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VIA HAND DELIVERY

RECEIVED

April 1, 2015

APR 1 2015

Ms. Courtney Avery
Administrator
Illinois Health Facilities and
Services Review Board
525 West Jefferson Street, 2nd Floor
Springfield, IL 62761

HEALTH FACILITIES &
SERVICES REVIEW BOARD

Re: **Project No. 14-043, St. Elizabeth's Hospital, O'Fallon**

RESPONSE TO LEGAL OBJECTIONS

Dear Ms. Avery:

My law firm has been retained by the applicants on St. Elizabeth's Hospital, Project No. 14-043, in connection with various objections advanced by opponents to the hospital's relocation project which have no bearing on the merits of the project and appear to be intended with an eye towards litigation against the Illinois Health Facilities & Services Review Board ("Board") were it to approve the hospital's project. As addressed below, the objections have either not been recognized by the courts or, to the extent addressed, have never prevailed in court.

One of the project's opponents, the City of Belleville, has communicated in writing that it is preparing for litigation against the Board if Project No. 14-043 is approved. When the City refused to comply with a lawful FOIA request for documents relating to Project No. 14-043, it claimed the documents were prepared "upon the request of the attorneys advising the City" in anticipation of legal proceedings. It also wrote that responsive documents were withheld because of "the City Council's consideration of probable, imminent" litigation.¹

The City specified the nature of its anticipated litigation in response to an investigation by the Attorney General's office into the City's failure to comply with the FOIA request. The City's attorney wrote that "the City is tantamount to a party in this administrative proceeding under the Illinois Health Facilities Planning Act (IHFA) (20 ILCS 3920/1 *et seq.*)" and that "the City would have standing to seek administrative review of any adverse decision in such

¹ See, Letter from City Attorney to Ms. Clare Ranalli dated October 16, 2014. This letter is included in the project file for Project No. 14-043 with the Barnes & Thornburg, LLP submission dated November 24, 2014 from Daniel Lawler to Ms. Courtney Avery.

administrative proceeding under Section 11 of the IHFPA (20 ILCS 3920/11).² The City's response to the Attorney General then repeats that documents were being withheld because of "the City Council's discussion of this matter in closed session as probable, imminent or pending administrative litigation affecting the City." (*Id.*) The City's specific reference to standing to challenge an adverse decision of the Board under Section 11 of the Planning Act and to imminent litigation contemplates only one thing: a lawsuit by the City against the Board to challenge an approval of Project No. 14-043.

We question the City's claim of standing. To our knowledge, no municipality has ever been found to have standing in court to challenge the issuance of a certificate of need by the Board, much less to have prevailed in court.

The City is partnering with Memorial Hospital in opposition to St. Elizabeth's project. The two have acted together to oppose St. Elizabeth's and support Memorial's respective CON projects dating back to Memorial's "satellite" facility in Shiloh. When Memorial submitted its CON application to the Board requesting its new (not replacement) hospital in Shiloh, Memorial recruited the City's mayor to address the Board during public comment and supplied him with talking points.³ Subsequently, Memorial sent the mayor a letter of appreciation that conveyed the hope that Memorial could "count on your continued partnership with Memorial."⁴ In furtherance of this partnership, the City requested a public hearing on St. Elizabeth's Project No. 14-043, and together with Memorial organized and funded a negative attack campaign against the project.

The objections Memorial has raised to St. Elizabeth's project are of the type that have been repeatedly rejected by the Board and by the courts. Memorial claims that because this Board approved Memorial's prior request to build a new acute care hospital in the same service area as its existing acute care hospital, the Board must essentially underwrite this venture by denying projects portrayed as harmful to Memorial's financial interests. Having obtained its own permit for a new facility, Memorial now wants the Board to deny St. Elizabeth's application for a replacement facility. That is not the way the CON process is supposed to work.

Time and again Illinois courts have advised litigious competitors that, "It is not the Board's responsibility to protect market share of individual providers." *Provena Health v.*

² See, Letter from City Attorney to Assistant Attorney General Benjamin Reed dated December 4, 2014 included with submission of Daniel Lawler to Asst. AG Reed dated February 3, 2015 as Attachment 1 hereto.

