

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)	

**RELATORS' EMERGENCY MOTION AND AFFIDAVIT
FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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INTRODUCTION

Relators-Plaintiffs-Appellants Edward Graham, Marguerite Harkness, William Grulich, Deborah Meckes, and Amy Dilzell (“Relators”), by and through their counsel, seek injunctive relief of a temporary restraining order (“TRO”) and preliminary injunction to maintain the *status quo* against Respondents City of Lakewood (“City”) and Mayor Michael Summers (“Mayor”) (collectively, “Respondents”). Relators seek an order to stop the Respondents implementation of the proposed Ordinance No. 27-18 (“Ordinance”) pending before the Lakewood City Council regarding demolition of Lakewood Hospital (City-owned property at the southeast corner of Detroit Avenue and Belle Avenue) with the developer Carnegie Management and Development Company (“Carnegie”). (Exhibit 1).

The Ordinance is scheduled for its third and final reading on Monday, April 30, 2018, and the Lakewood City Council, with two thirds majority, could immediately vote to authorize the Mayor to enter into an agreement with Carnegie. According to the term sheet at Paragraph 10, the Ordinance obligates the City’s “Demolition” of Lakewood Hospital (“the Project Site”) and provide the land “in a ‘Development and Pad Ready’ condition” for the developer “as soon as practicable following execution of the Development and Use Agreement.” (Ex. 1).

The Ordinance fails to identify or reference the within Eighth District Court of Appeals matter, which would effect the City’s ability to demolish Lakewood Hospital. The Ordinance exemplifies the City’s abuse of corporate powers and disregard for the judicial process currently pending. As stated by the Appellate Panel during oral argument, this tribunal has the jurisdiction and power to prevent irreparable harm regarding Lakewood Hospital. At this critical junction, equitable relief is necessary to preserve Lakewood Hospital and the *status quo* until the appellate decision is rendered. Relators are not seeking to prevent the Lakewood City Council from voting, but seeking a TRO to prevent any implementation that would raze Lakewood Hospital.

ARGUMENT

As set forth in Plaintiffs' First Amended and Verified Complaint ("FAC") filed on August 5, 2015, Respondents fraudulently and in bad faith have circumvented the Amended Lease ("Lease") and Definitive Agreement ("DA") contract terms by changing, reducing, terminating, and transferring Lakewood Hospital and City-owned medical services, employees, and assets to third parties, including Defendant Cleveland Clinic Foundation's ("CCF") wholly-owned hospitals (i.e Fairview and Avon), outside of the City of Lakewood. Respondents now propose the irreparable harm of demolishing Lakewood Hospital, for the benefit of the developer Carnegie, and making the site "pad ready" for the project. Such an action would moot the pending appeal and relief being requested by the taxpayers: invalidating the restrictive use covenant and allow a competing hospital system to operate an inpatient medical facility.

No third parties will be harmed unjustifiably by a preliminary injunction. Carnegie, the developer seeking an executed term sheet through the Ordinance and the City's obligation to raze Lakewood Hospital, has nine months to perform its due diligence. (Ex. 1 at Paragraph 3.a.). Thus, no harm or delay should reasonably occur because that process should continue.

Moreover, the public interest will be served by maintaining an invaluable City-owned asset of Lakewood Hospital until this appeal is decided on the merits. The threat of losing the City-owned asset of Lakewood Hospital to demolition is very real and immediate. The City proposes through the Ordinance, despite this pending appeal, to enter into a term sheet that will require it to demolish Lakewood Hospital and make it "pad ready" for Carnegie at its expense. (See Affidavit of Relator Edward Graham and Ex. 1 at Paragraph 10). Such an action cannot be reversed. The City's largest asset is proposing to be destroyed while its elected officials and stewards do nothing. In fact, the Respondents propose to raze Lakewood Hospital, at their expense, and convey the land to Carnegie, without any compensation to the City of Lakewood.

There is no other remedy at the moment and Respondents will continue to move forward with their redevelopment plan, even in light of this appeal, as is exhibited by the terms of the Ordinance and letter urging its passage. (Ex. 1). This Court should also be aware that the Respondents have publicly demonstrated their disregard for the pending appeal by authoring Question No. 32 “Will any pending litigation affect this development?” and the Answer that “the City has no reason to believe any court would halt the development of this site.” (*See*, <http://www.onelakewood.com/wp-content/uploads/2017/02/One-Lakewood-Place-Term-Sheet-FAQs.pdf>). Contempt and indifference to this Honorable Court should not be condoned.

Respondents proposed actions will irreparably harm Relators, as intended beneficiaries, the taxpayers of the City of Lakewood, and the general public. The City’s present and future interests in Lakewood Hospital by the past, present, and future erosion of City-owned asset of Lakewood Hospital being razed and the land given to Carnegie, must not be allowed.

Wherefore, Relators move for a temporary restraining order to maintain the *status quo* and prevent the demolition of Lakewood Hospital while this appeal is pending. Relators’ proposed judgment entry would stop the presently proposed irreparable harm of demolishing Lakewood Hospital and allow for a determination of this appeal on the merits. An affidavit in support of this Motion and the facts pled in the FAC are incorporated by reference as if fully rewritten herein.

Relators’ counsel certifies to this Honorable Court that via email communication the Respondents’ counsel have been notified and sent a copy of this TRO and preliminary injunction filing. Furthermore, any additional notice is not required because of the irreparable harm that is proposed to occur, requiring immediate relief by this Court. Relators also request a preliminary injunction be ordered, or set down for a hearing at the earliest possible time - but no later than fourteen (14) days, to take precedence over all of the matters, except older matters of the same

character (i.e. equitable, emergency, and injunctive nature). Finally, Relators are attaching a proposed judgment entry for this Court to consider and execute as a TRO and preliminary injunction order to maintain the *status quo* and to stop any irreparable harm by Respondents' proposed Ordinance to raze Lakewood Hospital while this appeal is pending.

I. THE COURT SHOULD GRANT RELATORS' TRO AND MOTION FOR PRELIMINARY INJUNCTION TO PRESERVE LAKEWOOD HOSPITAL

The Court will “consider whether (1) the movant has shown a strong or substantial likelihood or probability of success on the merits, (2) the movant has shown irreparable injury, (3) the preliminary injunction could harm third parties, and (4) the public interest would be served by issuing the preliminary injunction.” *Sinoff v. Ohio Permanente*, 146 Ohio App.3d 732, 741, 767 N.E.2d 1251, 1257-1258 (8th Dist. 2002). Granting a “preliminary injunction is an extraordinary remedy and, as such, [Plaintiffs] ha[ve] a substantial burden to meet in order to be entitled to a preliminary injunction.” *Id.* at 740. However, “the interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of [the United States Supreme Court].” *Commonwealth of Mass. v. Mellon*, 262 U.S. 447, 486, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). The policy supporting “the extension of the equitable remedy to a single taxpayer in such cases [is] based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation.” *Id.* at 487 (Emphasis added). The public policy establishing taxpayers suits support a preliminary injunction as follows:

The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of [the United States Supreme Court]. [. . .] The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the

peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation.

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

A. Relators' Claims Are Meritorious

First, Relators have shown a likelihood of success on the claims in their appeal to this court and the facts plead in the FAC. Edward Grahams' affidavit in conjunction with the FAC verified pleading are sufficient to prove the looming threat of future irreparable harm regarding the Ordinance and proposed demolition and razing of Lakewood Hospital at Respondents expense and costs. (Ex. 1). Further, the land upon which Lakewood Hospital is built is proposed to be given to the developer Carnegie without any compensation to the City of Lakewood. (*Id.*)

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

Relators are elected officials and the stewards of the charitable trust Lakewood Hospital and have the following fiduciary duties:

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

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

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

In this case, the Respondents are not promoting the purposes of the charitable corporation Lakewood Hospital. The Ordinance to approve and enter into a term sheet with Carnegie, that obligates the city to demolish Lakewood Hospital, is not reasonable while this appeal is pending. (Ex. 1 at Paragraph 10).

