.

Count 14

Count 14 for CCF's liability as the alter ego of LHA is not an independent cause of action but instead rests on the proposition that "[c]ontrol over LHA . . . by CCF was exercised in such a manner as to commit the wrongful and/or unjust . . . acts alleged [in the amended complaint] against" Lakewood, its taxpayers and residents.[43] Because all of the substantive claims in the amended complaint are dismissed for failure to state a claim or lack of subject matter jurisdiction, count 14 must be dismissed too.

[43] *Id.*, p. 60, ¶235.

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Conclusion

For all of the reasons given here, the entire amended complaint, filed August 5, 2015, is dismissed at the plaintiffs' costs.

IT IS SO ORDERED:

Judge John P. O'Donnell

July 11, 2017
Date

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PLEASE SUBSTITUTE FOR ORDINANCE NO. 51-96 ORIGINALLY SUBMITTED WITH THIS EVENING's DOCKET, WHICH HAD BEEN PLACED ON 1st READING & REFERRED TO COMMITTEE OF THE WHOLE 11/18/96; 2nd READING ON 12/2/96.

ORDINANCE NO. 51-96

BY: Boscia, Corrigan, Flannery, George, Roth, Seelie, Smith

AN ORDINANCE, authorizing the amendment and restatement of a Lease dated June 26, 1987, by and between the City of Lakewood, Ohio ("City"), as Lessor, and Lakewood Hospital Association, a non-sectarian Ohio non-profit corporation organized for charitable purposes ("LHA") as Lessee, and authorizing the execution and delivery of an amended and restated Lease between the City and LHA, to permit an affiliation between LHA and The Cleveland Clinic Foundation ("CCF"), and authorizing and approving related matters.

WHEREAS, the City of Lakewood owns certain real and personal property comprising hospital facilities and property located in the City, which are managed and operated by the Lakewood Hospital Association pursuant to a Lease dated June 26, 1987, under the authority of Article XX, Section 4 of the Amended Charter of the City of Lakewood; and

WHEREAS, there have been, and continue to be, significant changes in the health care industry, including changes in the method and amounts of payments to hospitals and physicians for health care services, increased competition for patients among hospitals and alternative health care delivery systems, reductions in patients days and revenues due to utilization review pressures, aggressive efforts by business coalitions to limit hospital costs and obtain price discounts and increases in the aged population; and

WHEREAS, in today's economy and changing health care environment, community hospitals are particularly vulnerable due to limitations on their ability to compete with larger hospital networks and other private health care delivery systems for patient revenues; and

WHEREAS, community hospitals in Ohio and across the nation have determined that it is in the best interest of their institutions to affiliate with a larger hospital network so as to obtain the flexibility and financial support necessary to compete in the current and expected future economic conditions of the health care industry; and

WHEREAS, the LHA Board of Trustees has examined the potential options for the future of Lakewood Hospital and has determined that an affiliation with The Cleveland Clinic Foundation will provide LHA with greater resources and more flexibility to gain financial and competitive advantages necessary to continue and thrive as both a health care provider and major employer in the City of Lakewood; and

WHEREAS, LHA has requested that the City approve and enter into an amended and restated Lease so that LHA may meet the conditions of its entering into a Definitive Agreement with CCF; and

WHEREAS, this Council has determined that it is in the best interests of the residents and taxpayers of the City of Lakewood, and LHA and its patients, that the current Lease dated June 26, 1987 be amended by agreement of the parties, and that an amended and restated Lease be entered into by and between Lakewood Hospital Association and the City of Lakewood on the terms and conditions, and in substantially the form attached hereto as Exhibit "A," as approved by the Director of Law, and in accordance with Chapter 140 of the Ohio Revised Code; and

WHEREAS, the amended and restated Lease will require LHA to continue to pay the principal of and any premium and interest on the City's outstanding bonds under the Trust Indenture dated March 15, 1983, and the First Supplemental Trust Indenture dated June 15, 1989, between the City and National City Bank as Trustee, and will require LHA to make other additional payments, including a new Additional Payment to the City; therefore,

EXHIBIT
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BE IT ORDAINED BY COUNCIL OF THE CITY OF LAKEWOOD, OHIO, TWO-THIRDS OF THE MEMBERS THEREOF VOTING AFFIRMATIVELY;

Section 1. The current Lease dated June 26, 1987, by and between the City of Lakewood and Lakewood Hospital Association will be amended and replaced by an amended and restated Lease on the terms and conditions, and in substantially the form attached hereto as Exhibit"A," and as approved by the Director of Law.

Section 2. In consideration of the payments to be made by Lakewood Hospital Association under the terms of the Lease, and the covenants and other obligations contained therein, this Council authorizes and approves the amendment and restatement of the Lease dated June 26, 1987, and the execution and delivery of an amended and restated Lease, in substantially the form attached hereto as Exhibit "A," and as approved by the Director of Law, with such changes, if any, which are approved by the officers of this City executing the Lease, permitted by the Bond Indentures, consistent with law and this Ordinance, in the best interest of this City and in a form approved by the Director of Law.

Section 3. The Mayor, President of Council and Director of Finance are hereby authorized and directed to execute the Lease on behalf of the City of Lakewood, and to execute such other documents and take such other actions as are necessary and appropriate to give effect to the amended and restated Lease. The Lease may be signed upon the passage of this Ordinance, placed into escrow upon terms and conditions approved by the Director of Law and shall become effective upon the closing of the Definitive Agreement by and between the Lakewood Hospital Association and The Cleveland Clinic Foundation.

Section 4. It is found and determined that all formal actions of this Council concerning and relating to the passage of this Ordinance were adopted in an open meeting of this Council, and that all such deliberations of this Council and any of its committees that resulted in such formal actions, were in meetings open to the public, in compliance with all legal requirements.