³ See, Email from Memorial to Belleville's mayor dated June 23, 2011 included as Attachment 2 hereto. (While St. Elizabeth's did submit a written comment on the Shiloh project, it neither litigated nor threatened to litigate the Board's approval of that project.)

⁴ See, Letter Memorial CEO to Belleville mayor dated June 30, 2011 included as Attachment 3 hereto.

Illinois Health Facilities Planning Bd., 382 Ill. App. 3d 34, 48 (1st Dist. 2008.) This same admonition has been consistently delivered by the courts for decades.⁵ It remains unheeded.

The case of *Provena Health* involved facts remarkably similar to the present situation. There, Sherman Hospital (like St. Elizabeth's) sought to build a replacement facility about five miles from its existing location. A competitor, Provena, argued that the Board's prior approval of its own major modernization project was based on financial projections premised on Sherman staying put and, therefore, the Board should deny Sherman's project in order to preserve Provena's financial status. The Appellate Court affirmed the Board's approval of the permit and held that the impact of Sherman's relocation on Provena's project was *not* a factor to be considered under the Planning Act. The Court also held that the Board "was not required to consider the effect on Provena's market share or profitability." (*Provena Health*, 382 Ill. App. 3d at 48.) The argument that the Board's approval of one project compels its denial of another was flatly rejected in *Provena Health*, and should similarly be rejected here.

Memorial has raised no objection here that has not been repeatedly rejected before by the Board and by the courts. Even Memorial's threat of firing 200 of its own employees if the Board approves St. Elizabeth's project is a ploy that has been floated and failed before. Once again, the Appellate Court in *Provena Health*, after stating that it is not the Board's responsibility to protect market share of individual providers immediately added, "Nor does the Planning Act protect jobs." (382 Ill. App. 3d at 48.) With ominous threats of financial distress and fired employees, Memorial demands protection. But it is protection of the type that the courts do not countenance, the Planning Act does not afford, and the Board should not bestow.

In addition, and as one Board member noted at the January meeting, there is no negative impact on Memorial given that St. Elizabeth's project is a replacement hospital project that *reduces beds and adds no services*. St. Elizabeth's and Memorial have operated in close proximity to each other for many, many years, just as Sherman and Provena had. When Provena claimed that Sherman's relocation would prove to be Provena's downfall, the Board's staff responded and the Appellate Court repeated that "the State Agency finds it compelling to note that both hospitals have operated in close proximity to each other for over 100 years without financial disaster." *Provena Health*, 382 Ill. App. 3d at 41.

As addressed above, the City of Belleville's threats of litigation and Memorial's threats of financial calamity and mass firings are not legitimate or recognized objections to St. Elizabeth's relocation project. The project substantially complies with the Board's criteria and will advance the stated goal of this Board of providing Illinois citizens with modern health care facilities:

⁵ See, *Cathedral Rock of Granite City v. Ill. Health Facilities Planning Bd.*, 308 Ill. App. 3d 529, 540 (4th Dist. 1999)("While plaintiff's market share may have been affected by the Board's decision ... [n]o rule of law forever entitles plaintiff to such share."); *Dimensions Medical Center Ltd. v. Elmhurst Outpatient Surgery Center*, 307 Ill. App. 3d 781 (4th Dist. 1999)(a competing provider has no "legitimate claim of entitlement" to "providing medical care in a protected market").

Ms. Courtney Avery
April 1, 2015
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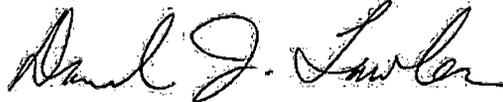
"The people of Illinois should have facilities which are modern in accord with all recognized standards of design, construction, operation and which represent the most cost efficient alternative for the provision of quality care." 77 Ill. Adm. Code 1100.360.

As members of this Board supported St. Elizabeth's project at the January meeting, with four positive votes out of five, it was noted that the above policy should not be subjugated to either the desires of a competitor with its own interests at heart or of a particular City that wants to block a local provider from relocating, even though that provider is moving just slightly out of the City's boundaries and its patients largely reside outside the City.

Please include this submission in the project file of Project No. 14-043 for the Board's consideration.