B. There Is Irreparable Injury

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

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

Respondents have already stripped Lakewood Hospital of its medical programs, services, equipment, and employees in an effort to strengthen its position that Lakewood Hospital should be razed in favor of building a new private multi-use development. All signs point to this occurring on Monday, April 30, 2018, at the third and final reading of the Ordinance. The biggest loss will be the demolition and razing of the City-owned Lakewood Hospital before this appeal is determined on the merits.

C. No Third Parties Will Be Harmed

No third parties will be harmed by the issuance of a TRO and/or a preliminary injunction. Moreover, the intended third-party beneficiaries of Relators and Lakewood Hospital already have been harmed by the Relators' actions. Razing Lakewood Hospital will prevent the single-use facility from reopening for inpatient care, which is its highest and best use. Relators are only seeking to preserve the *status quo* and prevent the razing of Lakewood Hospital until this appeal is resolved. Respondents cannot reasonably claim that by slightly delaying the plan to demolish Lakewood Hospital will cause the City or Carnegie any harm. The Ordinance can be executed and the Due Diligence Period of nine (9) months can proceed. (Ex. 1 at Paragraph 3). Relators are only seeking a limited and narrow TRO/preliminary injunction regarding the implementation of the demolition of Lakewood Hospital. The least detrimental option is to GRANT Plaintiffs' motion for a TRO and issue a preliminary injunction, enjoining Respondents from the future irreparable harm proposed in the Ordinance regarding the demolition of Lakewood Hospital, until this case has been decided on the merits.

D. A Preliminary Injunction Will Best Serve The Public Interest

Fourth, the public interest would be served by issuing Relators' TRO and preliminary injunction because the public is the beneficiary of the Lakewood Hospital, a charitable trust. Denying Relators' TRO/preliminary injunction and allowing Lakewood Hospital to be razed

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

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

While this Court has discretion and power to grant an order for a TRO/preliminary injunction and fashion the order and its enforceability as it so pleases, there is legal precedent to support equitable relief being requested by the Relators.

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

A Texas appellate court affirmed plaintiffs' doctors granted "temporary injunction to prevent owners [of a women's health care hospital] from closing [the] hospital pending trial on the merits" on breach of contract and fraud claims where the trial court "held that: (1) injunction was a prohibitive injunction, not a mandatory injunction; (2) injunction preserved the status quo; (3) doctors adduced evidence of the requisite probable right of recovery and irreparable harm necessary to obtain injunction; [and] (4) language of injunction was sufficiently specific as to the status quo to be maintained [. . .]." *Thompson*. Similarly, the Supreme Court of Alabama affirmed a granting of a motion for preliminary injunction seeking to preserve the *status quo* until a suit by a hospital board challenging the hospital's management company's assignment of its lease to another company was resolved on the merits or settled. *Health Care Management Group of Camden, Inc. v. Health Care Management Group, Inc.*, 522 So.2d 280 (Ala. 1988) (holding "that hospital board was entitled to preliminary injunction preventing management companies from transferring funds out of state and from converting hospital into substance abuse rehabilitation facility, pending determination of merits of board's claim against management companies.").

In this case, Respondents have proposed razing Lakewood Hospital through an Ordinance scheduled for a third and final reading on Monday, April 30, 2018. In Georgia, a United States District Court granted a TRO in an anti-trust suit brought by the Federal Trade Commission

against a Georgia health care system trying to consolidate two hospital systems. *See F.T.C. v. Phoebe Putney Health System, Inc.*, M.D.Ga. No. 1:11-CV-58, 2013 WL 2553626 at *1 (May 15, 2013) (“Plaintiff’s TRO Motion [. . .] GRANTED and Defendants are ENJOINED from taking any further steps to consolidate Palmyra and Phoebe Putney [hospitals].”). The same relief should be granted here, a TRO, to prevent the demolition of Lakewood Hospital.

Further, in this case, Relators’ claims are ripe for review because the Ordinance is scheduled to be voted upon on Monday, April 30, 2018, after its third and final reading. There is precedent that by a United States District Court granting a motion for preliminary injunction in a case involving a proposal to close and transfer hospital facilities. In *Seafarers Int’l Union of North America, AFL-CIO v. Weinberger*, the United States District Court in the District of Columbia “held that the union had standing and had shown a strong likelihood of success of the merits entitling it to a preliminary injunction against proposed implementation of [a] plan” by the officials of the Department of Health, Education and Welfare to close and transfer facilities of Public Health Service hospitals. *Seafarers Int’l Union of North America, AFL-CIO v. Weinberger*, 363 F. Supp. 1053 (D.D.C. 1973) (“Preliminary injunction issued.”) (Emphasis added).

For the foregoing reasons, there is persuasive precedent involving TROs and preliminary injunctions being granted in relation to hospitals and contract breaches to support Relators’ motion for a TRO/preliminary injunction. Relators’ motion should be GRANTED and this Court should issue a TRO/preliminary injunction enjoining Relators from future misconduct until the Court has decided the merits of this appeal.

III. RELATORS PROPOSE A NARROWLY DRAWN, SPECIFIC ORDER THAT IS PROHIBITORY IN NATURE

Relators request the maintenance of the *status quo* and prevention of Lakewood Hospital's razing until the appeal has been resolved on the merits, which is specific, prohibitory, not mandatory in nature, and enforceable on the part of this Court.

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

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

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

Ohio's Civil Rule 65(D) provides for the form and scope of a restraining order or injunction: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained [. . .]." Civ. R. 65.

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

Thompson at 580 (quoting *San Antonio Bar Ass'n v. Guardian Abstract & Title Co.*, 156 Tex. 7, 291 S.W.2d 697, 702 (Tex. 1956)). The law in Ohio is nearly the same as in Texas regarding the specificity requirement of preliminary injunctions, though a little bit more vague. See *Adkins v. Boetcher*, 4th Dist. Ross No. 08CA3060, 2010-Ohio-554, 2010 WL 571987; *M.P.C. Plating Inc. v. Local 507, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 8th Dist. Cuyahoga No. 50973, 1986 WL 11517 (Oct. 2, 1986).

Relators request a prohibitory injunction, which is specific enough under Ohio law. The proposed order is prohibitory in the sense that it would prevent the Respondents from demolishing Lakewood Hospital while this appeal is pending. For the foregoing reasons, Relators' motion for a TRO/preliminary injunction should be GRANTED because a narrowly drawn, specific, and prohibitory proposed judgment entry can be issued.