Adopted: December 16, 1996

JoAnn Boscia
President

Karen A. Schaser
Clerk

Approved: December 17, 1996

Madeline Cain
Mayor

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AMENDED AND RESTATED
LEASE

by and between

CITY OF LAKEWOOD, OHIO

AND

LAKEWOOD HOSPITAL ASSOCIATION

THIS AMENDED AND RESTATED LEASE dated as of December 23, 1996 (the "Lease"), is made by and between the City of Lakewood, Ohio (the "City"), a municipal corporation and political subdivision in and of the State, and duly organized and validly existing under the laws of the State and Lakewood Hospital Association (the "Lessee"), a nonprofit hospital agency, as defined in Section 140.01, Ohio Revised Code, now having its principal office in Lakewood, Ohio and the operator of the healthcare facility known as Lakewood Hospital (the "Hospital").

Since 1987 major changes have occurred in the method by which many individuals ensure their ability to afford hospital care and in the selection of acute care providers by entities paying the costs of hospitalization and other costs; and

Entities paying the costs of hospitalization currently are insisting on a single contract providing for acute hospital care for all of its insureds or members in a large geographic area which has caused individual hospitals to enter into affiliations and other arrangements to meet the demands of those entities paying hospitalization costs; and

The Lessee needs to affiliate the Hospital with other hospitals to provide in a single contract a large geographic coverage of hospital care and for that purpose proposes to affiliate with The Cleveland Clinic Foundation ("CCF") and the Cleveland Health Network and in order to effect that affiliation needs to enter into a revised lease with the City in order to accommodate that affiliation.

STATEMENT OF INTENT

PURPOSE

The purpose of this Lease is to continue the services and traditions of the Hospital.

The Lease will continue to relieve the City of any obligations or necessity of providing tax monies to subsidize the operation of the Hospital.

Because of the affiliation with CCF that will be made possible by the Lease, the Lessee will be able to compete on a fair and equal basis with other hospital systems, enter business relationships necessary to insure its financial well-being, establish the mass necessary to secure managed care contracts, continue healthcare services to residents of the City and develop new programs.

EXHIBIT
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PARTIES TO AGREEMENT

The City is the lessor under this Lease.

The Lessee is Lakewood Hospital Association, a non-profit corporation organized for the charitable purpose of operating the Hospital and its related health care facilities and services.

GOVERNING BODY

The Hospital will, subject to certain matters reserved to the member of the Lessee, be governed by the Lessee's Board of Trustees ("Governing Board").

The Governing Board will be composed of twenty-three members consisting of the Mayor of the City; two members of the Council of the City (representing the political parties with the largest and second largest number of representatives in Council) selected by Council; three representatives of community organizations of the City nominated by the Council of the City and elected by the Governing Board with the election ratified by the Member; four members, two of whom are nominated by the Mayor and two by the Council and elected by the Governing Board with the election ratified by the Member; three members elected by the Member; nine members nominated and elected by the Governing Board with the election ratified by the Member; and the immediate past President of the Medical Staff of the Hospital.

The Governing Board will elect its own Chairperson and Vice Chairperson.

The meetings of the Governing Board shall be open to the public to assure full disclosure of the operations of the Hospital unless the Governing Board determines that public discussion or action by the Governing Board would be detrimental to the interests of the patients of the Hospital or the welfare of the residents of the City or the Hospital.

LEASE; TERM; RENT AND ADDITIONAL PAYMENTS

This agreement is a lease of the real and personal property for the operation of the Hospital from the City to the Lessee and continues the transfer from the City to the Lessee of all liabilities, debts, monies, accounts and inventories of the Hospital.

The term of the Lease is thirty years with the parties agreeing that the Lessee has an option to renew this Lease for an additional term of thirty years commencing at the expiration of the original thirty-year term of this Lease.

At the end of the term of this Lease or of the additional term if the Lessee exercises its option, the Lessee shall retire or make provision for retiring all of the Lessee's indebtedness and pay or cause to be paid all of its liabilities and shall relinquish the real and personal property of the Hospital and all monies, accounts and inventories then held by the Lessee to the City.

The Lessee agrees to pay, in each year, the amount necessary, to retire the revenue bonds of the City issued to pay for improvement of the Hospital, which payments if those bonds remain outstanding to their final maturity, will aggregate $53,082,649, and to assume all other obligations of the City relating to the Hospital, and to pay as Additional Payments the amounts in each year set forth for the respective year in Schedule 1 hereto.

The Lessee in consideration of and in accordance with the Lease agrees to maintain the Hospital in good repair and operating condition and also agrees to replace equipment and other personal property necessary to the activities then to be carried on in operation of the Hospital.

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PROVISION FOR INDIGENT CARE

The Lessee agrees to continue to provide healthcare services in accordance with this Lease to residents of the City without regard to their ability to pay based on eligibility guidelines established by the Community Services Administration of the United States Department of Health and Human Services or any successor thereto or, if there is no successor, by the then community services standards used by hospitals servicing comparable communities.

OPERATION AND SERVICES OF THE HOSPITAL

The Lessee agrees to continue to provide within the City healthcare services in accordance with the terms of this Lease and, so long as effective, the Definitive Agreement between the Lessee and CCF.

The Lessee agrees to continue to provide residents of the City from facilities located within the City acute care medical/surgical services (including for children and adolescents), obstetrical/gynecological services, 24 hour a day emergency room providing trauma services, intensive care services and rescue squad/paramedic services as required by this Lease.

The Lessee agrees to maintain as one of its objectives providing high quality, affordable healthcare services with rates and charges consistent with other providers in Cuyahoga County of comparable size.

The Lessee agrees that so much of the Hospital as is operated as in-patient acute care facilities will be operated in compliance with the standards of the Joint Commission on Accreditation of Healthcare Organizations.

The Lessee agrees that its operations will be conducted without discrimination as to race, sex, creed, color, age or national origin.

The Lessee recognizes the need for positive employee relations and agrees to continue fair and just employment policies.

An equitable private pension benefit has been made available to employees not participating in the Public Employees Retirement System.