Very truly yours,

BARNES & THORNBURG LLP



Daniel J. Lawler

DJL:dp
Enclosures



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

January 23, 2015

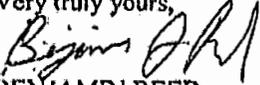
Via electronic mail
Mr. Daniel Lawler
Barnes & Thornburg LLP
One North Wacker Drive
Suite 4400
Chicago, Illinois 60606
Daniel.lawler@btlaw.com

Re: FOIA Request for Review- 2014 PAC 32181

Dear Mr. Lawler:

This letter is to advise you that we have received the enclosed response from the City of Belleville (City) with regard to your Request for Review. You may, but are not required to, reply in writing to the public body's enclosed response. If you choose to reply, you must submit your reply within 7 working days of the receipt of this letter pursuant to section 9.5(d) of the Freedom of Information Act (5 ILCS 140/9.5(d) (West 2013 Supp.)). When you send your reply to our office, please also send a copy of your reply to the City. If you have any questions, please contact me at (217) 782 - 1699 or the Springfield address below.

Very truly yours,


BENJAMIN REED
Assistant Attorney General
Public Access Bureau

cc: Ms. Jennifer Starnes (will receive letter only)
City Clerk's Office
City of Belleville
101 South Illinois Street
Belleville, Illinois 62221

ATTACHMENT A

CITY OF BELLEVILLE, ILLINOIS

GARRETT P. HOERNER, CITY ATTORNEY

5111 West Main Street
BELLEVILLE, ILLINOIS 62226-4728
Phone: (618) 205-0020
Fax: (618) 236-8550
E-Mail: gphoerner@belleville.net



CITY FLAG
DESIGNED BY
GEORGE L. LANDE
JULY 28, 1964



SENT VIA: breed@nrc.state.il.us

December 4, 2014

Mr. Benjamin Reed
Assistant Attorney General
Public Access Bureau
100 West Randolph Street
Chicago, Illinois 60601

Re: City of Belleville - Answer to Freedom of Information Act Request for Review
Case No. 2014 PAC 32181

Mr. Reed:

Pursuant to Sections 9.5(c) and (d) of the Illinois Freedom of Information Act (FOIA) (5 ILCS 140/9.5(c), (d)), I write in response to your November 20, 2014 correspondence (received on November 24, 2014) concerning the above-referenced matter. Specifically, you direct the City of Belleville (City) to "provide [you] with a detailed explanation of [the City's] legal and factual basis for asserted sections of FOIA, along with unredacted copies of a representative sample of the records in question for our confidential review."

For your information, I enclose a copy of the October 16, 2014 correspondence to Ms. Ranalli that was inexplicably omitted from the Request for Review, wherein the City's position in response to the subject request is detailed. Concerning the request for "[a]ll economic study impacts compiled by the City (whether informal/internal or external)", City Clerk Dallas Cook properly excluded otherwise responsive documents as exempt from disclosure under Section 7(1)(m) of the FOIA as materials prepared or compiled by or for the City in anticipation of a civil or administrative proceeding upon the request of the attorneys advising the City. 5 ILCS 140/7(1)(m). Of course, I expressly assumed that the subject request was not seeking production of the St. Elizabeth's Hospital economic impact study from September 2010 (which the City obtained from the O'Fallon via FOIA request) as it was not "compiled by the City". Similarly, concerning the request for "information supporting the City's statements that the relocation of St. Elizabeth's Hospital from Belleville will/may result in the Hospital serving a different patient population", Clerk Cook properly excluded otherwise responsive documents as exempt from disclosure under Section 7(1)(m) of the FOIA as communications between the City and its attorneys that would not be subject to discovery in litigation, and materials prepared or compiled by or for the City in anticipation of a civil or administrative proceeding upon the request of the

attorneys advising the City, 5 ILCS 140/7(1)(m). Of course, I expressly noted that the verbal statements made by St. Elizabeth's representatives on this matter are not subject to FOIA.