CONCLUSION

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

Respectfully submitted,
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CERTIFICATE OF SERVICE

A copy of the foregoing **RELATORS' EMERGENCY MOTION AND AFFIDAVIT FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** has been filed through the Court's electronic case management system ("ECM"), is available for review on-line by counsel and parties, will be provided notice of filing by the Court's ECM system, and a courtesy pdf copy is also being sent via email only on this 26th day of April, 2018, to the following:

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STATE OF OHIO)
)
COUNTY OF CUYAHOGA)

SS: **AFFIDAVIT OF EDWARD M. GRAHAM**


The undersigned Edward M. Graham, being first duly sworn, deposes and says that:

1. I am an individual who is over 18 years of age, of competent mind, and providing sworn testimony from personal knowledge.
2. Affiant is one of the five Lakewood Taxpayers who have filed this lawsuit to save the Lakewood Hospital.
3. Lakewood’s mayor, council president, and planning director placed Ordinance 27-18 (Exhibit 1) on the April 16, 2018, docket seeking Council’s authorization for the City to enter into a non-binding term sheet agreement with Carnegie Management and Development Corporation (“Carnegie”) that authorizes the Mayor to provide, among other things, that the City would transfer to Carnegie, “for nominal consideration,” the land upon which the Lakewood Hospital building now stands at the southeast corner of Detroit Avenue and Belle Avenue in Lakewood, Ohio.
4. Paragraph 10 of the non-binding term sheet agreement would require the City to demolish the hospital buildings at a cost of \$7 million dollars and make the site “pad ready” for new construction, the preservation of which this appeal involves. (Ex. 1).
5. The terms of that agreement could result in Lakewood Hospital being torn down and the proposed private mixed-use retail, business and housing project never coming to fruition. (Ex. 1).
6. The highest and best use in value for the existing property is as an inpatient hospital as originally constructed, or as an outpatient medical facility.

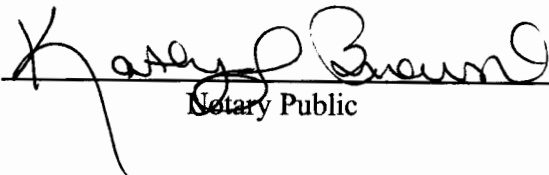
7. The Master Agreement, which is subject of this appeal, contains an illegal restriction on the use of the property as a medical facility by a competing hospital system of the Cleveland Clinic Foundation, which the mayor seeks to have made moot by the destruction of the medical buildings.
8. The pending lawsuit alleges that the Master Agreement between the City of Lakewood and the Cleveland Clinic Foundation was procured through bid rigging, fraud, and an exclusive contract steered only to the Cleveland Clinic Foundation. No competitor of the Cleveland Clinic Foundation was ever provided an opportunity to present a proposal for an outpatient medical facility on the Lakewood Hospital property.
9. Lakewood Council has regular meetings on the first and third Mondays of the month. Ordinance 27-18 was placed on the April 16, 2018, the second regular meeting of the month, for a first reading. A special council meeting was held a week later, on April 23, 2018, for the sole purpose of having a second reading of Ordinance 27-18. Another special meeting is scheduled for April 30, 2018 for the sole purpose of enacting Ordinance 27-18.
10. The mayor, a defendant in this case, is making every effort to destroy the subject of this case before the court makes a decision on the merits.
11. The expediting of the readings to enact Ordinance 27-18 seem to some as almost a fraud on the court.
12. There would be no remedy at law if the City were not enjoined from going forward with an agreement that calls for the destruction of Lakewood Hospital before this appeal is determined on the merits.

13. This case was filed May 28, 2015, almost two years ago and has yet to be decided on its merits. No party to this case would be harmed by a TRO and a preliminary injunction until the Eighth District Court of Appeals issues its opinion because the term sheet allows Carnegie nine (9) months to perform its due diligence. (Ex. 1).
14. To allow a party to destroy the res subject of the lawsuit would be unjust.

In Witness Whereof the undersigned Affiant, Edward M. Graham, sets his hand at Lakewood, Ohio this 26th day of April, 2018.


Edward M. Graham

Sworn to and subscribed in my presence this 26th day of April, 2018 at Lakewood, Ohio
by Edward M. Graham.


Notary Public



KATHY J. BROWN
Notary Public, State of Ohio
My Commission Expires
June 19, 2022

**DOCKET
OF A MEETING OF
THE LAKEWOOD CITY COUNCIL
TO BE HELD IN THE COUNCIL CHAMBERS
LAKEWOOD CITY HALL - 12650 DETROIT AVENUE
APRIL 16, 2018
7:30 P.M.**

The Regular Meetings of Lakewood City Council shall be held on the first and third Mondays of each month at 7:30 P.M., except that when such meeting date falls on a holiday such meeting shall instead be held on the following day. A Docket and Agenda of the business proposed to be transacted by Council will be available in the Clerk's Office and on the City's website www.onelakewood.com as soon after 4 PM on the Friday before a Council meeting as possible.

Section 121.08 of the Codified Ordinances of the City of Lakewood establishes rules for the public to follow when speaking before Council:

ADDRESSING COUNCIL – The President may recognize any non-member for addressing Council on any question then pending. In such cases, the person recognized shall address the chair, state his or her name and address and the subject matter he or she desires to discuss. Speakers must be courteous in their language and avoid personalities. When addressed by the Chair, the speaker must yield the floor and comply with all rulings of the chair, said rulings not being open to debate. Except with permission of Council specifically given, speakers shall be limited to five minutes. No person who has had the floor shall again be recognized until all others desiring an opportunity to speak have been given an opportunity to do so.

AGENDA ITEMS PROTOCOL:

The Clerk at the beginning of the meeting will present the AGENDA ITEMS sign-in sheet to the President of Council. Speakers will be called to address Council by the Chair. A citizen must first write his or her name, address and agenda item number on the designated sign-in sheet in order to be recognized.

PUBLIC COMMENT PROTOCOL:

The clerk at the end of the meeting will present the PUBLIC COMMENT sign-in sheet to the President of Council. Public Comment will be welcomed at the end of a Council Meeting on miscellaneous issues or issues other than agenda items. A citizen must first write his or her name, address and topic on the designated sign-in sheet in order to be recognized. The forum is not designed to be a question and answer session.

- I. Pledge of Allegiance
 - II. Moment of Silence
 - III. Roll Call
- Reading & disposal of the Minutes of the Regular Meeting of Council held April 2, 2018.

Reports, legislation and communications from Members of Council, the Mayor and other City Officials.

1. **ORDINANCE NO. 25-18** – AN ORDINANCE to amend Section 1105.02 of the Zoning Code of the Codified Ordinances of the City of Lakewood by changing and revising the Zoning Map of the City with respect to certain property as set forth and described as 1456 and 1470 Warren Road (PPN 314-04-063), from C4 (Public Schools) to C3 (Commercial, General Business). (REFERRED TO THE PLANNING COMMISSION 4/2/18) (Pg. 4)

2. **ORDINANCE NO. 26-18** – AN ORDINANCE to take effect immediately provided it receives the affirmative vote of at least two thirds of the members of Council, or otherwise to take effect at the earliest period allowed by law, amending Section 121.15, Duties of Clerk of Council, of the Codified Ordinances of the City of Lakewood in order to codify an obligation to verify training certificates found within the Third Amended Charter. (REFERRED TO THE RULES & ORDINANCES COMMITTEE 4/2/18) (Pg. 7)

******NEW BUSINESS******

3. Communication from Mayor Summers, Council President O’Leary, and Planning Director Sylvester regarding Recommended term sheet for One Lakewood Place, the Mixed-Use Development in the Heart of Lakewood. (Pg. 10)

4. **ORDINANCE NO. 27-18** –AN ORDINANCE to take effect immediately provided it receives the affirmative vote of at least two thirds of the members of Council, or otherwise to take effect and be in force after the earliest period allowed by law, authorizing the execution and delivery of an agreement by and between the City of Lakewood, Ohio, a municipal corporation and political subdivision in and of the State of Ohio (the “City”), and Carnegie Management and Development Corporation, an Ohio corporation (Carnegie”), related to the development of City-owned property at the southeast corner of Detroit Avenue and Belle Avenue, and authorizing and approving related matters. (Pg13)