The Lessee agrees to provide the City and its residents a full disclosure of its finances through an annual audit of its financial statements which will be available to the public.

This Statement of Intent does not purport to be complete and is subject in all respects to Articles I to XIV, both inclusive, and is qualified in its entirety by reference to the terms and provisions of those Articles. The language contained in said Articles I to XIV shall control and be determinative of the interpretation of this Lease and this Statement of Intent.

WITNESSETH, THAT

In consideration of the premises and the mutual covenants hereinafter contained, and in order for the City to carry out this Lease, the parties hereto covenant, agree and bind themselves as follows; provided that no covenant, agreement or obligation of the City under this Lease shall be a general debt on the City's part, but shall be payable solely out of the rentals, revenues and other income, charges and moneys realized from the use, lease, sale or other disposition of the Leased Premises, the sale of the Bonds and any insurance and condemnation awards as herein provided:

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third party payors for recoupment of amounts paid to the Operator, (xv) liens on Property acquired by the Operator if the assumption of the Hospital Debt secured by such lien is additional Hospital Debt permitted under the Senior Indenture and if an Officer's Certificate is delivered to the Trustee certifying that (A) such lien and the Hospital Debt secured thereby were created and incurred by a person other than the Operator prior to acquisition of such Property by the Operator, (B) such lien was created prior to the decision of the Operator to acquire the Property and was not created for the purpose of enabling the Operator to avoid the limitations of the Senior Indenture on creation of liens on Property, and (C) the lien attaches solely to the Property and does not extend by its terms to other Property of the Operator, and (xvi) such minor defects, irregularities, encumbrances, utility, access and other easements and rights of way, restrictions, reservations, exceptions and clouds on title as normally exist with respect to properties similar in character to the Leased Premises and as do not in the opinion of Independent Counsel, in the aggregate materially impair the property affected thereby for the purpose for which it is or will be held by the City.

"Rental Payment Date" means the fifteenth day of each month.

"Required Services" means (i) obstetrical/gynecological services, (ii) 24 hour a day emergency room providing trauma services, (iii) rescue squad/paramedic services, (iv) intensive care services and (v) acute care medical/surgical services (including, without limitation, care for children and adolescents), of the nature then generally provided by a community hospital in communities comparable to the City; or such services as may result from amendments to this definition pursuant to Section 9.16 hereof. The term "Required Services" does not include the magnitude or level of service, such as hours of service, or the manner (including changes in technology) by which the types of services are provided; provided, however, that the change in magnitude or levels of services does not, as a practical matter, result in the significant reduction in such service so as to be an effective elimination of such service.

"Senior Indenture" means the Trust Indenture dated as of March 15, 1983 between the City and the Senior Trustee, as supplemented and amended by the First Supplemental Senior Indenture, as such may be amended or supplemented from time to time in accordance with the provisions thereof.

"Senior Ordinance" means Ordinance No. 8-83 of the City passed by the Council on February 26, 1983.

"Senior Trustee" means National City Bank, Cleveland, Ohio and any successor thereto as trustee under the Senior Indenture.

"Special Funds" means, collectively, the funds or accounts permitted by, established under, or identified in the Indentures.

"State" means the State of Ohio.

"Subordinated Indenture" means the Trust Indenture dated as of November 1, 1983 between the City and the Subordinated Trustee.

"Subordinated Ordinance" means Ordinance No. 106-83 of the City passed by the Council on October 17, 1983.

"Subordinated Trustee" means Mellon Bank, F.S.B., successor trustee to KeyBank National Association, Cleveland, Ohio (formerly known as Society National Bank and successor by merger to Central National Bank of Cleveland) and any successor thereto as trustee under the Subordinated Indenture.

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"Termination Date" means the later of (i) January 2, 2027, or (ii) January 2, 2057 if extended by the Lessee exercising its option pursuant to Section 2.5 hereof, subject to earlier termination of this Lease by the Lessee pursuant to Section 12.1, and by the City pursuant to Sections 13.2 and 13.4 hereof subject to reinstatement under Section 13.2 or 13.8 hereof.

"Total Operating Revenues" means total patient revenue less provision for uncollectible accounts, charity cases and any contractual adjustments, plus other operating revenues.

"Trustees" means collectively the Senior Trustee and the Subordinated Trustee.

"Unassigned Rights" means all of the rights of the City (i) to receive Additional Payments under Section 3.2 hereof, (ii) to be held harmless and indemnified under Section 9.9 hereof, (iii) to be insured under insurance policies and/or plans required under Section 6.4 hereof, (iv) to receive prior notice of any proposed sublease, right to use or assignment of the Leased Premises or Management Contract under Section 11.1 hereof and to prevent the effectuation thereof pursuant to that Section, (v) to receive prior notice of and prevent the effectuation of the termination of services pursuant to Section 9.16 hereof, (vi) to exercise the remedies available to the City under Section 13.2 hereof, (vii) to be reimbursed for attorneys' fees and expenses under Section 13.5 hereof, (viii) to accept the surrender by the Lessee of the Leased Premises upon termination of this Lease under Section 14.1 hereof, (ix) to receive notices, determine whether to provide requested approvals and terminate this Lease under Section 14.15 hereof and (x) to execute amendments hereto under Section 14.6 hereof.

Section 1.3. Certain Words Used Herein; References; and Headings. Any reference herein to the City, the Hospital Trustees, the Executive, the Council, the Fiscal Officer, any members or officers of the City, the Council or the Hospital Trustees, or other public boards, commissions, departments, institutions, agencies, bodies or entities, or members or officers thereof, includes those succeeding to their functions, duties or responsibilities pursuant to or by operation of law or performing their functions lawfully.