Nevertheless, the Request for Review contends that these exemptions are somehow inapplicable because "this is not a contested case proceeding nor is the City a party to that proceeding." However, this contention belies Illinois law, as the City is tantamount to a party in this administrative proceeding under the Illinois Health Facilities Planning Act (IHFA) (20 ILCS 3920/1 *et seq.*). Indeed, the City is the "interested person" who requested the public hearing under Section 6.2 of the IHFA (20 ILCS 3920/6.2), and the City would have standing to seek administrative review of any adverse decision in such administrative proceeding under Section 11 of the IHFA (20 ILCS 3920/11). And, consistent with the City's position, the Request for Review does not dispute the similar applicability of Section 2(c)(11) of the Illinois Open Meetings Act (OMA) to permit the City Council's discussion of this matter in closed session as probable, imminent or pending administrative litigation affecting the City, 5 ILCS 120/2(c)(11).

Simply put, St. Elizabeth's Hospital improperly seeks to utilize FOIA to gain an unfair advantage over a public body in administrative proceeding, while neither it nor any other private party is required to publicly disclose all of its information concerning the same administrative proceeding. The fact remains that, as the Request for Review expressly acknowledges, any written comment timely submitted by the City and/or others is publicly disclosed by the Illinois Health Facilities and Services Review Board and St. Elizabeth's may respond thereto as it deems necessary.

At its core, St. Elizabeth's Hospital is complaining that the City has not provided a basis for:

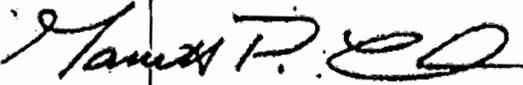
- presenting arguments that St. Elizabeth's Hospital leaving Belleville would have an adverse economic impact upon the community; and
- presenting arguments that St. Elizabeth's Hospital seeks to move in order to obtain a better payer mix.

The foundation for the concerns that St. Elizabeth's Hospital leaving Belleville would have an adverse economic impact upon the community come from two basis: (1) the 2010 economic impact study St. Elizabeth's Hospital performed with the Illinois Hospital Association detailing the economic impact of the hospital on the community; and (2) common sense. Neither of these are the subject of FOIA. The documentation that exists was St. Elizabeth's own, thus need not be provided (as we advised them in the October 16, 2014 correspondence). As for common sense, it is seemingly obvious that one of the largest employers in the community closing its business and relocating to another community would have an adverse economic impact on the City. In fact, the economic impact study performed by St. Elizabeth's Hospital was sufficiently convincing that the City concluded that its plan to pay for an independent economic impact study was unnecessary and, thus, none was performed. There is no documentation that has been strategically withheld from St. Elizabeth's Hospital despite their contentions to the contrary.

The basis for believing that St. Elizabeth's Hospital seeks to move in order to obtain a better payer mix also is derived from sources that are not subject to FOIA. The first basis, as mentioned in the October 16, 2014 correspondence, are accounts of conversations during which St. Elizabeth's Hospital executives told people they needed relocate to O'Fallon to get a better payer mix. The source of the information is St. Elizabeth's Hospital itself and the comments were verbal, not in writing, thus not the subject of FOIA. Finally, there is documentation that St. Elizabeth's Hospital recently provided to the Illinois Health Facilities and Services Review Board that details one of their most important criteria was the site location's impact upon their business plan. The specifics of that criteria included changes is "demographics, usage, payor mix, and physician use." Again, while this document was not in the City's possession at the time it responded the subject request, it is yet another example of the basis for these opinions coming from St. Elizabeth's Hospital representatives, rather than some mysterious documentation that was withheld.

In the interest of transparency, I enclose for your review both the economic impact study and the site analysis performed by St. Elizabeth's Hospital that support the contentions that have been made. And, as requested, I further enclose for your confidential review unredacted copies of a representative sample of the records withheld, appropriately labeled as confidential. If you have any further questions or comments, please contact me at your convenience. Thank you for your attention to this matter.

By:


Garrett P. Hoerner

enclosures

cc: Mayor Mark Eckert (w/ enclosure via e-mail only)
Clerk Dallas Cook (w/ enclosure via e-mail only)
Mr. Mark Silberman (w/ enclosure via e-mail only)

Lawler, Daniel

From: Lawler, Daniel
Sent: Thursday, November 06, 2014 2:49 PM
To: 'publicaccess@atg.state.il.us'
Subject: St. Elizabeth's Hospital Request for Review by PAC
Attachments: Request for Review.pdf; Attachment 1.pdf; Attachment 2.pdf; Attachment 3.pdf

To the Public Access Counselor (PAC):

Attached please find my Request for Review by PAC in connection with a FOIA request made on behalf of my client, St. Elizabeth's Hospital, Belleville, to the City of Belleville. The request was submitted by my co-counsel, Claire Ranalli of McDermott, Will & Emory. (See Attachment 1, which includes the FOIA request and Ms. Ranalli's subsequent communications with the City.)