5. Communication from Councilmember O'Malley regarding Appointment to Lakewood Citizens Advisory Commission. (Pg.30)
6. Keep Lakewood Beautiful Home Awards Presentation. (To Be Provided).
7. Communication from Human Services Director Gelsomino regarding 2018 ServeOhio Award-H20. (Pg. 31)
8. Communication from Public Works Director Beno regarding Authority for Purchasing through Consortiums & Purchasing Organizations. (Pg. 32)
9. **RESOLUTION NO. 8996-18** – A RESOLUTION to take effect immediately provided it receives the affirmative vote of at least two thirds of the members of Council, or otherwise to take effect and be in force after the earliest period allowed by law, authorizing the Director of Finance to enter into an agreement with Buy Board Cooperative Purchasing to continue the efficient purchasing with the City of Lakewood and to permit direct purchasing from said agency without the necessity of advertising and bidding as required in Lakewood Codified Ordinance §111.04, Bidding. (Pg. 33)
10. Communication from Public Works Director Beno regarding Cuyahoga County Solid Waste District. (Pg. 35)



12650 Detroit Avenue • 44107 • (216) 529-6630
www.onelakewood.com

April 16, 2018

Lakewood City Council
Lakewood, OH 44107

Re: Recommended term sheet for One Lakewood Place, the Mixed-Use Development in the Heart of Lakewood

Dear Council Members,

The city administration and Carnegie Development Corporation have agreed on a shared vision for the development at the corner of Belle and Detroit, known as One Lakewood Place, and now we are recommending your approval of the attached term sheet.

Our partnership with Carnegie has created a flexible document, with important controls, that will deliver a transformative project on this site. The term sheet explains the business terms and structure of the project, the roles and responsibilities of the parties, and the minimum requirements for each party to deliver. It is primarily informed by Carnegie's Round 2 proposal and the city's development objectives created to guide this entire process, both of which can be found at www.onelakewood.com/DowntownDevelopment. A summary of the sections and deliverables outlined in the term sheet includes:

- Minimums established for the amount of office, retail, residential and on-site structured parking to ensure a truly mixed use project is constructed
- Carnegie paying for the construction and maintenance, and programming for the first-class multi-functional community gathering space for the community
- The historic Curtis Block building will be preserved, and renovated to create dynamic new spaces for growth in this architecturally significant building
- The project will be completed within four years
- The project will be maintained in a first-class manner in accordance with an approved operations and maintenance plan
- Community engagement is specifically recognized as a vital and integral component of the project
- Acknowledging and affirming the importance of the planning review process by the Planning Commission and the Architectural Board of Review as part of the project
- The design of the project will integrate with the residential properties on Belle and Marlowe Avenues

- On-site structured parking will include available spaces for any patron or visitor to the Downtown Lakewood District
- Performance bonds will be secured for the to ensure the completion of the Project
- Carnegie and the city have agreed to explore ambitious areas of focus for sustainability elements this project may be able to take on – including renewable energy possibilities, alternative transportation, and green infrastructure

The estimated \$72 million development will generate real estate taxes on this property for the first time and will create new opportunities for income tax growth, most notably through new Class A office space and the addition of residential units that will attract businesses, add jobs, and increase the tax base. The project will generate a conservative estimate of \$1.5 million in combined real estate and income taxes annually, which will directly benefit Lakewood's tax base to support core services, in addition to supporting our other local government partners – the schools, the county, the MetroParks and the public library.

The city is investing in this project through the value of the land, which has an estimated value of between \$5 and \$6 million. The estimated value is primarily based on the fair market appraisal completed for Cleveland Clinic Family Health Center site in 2016, and will be confirmed by a market appraisal on the One Lakewood Place site. The city's investment is critical to achieving the above mentioned tangible benefits of the partnership, in addition to creating an opportunity for the city to be a formal partner throughout the design and approval process. One Lakewood Place will secure the long-term land use as a mixed-use site, which is a recognized urban development best practice that promotes and enhances neighborhood vibrancy and economic vitality, diversifies marketplace risk, and provides ample opportunities for people to engage with the project.

Carnegie has continued to be steadfast in its focus on and commitment to the development objectives, its proposal of a true mixed-use project, its approach to public financial support, and its confidence and thorough understanding of the marketplace. Specifically, Carnegie continues to address the importance of job creation, high quality urban design, opportunity for a diverse and sizable product mix (office, retail, apartments), and a commitment to forming a true partnership with the city. Carnegie is committed to making this Lakewood's project and is eager to begin the community planning process that will change the character of the project for the better.

The city and Carnegie have built confidence that this proposed partnership will deliver tangible results to the community and be a transformative project for the long-term. With the ordinance that follows, we are seeking your approval of the term sheet and related documents to allow for this project to begin in earnest. With an approval by the middle of May, Carnegie will be able to compete and sell this project at one of the nation's largest real estate conventions in the country. We look forward to working together on this important step of the process.

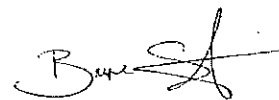
Sincerely,



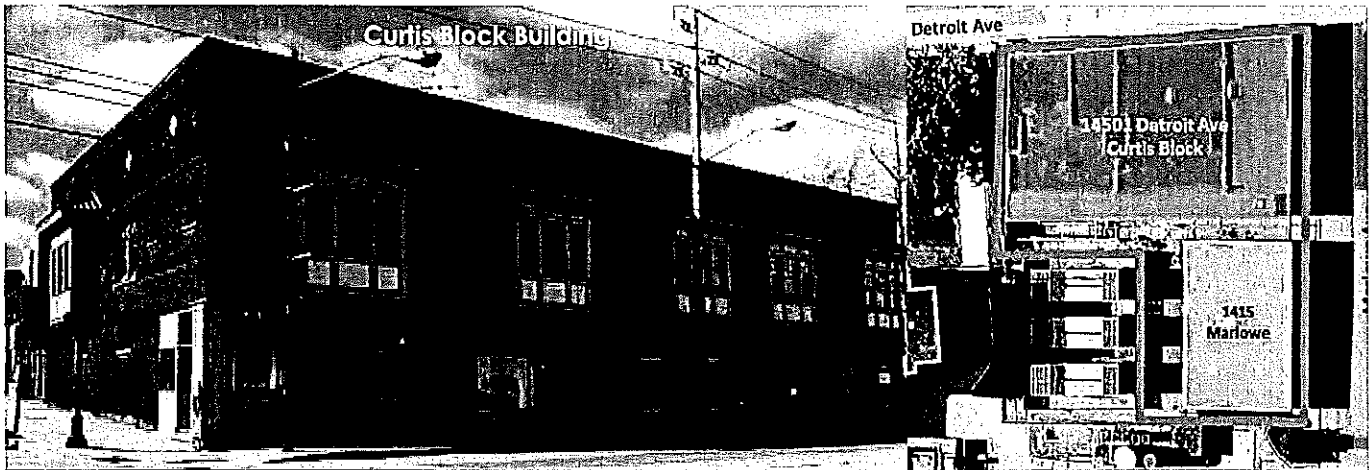
Mike Summers, Mayor



Sam O'Leary, Council President



Bryce Sylvester, Planning Director



DEVELOPMENT OBJECTIVES

The objective of the RFQ process is to select a private developer or development team that will develop the Site consistent with the City's Community Vision. Additionally, the development must be consistent with the Commercial Design Guidelines and fitting with the compact, walkable character of Downtown Lakewood. The Commercial Design Guidelines are linked on the Resources page. In summary, the development objectives for the Site include:

- A transformative mixed-use development that meets community housing, employment, shopping, and service needs, including growth opportunities for existing Lakewood businesses.
- Creatively integrate visionary architecture engaging and complimentary of the character and quality of Lakewood's building stock, including design characteristics of the original Hospital building.
- Relate to and activate the streetscape to generate street-level activity, and provide a safe, inviting pedestrian experience.
- Serve multiple modes of transportation on site, while meeting realistic vehicle parking needs.
- Design Lakewood's finest multi-functional outdoor community gathering space.
- Position the development to respond to shifting market conditions.
- Recognize and restate the historical significance of the site for the community in built form.
- Support environmentally sustainable development practices, including innovative storm water management techniques and energy efficient building practices that go beyond code requirements.
- Sensitivity to the directly adjacent single-family neighborhood.
- Promote joint venture partnership structures to achieve a catalyst economic development project that builds upon the real estate development momentum in Downtown Lakewood.
- Attract diverse businesses that provide residents with a wide range of opportunities.
- Provide housing types that compliment available community housing options.
- Business terms that deliver tangible returns on public investments, including job creation, tax revenue, and property values.