Any reference to a section or provision of the Constitution of the State or the Charter, a section, provision or chapter of the Ohio Revised Code, federal or State laws, or regulations governing Medicare or Medicaid includes that section, provision or chapter, or those laws or regulations, as amended, modified, revised, supplemented or superseded from time to time; provided, however, that no amendment, modification, revision, supplementation or supersession of the Constitution, laws of the State or the Charter shall be deemed to be applicable by reason of this Section, if that applicability would constitute in any way an impairment of the rights or obligations of the Bondholders, the City, the Lessee or the Trustees under this Lease.

Words of any gender include the correlative words of any other gender. Unless the context indicates otherwise, words importing the singular number include the plural number, and vice versa. The terms "hereof", "herein", "hereby", "hereto" and "hereunder", and similar terms, refer to this Lease; and the term "hereafter" means after, and the term "heretofore" means before, the date of delivery of this Lease.

Section 1.4. Status and Authority of City. The City represents and warrants that it has been duly organized and is validly existing under the laws of the State and that it has authority (i) by virtue of the Act and the Charter, to enter into this Lease and (ii) pursuant to Section 5.13 of the Indenture to enter into this Lease.

Section 1.5. Public Purpose for Lease. The Council has found and determined and confirms hereby that this Lease of the Leased Premises to Lessee will promote the public

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purposes as stated in Section 140.02, Ohio Revised Code, and that the City will be duly benefitted thereby.

Section 1.6. Qualification of Lessee. The City has found and determined and confirms hereby that the Lessee is a nonprofit hospital agency, as defined in Section 140.01, Ohio Revised Code, which has authority to lease and operate the Leased Premises as a facility open to the public, providing Required Services without regard to race, sex, creed, color or national origin.

(End of Article I)

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ARTICLE II

LEASED PREMISES; TERM OF LEASE; PURPOSE

Section 2.1. Leased Premises and Possession. In consideration of the Basic Rent, Additional Payments and other amounts for which provision is made herein, and of the covenants, agreements and obligations, and in reliance upon the representations and warranties, of the Lessee herein, the City covenants and agrees to lease, and hereby leases, the Leased Premises to the Lessee, and the Lessee hereby leases the Leased Premises from the City, subject to the provisions of this Lease and the Permitted Encumbrances,

TO HAVE AND TO HOLD the Leased Premises unto the Lessee for the Lease Term.

Possession of the Leased Premises shall be delivered and accepted upon the commencement of the Lease Term.

Section 2.2. Purpose. During the Lease Term, the Lessee, as between itself and the City, has sole and exclusive charge of the operation, maintenance, management, use, occupancy, and repair of the Leased Premises (unless there is an Event of Default and the Lessee has been excluded from possession of the Leased Premises hereunder), and the Lessee will manage, administer, maintain and operate so much of the Leased Premises as from time to time are Hospital Facilities as Hospital Facilities as contemplated by the Act and all of the Leased Premises in accordance with the terms of this Lease for the service of the general public, without discrimination by reason of race, sex, creed, color or national origin; provided that, subject to compliance with the requirements of this Lease, nothing in this Section or in this Lease is intended to prevent the Lessee from entering into affiliations with other healthcare providers, insurers or reimbursers and as part of such affiliation ceding to others the right to control or direct activities of the Lessee or to take control of the Lessee in specified circumstances.

Section 2.3. Assumption of Liabilities. Lessee has assumed and, except for future Bond Service Charges, paid all existing obligations and liabilities of the City and the Hospital Trustees whether fixed or contingent, known or unknown, associated with or arising out of the City's ownership of the Leased Premises and the Hospital Trustees' prior operation of the Leased Premises. Lessee further agrees to pay all future obligations and liabilities associated with the use, operation or ownership of the Leased Premises including future Bond Service Charges and to hold the City and the Hospital Trustees harmless therefrom.

Section 2.4. Assignment of Intangible Assets and Hospital Funds. In consideration of the promises and agreements made by the Lessee to the City in the Original Lease, for the purpose of paying a portion of the costs of Hospital Facilities, the costs of the management, operation, occupancy, use, maintenance, and repair of the Leased Premises, and the costs of programs, projects, activities and services useful to, connected with, supplementing, or otherwise related to the health care services provided and to be provided by Lessee and by the operation of the Leased Premises, the City did assign to Lessee all of the City's respective right, title and interest in and to (a) the Intangible Assets, (b) all moneys, accounts receivable, warranties and instruments comprising Hospital Funds and all proceeds realized therefrom and (c) inventory, supplies, materials, consumables and other property owned, accrued, held or received in connection with the Leased Premises prior to the Leased Premises initial leasing to the Lessee. All moneys, accounts, receivables and instruments which are held in trust or restricted to a particular purpose by the donor, shall be used, to the extent permitted by law, by the Lessee for the restricted purposes set forth in the instruments creating the trust or providing donations.

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enforceable by the City and the Trustees, respectively, to the full extent permitted by law. All amounts payable under this Section, together with interest thereon at the Interest Rate for Advances from the date of payment by the indemnified Person, shall constitute Additional Payments and shall be paid by the Lessee on demand by the indemnified Person. In any action brought to collect those Additional Payments, the indemnified Person shall be entitled to the recovery of the Additional Payments, except as limited by law or judicial order or decision.

Section 9.10. Compliance with Applicable Law and Insurance Requirements. The Lessee covenants and agrees to comply promptly with all Legal Requirements, as defined below, during the Lease Term at its sole cost and expense. At its own expense, the Lessee will procure, maintain and comply (or cause compliance) with all permits, licenses and other authorizations required for the Leased Premises.

The Lessee may contest any Legal Requirement, at the Lessee's expense and in its own name and on its own behalf, by any appropriate means in good faith, and may postpone compliance therewith pending the completion of the contest; provided that the Lessee shall deliver to the Trustees an opinion of counsel satisfactory to the Senior Trustee to the effect that the Leased Premises, or any part thereof, will not be subject to imminent loss or forfeiture.