ORDINANCE NO.

BY:

AN ORDINANCE to take effect immediately provided it receives the affirmative vote of at least two thirds of the members of Council, or otherwise to take effect and be in force after the earliest period allowed by law, authorizing the execution and delivery of an agreement by and between the City of Lakewood, Ohio, a municipal corporation and political subdivision in and of the State of Ohio (the "City"), and Carnegie Management and Development Corporation, an Ohio corporation ("Carnegie"), related to the development of City-owned property at the southeast corner of Detroit Avenue and Belle Avenue; and authorizing and approving related matters.

WHEREAS, after an extensive period of due diligence and public input, the City has engaged in a process for identifying an appropriate developer and development plan for the City-owned property at the southeast corner of Detroit Avenue and Belle Avenue, known as the Lakewood Hospital site, and following that process has identified Carnegie as the most appropriate partner for such development; and

WHEREAS, the City administration and Carnegie have arrived at a shared vision to invest in the development of the Lakewood Hospital site, to be known as "One Lakewood Place," in a way that is beneficial to the citizens of Lakewood, including by providing a mix of office, retail and residential space, structured parking, a multi-functional outdoor public space, and a rehabilitation of the historic Curtis Block building; and

WHEREAS, pursuant to the Constitution of the State of Ohio, the Ohio Revised Code and the Third Amended Charter of the City of Lakewood, municipalities have the power to enact laws that are for the health, safety, welfare, comfort and peace of the citizens of the municipality, and to provide for local self-government; and

WHEREAS, as set forth in Section 2.12 of the Third Amended Charter of the City of Lakewood, this Council by a vote of at least two thirds of its members determines that this ordinance is an emergency measure and that it shall take effect immediately, and that it is necessary for the immediate preservation of the public property, health, and safety and to provide for the usual daily operation of municipal departments, in that the development agreement must become effective in order for the parties to take advantage of the 2018 construction season; now, therefore

BE IT ORDAINED BY THE CITY OF LAKEWOOD, OHIO:

Section 1. The City authorizes the execution and delivery of the non-binding term sheet recommended by and between the City and Carnegie in substantially the same form attached hereto as Exhibit 1 ("Term Sheet"), as approved by the Director of Law, related to the development of City-owned property at the Lakewood Hospital site.

Section 2. The Mayor is hereby authorized and directed to execute the Term Sheet, and any and all among the Mayor, President of Council, Director of Finance, Director of Law and Director of Planning and Development are hereby authorized and directed to execute such other related and ancillary documents, including a development agreement, instruments of conveyance and those documents related to closing, and to take such other actions as are necessary and appropriate to give effect to the Term Sheet, the development agreement and any other related and ancillary documents.

Section 3. All provisions of Chapters 111 and 155 of the Codified Ordinances, including but not limited to Sections 111.04 and 155.07, with respect to contracts for the purchase, sale or lease of City-owned property are deemed to have been met or superseded by this ordinance inasmuch as that chapter may apply to the real property transactions contemplated under the terms of the Term Sheet and subsequent development agreement.

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 of any of its committees that resulted in such formal action were in meetings open to the public, in compliance with all legal requirements.

Section 5. This ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, property, health, safety and welfare in the City and for the usual daily operation of the City for the reasons set forth and defined in the preamble to this ordinance, and provided it receives the affirmative vote of at least two thirds of its members of Council this ordinance shall take effect and be in force immediately, or otherwise shall take effect and be in force after the earliest period allowed by law.

Adopted: _____

PRESIDENT

CLERK

Approved: _____

MAYOR

EXHIBIT 1

Recommended Term Sheet

(See following pages)

EXHIBIT

1

April 2, 2018

Carnegie Management and Development Corporation
27500 Detroit Road, Suite 300
Westlake, Ohio 44145
Attention: Mr. George J. Papandreas, E.V.P.

RE: Term Sheet for One Lakewood Place (the "Project")

Dear Mr. Papandreas:

This letter summarizes the material terms and conditions for a potential transaction between the City of Lakewood (the "City") and Carnegie Management and Development Corporation ("Developer") relating to the above-referenced Project. The terms and conditions under consideration are:

1. Project Description.

The Project will consist of a multi-story mixed use office/retail/residential development located on approximately 5.7 acres of City-owned real property bounded by Detroit Avenue, Belle Avenue and Marlowe Avenue in the City of Lakewood (the "Project Site"), as generally depicted on the site plan attached hereto as Exhibit A. Developer submitted the Project as part of the Request for Qualifications (RFQ) issued by the City on February 6, 2017, and as presented in response to the Request for Proposals (RFP) issued by the City on May 8, 2017.

The Project will include a mix of office, retail and residential space, structured parking, a multi-functional outdoor public space, and a rehabilitation of the historic Curtis Block building.

The Project will demonstrate high quality design and architecture; it will include a balanced and thoughtful mix of uses, incorporate economically feasible sustainable development practices, create a first class multi-functional outdoor community gathering space, and be supported by the Community Vision, the Development Objectives, and the Commercial Design Guidelines (copies of which are available at www.onelakewood.com/DowntownRFO).

2. Project Requirements.

- a. **Office and Retail Development Requirements.** The Project will include a mix of retail and office users. Except as otherwise provided in this letter, the Project will include a minimum of 100,000 square feet, combined, of office and retail space (the "Minimum Combined Commercial Development"), consisting of at least 35,000 square feet of office space and 25,000 square feet of retail space.

If Developer has committed to proceed with the Residential Component (defined below), Developer may convert up to 40,000 square feet of the

Minimum Combined Commercial Development to residential use in response to market conditions, provided Developer still meets the individual minimum requirements for office space and retail space set forth above.

Developer will submit a summary of anticipated retail tenant categories for the City's review, which tenant mix will be generally consistent with the product mix concept submitted by Developer in response to the RFP.

- b. **Residential Development Requirements.** The Project will include a minimum of the lesser of either (i) 140 residential units or (ii) 100,000 square feet (the "Residential Component"). The residential units will be (i) reflective of current and anticipated market conditions, (ii) respectful of and sensitive to the scale and character of the surrounding single family neighbors, and (iii) responsive to the changing dynamics of housing demand and availability within the City of Lakewood. Developer shall strive to include at least 15 "for sale" units or 15,000 square feet of "for sale" residential space, whichever is less.

If Developer elects to engage a partner in (or assign responsibility for) the Residential Component to a third party, such partner or assignee shall be subject to the City's approval, which approval will not be unreasonably withheld, conditioned or delayed.