As used in this Section, the term "Legal Requirements" means all laws, statutes, codes, acts, ordinances, resolutions, orders, final judgments and decrees, injunctions, rules, regulations, permits, licenses, authorizations, directions and requirements of all governments, departments, commissions, boards, courts, authorities, agencies, officials and officers, foreseen or unforeseen, ordinary or extraordinary, which are applicable now or may be applicable at any time hereafter to the Lessee, to the Leased Premises, or any part thereof, to any use or condition of the Leased Premises, or any part thereof, or to health care providers or hospitals generally.

Section 9.11. Operation of the Leased Premises. At all times throughout the Lease Term, the Lessee covenants that it shall

(a) operate so much of the Leased Premises as are eligible therefor in compliance with the standards of the Joint Commission on Accreditation of Healthcare Organizations or any substitute organization which is nationally recognized as performing the functions now performed by such Commission.

(b) administer, operate, maintain, repair, occupy and use the Leased Premises in accordance with the terms of this Lease; and faithfully and efficiently administer, operate and maintain as Hospital Facilities so much of the Leased Premises as from time to time are Hospital Facilities rendering the Required Services and related services and care, at all times as facilities are available, without discrimination as to race, sex, creed, color or national origin, to patients who are residents of the City and all members of the general public as facilities are available and as professional opinion determines the necessity thereof.

(c) open to the public all meetings of its Governing Board to assure full disclosure of the operations of the Lessee except when the Governing Board by motion adopted by it determines that public discussion or action of the Governing Board would be detrimental to the interests of the patients of the Lessee, the welfare of the residents of the City or the Lessee.

(d) continue to provide the Required Services within the City and to utilize the Leased Premises as a healthcare facility subject to discontinuance pursuant to Section 9.16 of this Lease.

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(e) continue the provision of rescue squad and paramedic services as described in Exhibit B hereto.

(f) provide employment policies which are fair and just to all parties and promote positive employer-employee relations.

(g) undertake a pension plan for its employees not eligible for or desirous of participating in the Public Employees Retirement System which is equitable for the employees and the Lessee.

(h) continue to provide the Required Services within the City and other offered healthcare services to residents of the City without regard to their ability to pay based on eligibility guidelines established by the Community Services Administration of the United States Department of Health and Human Services or any successor thereto or, if there is no successor, then community services standards used by hospitals servicing comparable communities.

(i) maintain as one of its objectives providing high quality, affordable healthcare services with rates and charges consistent with comparable facilities in Cuyahoga County.

(j) assume and comply with any requirements imposed on the City by Section 291(i), Title 42, USCA, as amended, as a result of acceptance by the City of so-called Hill Burton grants-in-aid.

Section 9.12. Qualification for Third Party Payments. The Lessee shall at all times, unless a Consultant shall determine that it is in the best interest of the Lessee and holders of the Bonds not to maintain such status, use its best efforts to establish and maintain the status of the Lessee as eligible for payment or reimbursement under Medicare, Medicaid, and significant third party payors and any other successor programs, or any other federal or State programs substituted in lieu thereof or supplementary thereto. For purposes of this Section a third party payor shall be considered significant if it provides more than 15 percent of the Total Revenue for the Fiscal Year as shown on the most recent audited financial statements available pursuant to Section 9.4 hereof.

Section 9.13. Pension Policies. Lessee acknowledges that employees of the City employed in the Leased Premises are members of the Public Employees Retirement System of the State. Lessee agrees that it shall continue to pay the employer's contribution to the Public Employees Retirement System for each such employee so long as such employee is eligible and desires to continue to make and does make that employee's contribution to that System. An equitable private pension benefit will be made available to employees not eligible for or desirous of participating in the Public Employees Retirement System.

Section 9.14. Extent of Provisions Regarding Lessee; No Personal Liability. No representation, warranty, covenant, agreement, obligation or stipulation contained in the Lease, Indenture or other instruments or documents in connection therewith or with the Bonds shall be deemed to constitute a representation, warranty, covenant, agreement, obligation or stipulation of any present or future trustee, member, officer, agent or employee of the Lessee in an individual capacity, and to the extent authorized and permitted by applicable law, no official executing or approving the Lessee's participation in the Lease or the issuance of the Bonds shall be liable personally under the Lease or on the Bonds or be subject to any personal liability or accountability by reason of the issuance thereof.

Section 9.15. Lessee Not to Affect Adversely Tax-Exempt Status of Interest. For the benefit of the City, the Trustees and the holders of the Series 1983 Bonds, the Lessee hereby

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Section 14.14. Trustees. When all Bonds are no longer outstanding under the Indentures, all references to the Senior Trustee, Subordinated Trustee and Trustees shall be deemed eliminated from this Lease and any approval herein required of the Senior Trustee, the Subordinated Trustee or the Trustees shall be eliminated from this Lease.

Section 14.15. Matters Relating to Definitive Agreement. The Lessee has entered into a Definitive Agreement with the Member and the Lessee agrees that it will enforce its rights against the Member given to it in Article 2 of that Definitive Agreement and in the event that the Member should fail to observe its obligation to the Lessee under that Article 2, the Lessee shall promptly notify the City of that failure.

The Lessee acknowledges and agrees that the City may utilize any legally available remedy, including, without limitation, injunctive relief, to compel the Lessee to enforce its rights and entitlements under Article 2 of the Definitive Agreement. The Lessee further agrees that it will not agree to any amendment or modification of the Definitive Agreement that amends, modifies, alters or clarifies the rights and entitlements of the Lessee under Article 2 of the Definitive Agreement in any manner which, in the reasonable judgment of the City, diminishes or impairs any such right or entitlement, and that the Lessee will not waive any refusal or failure by any other party to the Definitive Agreement to fulfill its duties or obligations under Article 2 thereof, unless the Lessee shall first have notified the City of (i) its intent to agree to such amendment or modification or to grant such waiver, the proposed effective date of such amendment, modification or waiver (which shall not be earlier than the seventieth (70th) day following such notification) and (ii) the reasons for agreeing to or granting such amendment, modification or waiver. Such amendment or modification may be entered into or such waiver granted on or after the proposed effective date, so long as there shall not have become effective within sixty (60) days after such notification an ordinance or resolution of the City directing the Lessee not to enter into such amendment or modification or grant the waiver which was the subject of the notification.