- c. **Preservation of Curtis Block.** The Curtis Block building has been designated as an historic structure pursuant to Chapter 1134 of the City's Zoning Code. Developer's incorporation of the Curtis Block into the Project will include the following:
- i. Developer will secure a certificate of appropriateness for the exterior of the Curtis Block building from the Architectural Board of Review ("ABR") which confirms that proposed design plans for the building are in accordance with Chapter 1134.
 - ii. Developer will retain the building's key architectural features, and implement measures to preserve the existing form, integrity and materials of the building when economically feasible.
 - iii. Developer will collaborate with the City to jointly explore the highest and best use of the Curtis Block, including considering tenant and use options that support community initiatives, organizations, goals and/or programs.
- d. **Public Space/Improvements.** The Project shall include no less than .5 acres located at the corner of Detroit Avenue and Belle Avenue dedicated to public use (the "Public Plaza"). Ownership of the Public Plaza will be transferred to Developer in a manner more particularly described in the Development and Use Agreement (defined below). The

Public Plaza will be improved in a first class manner with quality materials in service of the objective of being a first class multi-functional community gathering space. Developer shall be responsible for maintaining and programming the Public Plaza consistent with Sections 3(b) and 7 of this letter.

- e. **Historical Significance.** The City and Developer acknowledge the historical significance of the Project Site to the Lakewood community. To the extent economically feasible, Developer shall make an effort to honor such history and incorporate it into the design and/or programming of the Project Site.
- f. **Parking Requirements.** On site, adjacent, and proximate parking is critical to the success of the Project. Parking requirements for the Project will be determined primarily by the final Project size and occupant mix and will be satisfied through (i) on-site structured parking owned by Developer and (ii) existing public parking/shared parking proximate to the Project. A portion of the parking spaces within the Project shall be made available for use by the public on terms similar to downtown municipal parking lots (e.g. first 30 minutes are free). For the avoidance of doubt, the “public” spaces shall be available to all downtown visitors and shall not be limited to patrons of the Project.

Developer has been advised that the City has certain parking obligations related to the Project Site under Section 2.2(b) and (c) of that certain Master Agreement among the City, Lakewood Hospital Association and the Cleveland Clinic Foundation, dated December 21, 2015. The City will continue to explore a mutually acceptable alternative approach to satisfying these obligations prior to execution of the Development and Use Agreement.

3. **Property Conveyance.**

- a. **Due Diligence Period.** Developer will have a period of nine months following the execution of a development, use and sale agreement mutually agreed upon by the City and Developer (the “Development and Use Agreement”), which period may be extended for an additional three-month period, provided Developer is working in good faith to determine the feasibility of the Project (the “Due Diligence Period”) in which to conduct, at Developer’s sole cost and expense, any inspections of the Project Site Developer deems necessary or desirable to confirm the feasibility of the Project and the condition of the Project Site, including, without limitation, physical inspections, environmental inspections, tests and surveys, soil borings, geotechnical testing, surveys and title searches. Developer will provide the City with copies of any such inspections and reports, regardless of whether Developer elects to proceed with the acquisition of the Project Site. Prior to the expiration of the Due Diligence

Period, Developer may elect to terminate the Development and Use Agreement in writing, for any reason, and upon such termination, Developer will have no further rights or obligations under the Development and Use Agreement except for provisions of the Development and Use Agreement that expressly survive termination.

- b. **Public Plaza.** In consideration of the transfer of the Public Plaza, the Development and Use Agreement will provide for: (i) City review and approval of the plans and specifications for the Public Plaza in accordance with its normal ABR and Planning Commission process; (ii) continuing Developer responsibility for maintaining the Public Plaza in a first class condition; (iii) continuing Developer responsibility for programming of the Public Plaza; and (iv) City access to and use of the Public Plaza for community events, the cost, terms, frequency and schedule for which is based on a mutually agreed number of days as will be more particularly addressed in the Development and Use Agreement.
- c. **Conditions to Closing.** If Developer does not elect to terminate the Development and Use Agreement as provided herein, the City will convey fee title to the Project Site to Developer via limited warranty deed. In consideration of (i) Developer's commitment to construct the Project in a first-class manner and in accordance with the Development Objectives, including the Public Plaza and other components described in this letter, (ii) inclusion of sustainability features, as more particularly described in Section 4(c) below, and (iii) the other economic benefits that are anticipated to be realized by the construction of the Project, and as part of the City's investment in the Project, the City will convey the Project Site to Developer for nominal consideration (the "Purchase Price").
 - i. **Conveyance of Project Site:** Conveyance of the Project Site (including the Residential Component) to Developer shall be subject to Developer demonstrating to the City's reasonable satisfaction that it has satisfied the following conditions:
 - (A) Developer has obtained executed commitment letters from one or more lenders sufficient for financing at least the construction of the Public Plaza, the office and retail components of the Project and the parking garage, together with confirmation from such lender(s) that they are prepared to close the financing;
 - (B) Developer and the City have commenced negotiating a mutually acceptable operations and maintenance plan for the Public Plaza;
 - (C) Developer, with assistance and support from the City, has obtained the necessary rezoning and any required lot splits or consolidations contemplated by Section 4(a) below;
 - (D) ABR and the Planning Commission have approved the plans and specifications for the Project as contemplated by Section 4(b) below; and
 - (E) such other customary closing conditions to be more particularly described in the Development and Use Agreement. If

the foregoing conditions to transfer of the Project Site are not satisfied within twelve (12) months after the expiration of the Due Diligence Period, the City shall have the option of terminating the Development and Use Agreement, and upon such termination, the parties will have no further rights or obligations under the Development and Use Agreement except for provisions of the Development and Use Agreement that expressly survive termination; provided, that Developer shall have the right to extend such period so long as Developer is diligently pursuing satisfaction of any remaining conditions.

- ii. **Reversion of the Residential Component:** The City shall retain a reversionary right in the Residential Component of the Project Site in the event the Developer fails to demonstrate (to the City's reasonable satisfaction, not to be unreasonably withheld) that it has fulfilled the following conditions: (A) within eighteen (18) months after conveyance of the Project Site, Developer has obtained executed commitment letters from one or more lenders sufficient for financing the construction of the Residential Component, together with confirmation from such lender(s) that they are prepared to close the financing; (B) within eighteen (18) months after conveyance of the Project Site, the City has approved the proposed partner or assignee (if other than Developer) for the Residential Component in accordance with the proposed requirements set forth in Section 2(b), if applicable; (C) by October 1, 2021, Developer shall have commenced re-grading of the Project Site in preparation for development; and (D) by April 1, 2022, Developer shall have commenced construction of the Residential Component as evidenced by commencing the pouring of the foundations for the Residential Component (all of the foregoing collectively referred to as the "Reversionary Conditions"). In the event of a failure of fulfilling any of the Reversionary Conditions, Developer shall convey fee ownership of the Residential Component to the City in a manner consistent with this Section 3(c)(ii) and otherwise mutually acceptable to the parties. If the City exercises its reversionary right described in this Section 3(c)(ii), (1) Developer shall reconvey the Residential Component of the Project Site to the City free and clear of all liens and other encumbrances, other than those liens and encumbrances that were in effect on the date the City conveyed the Project Site to Developer, and (2) Developer shall indemnify the City against any changes in the environmental condition of the Residential Component of the Project Site arising after the date of the City's original conveyance.

4. **Design and Construction Guidelines.** The Project will be constructed in accordance with the Commercial Design Guidelines and the Development Objectives. In addition, the Project will be constructed of high quality materials in accordance with the plans and specifications approved by the ABR and the Planning Commission. "High quality material" shall mean durable and authentic materials containing thoughtful detailing. The Project will reflect a "four-sided" design that is aesthetically pleasing from all building elevations. The Project will seamlessly integrate with the design, massing and materials of existing commercial buildings in Lakewood. In particular, Developer will cooperate with the City to arrive at a mutually acceptable and appropriate transitioning of the massing and height of south building(s) to integrate with the existing houses located on Belle Avenue and Marlowe Avenue, as determined by Developer, ABR and the Planning Commission.