Without limiting the generality of the foregoing, the Lessee agrees that it will not terminate or purport to terminate the Definitive Agreement or permit CCF to terminate or purport to terminate the Definitive Agreement, in both cases pursuant to Section 10.2 of the Definitive Agreement, without the prior approval of the City evidenced by an ordinance or resolution of the City. In the event that the Lessee or CCF terminates or purports to terminate the Definitive Agreement without the prior approval of the City, then, in addition to any other rights and remedies that the City may have pursuant to this Lease with respect thereto, the City shall have the right (but shall not be obligated) to terminate this Lease subject to the rights of the holders of the outstanding Bonds (as long as such Bonds remain outstanding). If the City terminates the Lease under this paragraph, the termination will become effective on the last day of the one hundred twentieth (120th) month following the effective date of the termination of the Definitive Agreement unless the effective date of the termination of the Definitive Agreement occurs prior to December 31, 2002 in which event the termination will become effective on December 31, 2012.

The Lessee agrees that it will not assign or purport to assign its rights under the Definitive Agreement nor permit the Member to assign or purport to assign its rights pursuant to Section 12.9 of the Definitive Agreement unless the proposed assignee is both a non-profit corporation and, in the case of an assignment by the Member, is a Permitted Affiliate, and unless the Lessee shall first have notified the City of (i) its intent to make such an assignment or to permit such assignment, the proposed effective date of such assignment (which shall not be earlier than the sixtieth (60th) day following such notification), (ii) whether, in the case of a proposed assignment by the Member, the entity to which the Member seeks to assign its rights is a Permitted Affiliate as herein defined and is a non-profit corporation, and (iii) the reasons for making or permitting such an assignment. Such assignment may be entered into on or after the proposed effective date, so long as there shall not have become effective an ordinance or

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DEFINITIVE AGREEMENT
BY AND BETWEEN
THE CLEVELAND CLINIC FOUNDATION
AND
LAKEWOOD HOSPITAL ASSOCIATION

EXHIBIT
3

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1.1.3.3 The Member shall elect three trustees, which selection shall not be subject to any right of approval by the City or any other body;

1.1.3.4 The Immediate Past President of Lakewood's Medical Staff shall be a trustee; and

1.1.3.5 The remaining nine trustees shall be selected in accordance with the nomination process in existence prior to the Closing, unless the Code of Regulations is changed as permitted by Section 1.1.1.1, above, provided, however, that at all times during the term of this Agreement, the remaining nine trustees shall be nominated by a committee of Lakewood's Board of Trustees and first approved by the Lakewood Board of Trustees and then to the ratification by the Member, which ratification shall be acted upon by the Member's Board of Trustees or Executive Committee of the Board of Trustees, so long as the lease, referred to in Section 1.8, below, remains in effect.

Notwithstanding the foregoing, except with regard to the trustees selected under Section 1.1.3.3, the Member shall not have the right to remove any of the trustees or fill vacancies, except consistent with the ratification right set forth above for the initial election of trustees. Vacancies shall be filled in the same manner as provided for above with respect to the trustee's original appointment. The Board of Trustees of Lakewood shall otherwise retain the right to remove trustees (other than trustees selected under Section 1.1.3.3, or as otherwise provided in the Lease).

1.1.4 All of the rights set forth in this Section 1.1 shall be exercised by CCF in a fiscally prudent manner, consistent with Lakewood's charitable purpose and Lakewood's obligations under the lease, referred to in Section 1.8, below, in order to preserve the operations of Lakewood as a going concern, as defined under generally accepted accounting principles.

1.1.5 Except as otherwise provided in this Article 1, Lakewood's Board of Trustees shall retain the rights, privileges, duties and obligations of trustees provided by Chapter 1702 of the Ohio Revised Code, and any amendments thereto or corresponding provisions of any future law, and all other rights and obligations of trustees under Ohio statutory or case law.

SECTION 1.2 <u>Rights of the City</u>. The City shall have the rights set forth in the lease referred to in Section 1.8, below and annexed hereto as Exhibit 1.8 (the "Lease").

SECTION 1.3 <u>Officers and Trustees of Lakewood; Committee Members.</u>

1.3.1 The parties agree that immediately after the Closing, those individuals listed on Schedule 1.3A, attached hereto and incorporated herein, shall be the members of Lakewood's Board of Trustees. The parties further agree that immediately after the Closing, Lakewood's Board of Trustees shall elect those individuals listed on <u>Schedule 1.3B</u>, attached hereto and incorporated herein, to the office listed opposite such individual's name and that

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____________, 1996 at __________ P.M., or at such other location, date, and time as may be agreed upon by the parties (the "**Closing Date**").

SECTION 1.8 <u>City Lease</u>. Lakewood and the City shall enter into a new real and personal property lease (the "**Lease**"), on terms and conditions acceptable to the City, Lakewood and CCF, which provides for the lease of the real and personal property currently occupied or used by Lakewood for a term of thirty (30) years, with an option of Lakewood to renew for an additional thirty (30) years, subject to CCF's approval, and substantially in the form of Exhibit 1.8. The rent payable under such lease shall be agreed to by the City, Lakewood and CCF. *CCF shall have the right to cure any and all defaults of Lakewood under such lease.* If CCF does not grant approval and Lakewood desires to renew such Lease, CCF shall have the option to terminate this Agreement pursuant to Section 10.2.2.

1.8.1 Notwithstanding any provisions in this Agreement to the contrary, CCF acknowledges and agrees that no provision of this Agreement will cause Lakewood to take or omit to take any action that could cause Lakewood to fail to perform or to observe, or otherwise be in default of, any of its obligations under the Lease, referred to in Section 1.8.

SECTION 1.9 <u>Participation on CCF's Board of Trustees</u>. CCF shall amend its Code of Regulations to provide that Lakewood shall have the right to elect the Chairman of the Lakewood Board of Trustees to the Board of Trustees of CCF.

ARTICLE 2.
POST-CLOSING COMMITMENTS

SECTION 2.1 <u>Covenants and Rights of CCF</u>. From and after the Closing Date, the parties agree as follows:

2.1.1 CCF shall assure that Lakewood shall have a cash to debt ratio of 1:1 on a fiscal year basis. Such ratio shall be determined based on the annual audited financial statement of Lakewood. Cash shall include all cash in any accounts of Lakewood maintained for any purpose, whether or not such purpose is limited to a specific use; provided, however, that cash shall not include: (a) cash on deposit for any employee welfare plan maintained by Lakewood which represents: (i) funds contributed by employees, (ii) funds contributed to such employee welfare plan which represent employer matching funds which Lakewood is legally obligated to contribute, or (iii) funds representing the vested portion of such plan; or (b) funds generated from Medical Staff dues. Cash shall also include marketable securities. Cash shall also include the proceeds of any disposition of accounts receivable, whether or not such disposition is at the direction of CCF, as provided in Section 1.1.2.4, above, provided that such proceeds shall only count towards cash for the amount received for accounts receivable that exceed by thirty percent (30%), as measured in days in receivable, the median accounts receivable referenced in Section 1.1.2.4. Debt shall include, but not be limited to, revolving

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working capital loans, debt incurred as a result of a pledge of accounts receivables, long term debt, and current installments of long term debt; provided, however, that debt shall not include debt which has not been approved in accordance with and to the extent required by Section 1.1.1.6. In addition, required payments to the City of Lakewood under the Lease Agreement shall be included as debt only if unpaid in the year the payment is due. If, as a result of such annual audit, it is determined that Lakewood does not meet such ratio, CCF shall advance sufficient funds to Lakewood to meet such ratio. Further, if Lakewood's cash to debt ratio exceeds 1:1, Lakewood shall return to CCF fifty percent (50%) of such excess cash until all advances shall have been repaid to CCF; provided, however, that any advances not repaid to CCF at such time as the lease, referred to in Section 1.8, above, terminates shall be forgiven by CCF; and provided, further, that none of such advances, whether or not repaid shall be considered to be debt. CCF shall provide any such advance of funds required hereunder within thirty (30) days of the receipt of the fiscal year audited financial statement (for Lakewood only and not on a consolidated basis with any affiliate of Lakewood) for the then concluding fiscal year, which shall be the period of measurement of the ratio set forth herein.

2.1.1.1 In determining the availability of cash, for a period of two years after the Closing, such determination shall be made without any reduction in cash which may be used to satisfy liabilities of Lakewood for matters which were not disclosed under Article 3. For purposes of this exclusion, liabilities which are not disclosed under Article 3, include those liabilities which, while not "material" as defined below, are nevertheless not disclosed to CCF.

2.1.2 Capital expenditures by Lakewood (which are anticipated to be provided from Lakewood's cash generation and net liquid assets), within the Lakewood Service Area, will average $5 million per year over a rolling ten year period for the investment in or replacement of physical plant, the acquisition of equipment, and the implementation of new programs; provided, however, that at least an average of $3 million is expended annually over a rolling three year period. Of the average $5 million per year over a rolling ten year period and of the average $3 million per year over a rolling three year period, at least seventy-five percent (75%) of such average minimum capital expenditures shall be made in the City of Lakewood. All capital expenditures in excess of $500,000 for a particular item shall require a business plan approved by CCF. Cash which may be set aside for such expenditures unless and until actually spent shall be included in determining whether the requirements set forth in Section 2.1.1 have been fulfilled or whether CCF is required to advance funds to permit Lakewood to meet the ratio set forth therein; provided, however, that such cash, which has been set aside, shall not be treated as a capital expenditure under this Section 2.1.2 unless and until it has been actually spent.

2.1.3 Right to Manage. If cash generation from Lakewood operations and investments averages less than $3 million per year in any consecutive (i.e., rolling) three year time period (the "Period of Deficiency"), as reported in the audited financial statement entitled "Statements of Cash Flows", or CCF is required to advance funds which total in the aggregate $30 million or more to meet any requirement in the Agreement, CCF shall have the right to assume the management of the day to day operations of Lakewood, subject to the authority of

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the Lakewood Board of Trustees. Notwithstanding the prior sentence, during the period in which CCF provides the management of the day-to-day operations of Lakewood, CCF shall have the right to appoint a new CBO and Lakewood Board of Trustees shall not have the right to terminate or approve the CBO as provided in Section 1.1.2.2 of this Agreement. For example, Lakewood's cash generation in 1994 and 1995 was $9,627,409 and $12,992,588, respectively. Such determination shall be made without regard to any cash contributed by CCF hereunder. Such management rights shall exist for a period of three years from the end of the Period of Deficiency.

2.1.4 CCF shall provide Lakewood with funds (without any obligation to repay) in an aggregate amount of $10 million to assist Lakewood in the development or improvement of some or all of the programs and facilities listed on Exhibit 2.1.4A, attached hereto; provided, however, that seventy-five percent (75%) of such expenditures shall be made for programs or facilities located within the City of Lakewood. Such funds shall be committed and provided over a five year period from Closing, in accordance with a plan to be agreed to by the CCF and Lakewood, which plan may thereafter be amended from time to time by agreement of CCF and Lakewood; provided, however, that any plan or amendment thereto will provide for the funds to be used in the development or improvement of programs or facilities located within the Lakewood Service Area.