In addition to the formal approvals described below, Developer will coordinate with the City Architect and Planning Director on all aspects of the Project, including, in particular, on the design of the public space. Developer will prepare and submit to the City for approval its plans for the exterior configuration, appearance, orientation, and permitted uses of the Project. The City will cooperate with Developer in obtaining all such approvals.

- a. **Rezoning/Lot Split and Consolidation.** In connection with the Project, the Project Site will need to be rezoned as a Planned Development, as more particularly described in Chapter 1156 of the Lakewood Zoning Code. The parties will work together to commence the rezoning process as soon as possible after the execution of the Development and Use Agreement. In light of Developer of obtaining a survey of the Project Site in connection with its due diligence, Developer also shall engage such surveyor to undertake a lot consolidation and any lot splits required by Developer for the development of the Project. If the rezoning process is delayed due to reasons outside of Developer's reasonable control, the City will agree to an extension of the Due Diligence Period sufficient to allow for the completion of the rezoning process.
- b. **ABR and Planning Commission Approvals.** The plans and specifications for the Project will be subject to review and approval by the ABR and the Planning Commission. Any material deviation from the final approved plans will be subject to City approval. These approvals (including the rezoning) are anticipated to require 6 - 10 months and are required to be complete prior to the transfer of the Project Site as described in Section 3(c).
- c. **Sustainability.** In addition to meeting the Development Objectives relating to sustainability, Developer in good faith will explore design options for the Project that prioritize renewable energy, alternative transportation and green infrastructure, which may include, to the extent economically feasible, the following elements:

- i. On-site renewable energy (examples may include installation of solar panels and/or geothermal energy systems) and/or a smart grid system with advanced energy metering; and
- ii. A car and/or bicycle share program, ample bicycle facilities, including dedicated, secure storage areas, and electric vehicle charging stations, or other alternative transportation options.

In the event that the aforementioned design options require additional studies, approvals or permits, Developer and the City agree to share associated costs, to the extent mutually agreeable.

In addition to the foregoing, Developer must comply with the requirements of Section 1339 of the municipal code, which address storm water management.

5. Timing Requirements.

- a. Developer anticipates commencing construction of the Project no later than three months after the expiration of the Due Diligence Period and anticipates completing construction of the entire Project not later than 48 months after the expiration of the Due Diligence Period, subject to “Uncontrollable Delays” (the definition for which shall include customary force majeure concepts, permit delays of no longer than 180 days and other mutually agreed upon permissible delays in the Development and Use Agreement), as evidenced by delivery of certificates of occupancy for each component of the Project.
- b. Notwithstanding the anticipated schedule reflected in Section 5(a) above, and subject to Uncontrollable Delays, in all events:
 - i. Developer shall complete construction of the office and retail components of the Project no later than December 31, 2022, as evidenced by a certificate of completion executed by Developer’s architect and evidence that such component of the Project has received all applicable City approvals necessary to obtain a certificate of occupancy upon completion of any tenant-specific work (“Substantial Completion - Commercial”);
 - ii. Developer shall complete construction of the Public Plaza and structured parking components of the Project no later than December 31, 2022, as evidenced by sufficient completion to make such components ready for public use (“Substantial Completion – Public Components”);
 - iii. Developer shall complete renovation of the Curtis Block building no later than December 31, 2021, to the point of Substantial Completion - Commercial; and

- iv. Developer shall complete construction of the Residential Component no later than December 31, 2023, as evidenced by (A) delivery of certificates of occupancy for the “for rent” portion of the Residential Component and (B) sufficient completion to permit the issuance of a certificate of occupancy upon installation of appliances and other finishes to be selected by the end purchaser (as applicable “Substantial Completion – Residential”). In the event that the Developer has not commenced construction of the Residential Component on or before an agreed upon outside date than the portion of the Project Site comprising the Residential Component may be re-conveyed to the City on the terms and subject to the conditions set forth in the Development and Use Agreement.
- c. Developer will submit a detailed timeline and master schedule for Project milestones for the City’s review within 60 days after execution of this letter, which timeline will be incorporated into the Development and Use Agreement. Such master schedule may be subject to amendment from time to time as development of the Project progresses, without the City’s approval, except where the outside commencement date or outside completion dates in Section 5(b) are changed, in which event the Developer shall seek approval of the City not to be unreasonably conditioned, withheld, or delayed.
- d. The parties agree to revisit the outside completion dates set forth in this Section 5(b) in the event the Development and Use Agreement is not executed by both parties by July 1, 2018.

6. Community Engagement and Reporting Requirements.

- a. Developer acknowledges that community engagement is a critical component of the Project and will cooperate with the City during the planning stages of the Project to gather and incorporate input from the Lakewood community and will specifically engage with property and business owners and organizations in the Downtown Lakewood district, as well as residents on residential streets surrounding the Project Site.
- b. Developer and the City will agree to a mutually acceptable schedule of status updates and meetings throughout the design and construction of the Project as well as a communication plan to be incorporated into the master schedule.

7. Maintenance and Programming.

Developer will maintain the Project in a first class manner, consistent with the operations and maintenance plan submitted in response to the RFP and other high quality mixed use developments in Northeast Ohio, including necessary

mulching, grass cutting, pruning, watering, etc., and will comply with an operations and maintenance plan for the Project to be mutually agreed upon by the City and Developer.

8. **Use Restrictions.** The Project will be subject to usual and customary use restrictions, including prohibitions against noxious uses, as set forth on Exhibit B attached hereto.
9. **Transfer Restrictions.** Developer will not convey any component of the Project to a third party for a period of three (3) years after such component achieves Substantial Completion – Commercial, Substantial Completion – Public Components or Substantial Completion – Residential, as applicable, without the City’s written approval, which approval will not be unreasonably withheld, conditioned or delayed. For the avoidance of doubt, the restrictions set forth in this Section 9 include transfers of membership interests in Developer that would result in a “change of control” (the definition of which shall be mutually agreed upon in the Development and Use Agreement). Notwithstanding the foregoing, Developer shall be permitted to convey the Residential Component to a party approved by the City pursuant to Section 2(b) without the City’s consent; provided, however, following such transfer the restrictions set forth in this Section 9 shall apply to any further transfer of the Residential Component.
10. **Demolition and Hazardous Materials Abatement.** As soon as reasonably practicable following the execution of the Development and Use Agreement, the City will complete the hazardous material abatement and demolition work necessary to deliver the Project Site in a “Development and Pad Ready” condition in accordance with the specifications and by an outside delivery date to be agreed upon and attached to the Development and Use Agreement.
11. **Financing.**
 - a. Except as otherwise expressly provided herein, Developer will be solely responsible for funding development of the Project, whether through equity, conventional financing or otherwise.
 - b. The City will cooperate with and provide support to Developer in its efforts to identify and apply for additional available county, state and federal funding for the Project and will consider providing additional incentives related to securing long-term tenants and improving the economic viability of the Project.
12. **Bonds.** Developer will provide payment and performance bonds sufficient to ensure the completion of the Project in form and substance customary for projects similar to the Project.
13. **City Repurchase Right.** In addition to other remedies to be more particularly described in the Development and Use Agreement, if Developer defaults in its obligations under the Development and Use Agreement prior to completion of

construction of any component of the Project (as evidenced by a certificate of occupancy for such component) and fails to cure such default within any applicable notice or cure period, the City will have the option to repurchase the Project Site under terms and conditions to be mutually agreed upon in the Development and Use Agreement.