2.1.5 CCF shall use its best efforts to ensure that its affiliated and employed physicians who practice in the Lakewood Service Area, including the CCF Westlake satellite, shall maintain admitting privileges at Lakewood, subject to the staff privileges requirements adopted by Lakewood as applied to any particular physician. Further, CCF and Lakewood shall use their respective best efforts to ensure that (i) Lakewood shall participate, including proportionate management and Board governance (proportionate as to participation and investment), in the western regional system established by CCF as part of its overall strategic plan. If Lakewood participates in the western regional system, the corporate management and governance offices of the western regional system will be located at a physical location other than any physical location generally identified and/or associated with any of the participants; (ii) Lakewood and CCF affiliated and employed physicians practicing in the Lakewood Service Area shall participate, including proportionate management and Board governance (proportionate as to participation and investment) in the physician-hospital organization established for the western region by CCF, to the extent that such physicians individually meet any participation criteria adopted by such organization; and (iii) CCF primary care physicians maintain privileges at Lakewood and are encouraged to utilize all inpatient and outpatient services of CCF Health Care System facilities in the western region.

2.1.6 Upon request by Lakewood, CCF shall work together with Lakewood to establish the joint operation of specialty services at Lakewood, all of which specialty service modification shall be consistent with the overall strategic plan and budget which shall be as established by CCF.

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2.1.7 Upon request by Lakewood, CCF shall work together with Lakewood to establish and operate medical educational programs with Lakewood as a residency rotation site.

2.1.8 Upon request by Lakewood, CCF and Lakewood will jointly establish programs to improve administrative efficiency and cost reduction and other clinical/administrative services to which the parties agree.

2.1.9 At any time, CCF may cause the Board of Trustees of Lakewood to take all action necessary for the defeasance and/or redemption of any or all of its then outstanding tax exempt debt obligations; provided, however, that the cost of such defeasance and/or redemption, including the payment of principal thereunder, shall be borne by CCF.

SECTION 2.2 <u>Maintenance of Insurance</u>. From and after Closing, Lakewood will insure the hospital facilities at all times and carry such other insurance with respect to the operation and maintenance of the hospital facilities of such type and in such amounts as are normally carried by hospital facilities or health care facilities of similar type and size, and against such risks as are customarily insured against in connection with hospital operations and hospital facilities or health care facilities of similar type and size, and will at all times carry and maintain or cause to be carried and maintained, and will pay or cause to be paid timely premiums with financially sound and reputable insurers. Notwithstanding the forgoing, Lakewood will maintain at least the types of insurance listed in Exhibit 2.2.

ARTICLE 3.
REPRESENTATIONS AND WARRANTIES
OF LAKEWOOD

Lakewood represents and warrants to CCF that, as of the date of this Agreement and except as set forth in the Schedules:

SECTION 3.1 <u>Organization, Qualification and Corporate Power</u>.

3.1.1 Lakewood and each Affiliate (as hereinafter defined in Section 3.2) is duly incorporated, validly existing, and in good standing under the laws of the State of Ohio. Lakewood and each Affiliate has the corporate power and authority to own and hold its respective properties and to carry on its respective business as now conducted.

3.1.2 The trustees, directors and officers of Lakewood and each Affiliate, a true and complete list of whom is set forth on <u>Schedule 3.1</u>, have been duly and properly elected and all actions of the Board of Trustees or Board of Directors of Lakewood and each Affiliate required for the consummation of the transactions contemplated by this Agreement thereby requiring Board of Trustee or Board of Director approval have been taken pursuant to proper and valid Board approvals. Lakewood and each Affiliate has previously made available to CCF for review complete and correct copies of minutes of all meetings of the members or

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5.1.1 Lakewood (i) is validly existing, and in good standing under the laws of the State of Ohio; (ii) has been determined by the Internal Revenue Service to be exempt from federal income tax under Section 501(a) of the Tax Code, as an organization (and not a private foundation) as defined in Section 509(a) of the Tax Code, and a "hospital" within the meaning of Section 170(b)(1)(A)(iii) of the Tax Code; there have not been brought to our attention any changes in the Internal Revenue Service's position or the facts on which Lakewood's exemption is based which are likely to result in such exemption or status being jeopardized; (iii) is duly qualified to transact business in the State of Ohio; and (iv) has the corporate power to own and hold its properties and to carry on its business as now conducted. Lakewood has the corporate power and authority to execute, deliver, and perform its obligations under this Agreement and the Lease contemplated herein. All regulatory approvals necessary for Lakewood to perform fully the transactions contemplated herein have been obtained.

5.1.2 Lakewood has the full corporate power and authority to execute, deliver, and perform this Agreement, and, upon the requisite approvals thereof, all corporate action of Lakewood necessary for such execution, delivery, and performance will have been duly taken. This Agreement and the Lease have been duly executed and delivered by Lakewood and constitute the legal, valid, and binding obligation of Lakewood enforceable in accordance with their terms (subject as to enforcement of remedies to the discretion of the courts in awarding equitable relief and to applicable bankruptcy, reorganization, insolvency, moratorium, and similar laws affecting the rights of creditors generally).

SECTION 5.2 Representations and Warranties to be True and Correct. The representations and warranties made by Lakewood contained in Article 3 shall be true, complete, and correct in all material respects on and as of the Closing Date with the same effect as though such representations and warranties had been made on and as of such date, and an officer of Lakewood shall have certified to such effect to CCF in writing.

SECTION 5.3 Lease Agreement. The City and Lakewood shall enter into the Lease as referred to in Section 1.8, above.

SECTION 5.4 Bond Trustee Consent. Bond trustee for the holders of bonds for which Lakewood is the obligor shall have consented to the transactions contemplated herein, to the extent necessary.

SECTION 5.5 Performance. Lakewood shall have performed and complied in all material respects with all agreements contemplated herein that are required to be performed or complied with by Lakewood prior to or at the Closing Date.

SECTION 5.6 All Proceedings to be Satisfactory. All corporate and other proceedings to be taken by Lakewood in connection with the transactions contemplated hereby and all documents incident thereto shall be reasonably satisfactory in form and substance to CCF and its counsel, and CCF and its counsel shall have received all such counterpart originals or certified or other copies of such documents as they reasonably may request.

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