14. **MBE/FBE Goals.** Developer will use commercially reasonable efforts to meet the MBE and FBE goals mutually agreed upon by the City and Developer and included in the Development and Use Agreement.
15. **Building Trades.** Developer recognizes the value of including building trades in the Project and will make good faith efforts to work with the building trades in connection with the Project.
16. **Miscellaneous.**
 - a. The parties acknowledge and agree that the scope, components and tenant mix of the Project as currently contemplated may need to be adjusted based upon additional underwriting and analysis to be completed following the execution of this Term Sheet. The Project scope, components and tenant mix may be adjusted following the execution of this Term Sheet based upon such underwriting and analysis and the mutual determination of the City and Developer that the anticipated scope, certain components of the Project and/or the tenant mix may not be economically feasible as initially envisioned.
 - b. Other than any costs that the City agrees to share pursuant to Section 4(c) above, Developer shall be responsible for its legal fees, its due diligence costs, the costs for any studies or reports ordered by Developer and any permit or approval fees required in connection with the Project. The City shall be responsible for any costs the City agrees to share pursuant to Section 4(c), its legal fees, and its due diligence costs associated with the demolition and hazardous material abatement work contemplated by Section 10. Except as set forth above or in the Development and Use Agreement, the sharing of costs associated with the Project shall require the mutual agreement of the parties.
 - c. Developer will require that its general contractor and all subcontractors make all required local income tax payments due in connection with the construction of the Project.

Both parties acknowledge and agree that this letter is not a legally binding instrument and that additional material terms must be negotiated before a legally binding agreement is reached. The potential transaction reflected in this letter is specifically conditioned upon (i) the preparation, negotiation and execution of a mutually acceptable Development and Use Agreement, and (ii) the approval of Lakewood City Council of the Development and Use Agreement. Neither party hereto will have any obligation or liability to the other whatsoever at law or in equity

(including any claims for detrimental reliance, partial performance, good faith or promissory estoppel or other similar types of claims) unless and until such time as both parties will have executed and delivered a formal Development and Use Agreement. Notwithstanding anything herein to the contrary, this paragraph supersedes all other conflicting verbal understandings or agreements or language set forth in the herein. The parties acknowledge a desire to complete negotiation of a mutually acceptable Development and Use Agreement within 90 days after execution of this letter.

We look forward to your response.

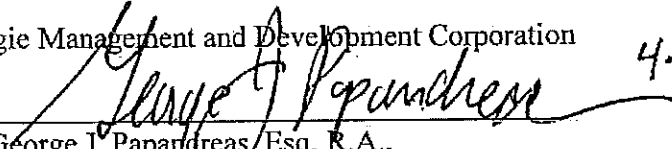
Sincerely,

Mayor Michael P. Summers

AGREED AND ACCEPTED:

Carnegie Management and Development Corporation

By:


George J. Papandreas, Esq. R.A.,

4.2.18

Its: Executive Vice President and Project Executive

Exhibit A

Site Plan

[to be attached]

Exhibit B

Prohibited Uses

- (a) An adult or pornographic bookshop, video store or movie theater (materials shall be considered “adult” or “pornographic” if the same are not available for sale or rental to children under 18 years old because they explicitly deal with or depict human sexuality);
- (b) A strip club, massage parlor, “head shop” or other store selling drug paraphernalia, tattoo parlor, bingo hall, or off-track betting parlor; provided, however, the prohibition against massage parlors shall not be deemed to prohibit massage services by a doctor, chiropractor or by a nurse or massage services offered by a licensed massage therapist in connection with the operation of a nail salon, hair salon, day spa, barber shop, health club or health spa;
- (c) A check-cashing or pawn shop;
- (d) A State liquor or packaged beverage store, except incidental to a supermarket, restaurant, prepared food shop, or cafe; provided, however, a high-end wine store that includes ancillary liquor sales shall be permitted;
- (e) A “second-hand” store whose principal business is selling used merchandise, thrift shop, “Salvation Army” or “Goodwill” type store, flea market or bazaar, except a high-end specialty re-sale shop is not prohibited;
- (f) A funeral parlor;
- (g) A business or use involving the sale of firearms;
- (h) A business or use that creates strong, unusual or offensive odors, fumes, dust or vapors, except for restaurants with adequate venting and odor-control facilities, or creates unusual fire, explosives or other hazards;
- (i) Off track betting club, internet sweepstakes cafes;
- (j) Fast food restaurants;
- (k) Manufacturing operation, factory, lumberyard, Industrial usage, except for use incidental to a retail operation, i.e. producing a small product on the premises for sale or to provide services on the premises to patrons of the location on the premises only, such as, but not limited to, eye glasses, dry cleaning and tailoring operations, provided such use does not cause noise or odors materially detectable outside the premises and is otherwise in compliance with the City’s zoning code.
- (l) Warehouse, processing or rendering plant;
- (m) Establishment selling cars (new or used), trailers, mobile homes, motorcycles, motor vehicles, boats;

- (n) Gas station, car wash or car repair;
- (o) Disco, night club or adult entertainment as a primary use;
- (p) Stores selling auto parts – exclusively or primarily;
- (q) “Vape” shops;

(r) The Project will not be operated as an “off price” center (i.e. will not be held out by Developer as a “discount center” as such term is recognized in the industry) and will not contain discount stores, including, but not limited to so-called “dollar stores” such as Family Dollar, Dollar General, etc.

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)	

[PROPOSED] TEMPORARY RESTRAINING ORDER & PRELIMINARY INJUNCTION

This cause came to be heard upon Relators’ Emergency Motion for a Temporary Restraining Order and Preliminary Injunction and was supported by an affidavit.

It appearing to the full satisfaction of the Court that this is a proper case for a temporary restraining order and preliminary injunction order and that Relators have no plain, speedy, or complete remedy at law to give them relief for those matters complained of in the motion for temporary injunction order; that unless a preliminary injunction order is issued as prayed for in Relators’ motion and supported by the affidavit, Relators will suffer substantial and irreparable harm before the matter can be heard upon Relators’ appeal, which is fully briefed and oral arguments concluded; that the subject matter is unique; that harm to Relators and other similarly situated class members, if injunctive relief is denied, would be greater than the harm to Respondents the City of Lakewood and Mayor Michael Summers or any third parties, if subsequent relief is granted; Relators have shown the likelihood of success on the merits; and that based upon the foregoing findings of fact and application of law;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that a temporary restraining order and preliminary injunction order preventing the demolition of Lakewood Hospital and maintaining the *status quo* regarding Lakewood Hospital as medical facility building until a further order of this Court. The *status quo* further requires the Respondents to refrain from implementing any action regarding the proposed City of Lakewood Ordinance No. 27-18, specifically Paragraph 10 of the attached term sheet, that obligates "Demolition" of Lakewood Hospital ("the Project Site") by Respondents and to provide the land "in a "Development and Pad Ready' condition" for the developer "as soon as practicable following execution of the Development and Use Agreement." This Order does not prevent or interfere with Relators action regarding the proposed ordinance at the April 30, 2018, City Council meeting.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiffs need not file a bond or other security because no damage or delay will occur. The Ordinance has a nine (9) month due diligence period and the temporary restraining order and preliminary injunction will not interfere with the Relators or any third-parties from performing their duties.

IT IS SO ORDERED.

Date

JUDGE

Prepared by:

Christopher M. DeVito (0047118)

Morganstern, MacAdams & DeVito Co., L.P.A.

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