St. Elizabeth's is proposing to relocate its hospital to O'Fallon, Illinois pursuant to a Certificate of Need application on file with the Illinois Health Facilities and Services Review Board (Review Board). The City of Belleville has publicly opposed the relocation, asserting an alleged adverse economic impact and that St. Elizabeth's will purportedly serve a different patient population. St. Elizabeth's FOIA request sought documents relating to these assertions, and other documents.

The City expressly refused to produce responsive documents relating to economic impact and patient population claiming that they were exempt from disclosure under Section 7(1)(m) of the FOIA as materials prepared or compiled by or for the City in anticipation of a civil or administrative proceeding upon the request of the attorneys advising the City. See Attachment 2, letter dated October 16, 2014 from the City Attorney to Ms. Ranalli. (The documents produced by the City in response to other items sought in the FOIA request, and not at issue here, are included in Attachment 3.)

The assistance we are seeking from the PAC is production from the City of those withheld documents that fall within the following two FOIA requests:

- a. Documents relating to the alleged economic impact of St. Elizabeth's relocation from Belleville, and
- b. Documents relating to the City's statements that St. Elizabeth's relocation would result in the hospital serving a different patient population,

The administrative proceeding before the Review Board should not be grounds for allowing the City to withhold responsive documents as this is not a contested case proceeding nor is the City a party to that proceeding, but rather, the City is only participating in it as any other member of the public who is allowed to submit comments on the project. We anticipate the City will submit to the Review Board information based on and including the withheld documents as part of the City's public comment on the project. As this is merely public comment, the withheld documents should not be treated as exempt documentation within the meaning of the Section 7(1)(m) exemption.

Finally, as is evident from the attached communications, the City has unduly delayed in responding to St. Elizabeth's FOIA request and improperly denied the above requests in what appears to be an attempt to prejudice St. Elizabeth's on its application before the Review Board. The written comment period on our project ends on November 26, 2014, and we expect the City will submit information relating to the withheld documents at or near that time in order to impair St. Elizabeth's ability to timely respond.

For the above reasons, we would greatly appreciate the PAC's efforts to obtain the City's disclosure of responsive documents in advance of the November 26, 2014 deadline. Thank you for your assistance, and please contact me if any additional information is desired.

Dan Lawler

Daniel J. Lawler | Partner
Barnes & Thornburg LLP
One North Wacker Drive, Suite 4400
Chicago, IL 60606
Direct: 312-214-4861

**BARNES &
THORNBURG LLP**

Atlanta | Chicago | Cleveland | Dallas | Denver | Detroit | Houston | Los Angeles | Miami | Minneapolis | New York | Philadelphia | San Francisco | Washington, D.C.

Mayor Mark Eckert

From: Thomure, Anne [athomure@memhosp.com]
Sent: Thursday, June 23, 2011 4:41 PM
To: meckert@belleville.net
Cc: Lynch, Judy
Subject: CON Hearing Talking Points
Attachments: SHILOH - CON Hearing - Talking Points.docx; SHILOH - CON HEARING Location-Details.docx

Mark,

Please find attached suggested talking points for the CON hearing. Please let me know if you have any questions or comments.

Also, please let us know if you'd like to ride up to Joliet with the group taking the hospital van - they are planning to leave the hospital at 5:30 a .m. on Tuesday. I also attached some information about the location and where to meet upon arrival as well as provided you with my cell phone number.

Thank you!

Anne

Anne Thomure
Director, Hospital and Community Relations
Executive Director
Memorial Hospital and Memorial Foundation, Inc.
4500 Memorial Drive
Belleville, Illinois 62226
PHONE: 618-257-5649
FAX: 618-257-6806
EMAIL: athomure@memhosp.com

TALKING POINTS

Two-minute presentation to CON Board - 6/28/11

BELLEVILLE MAYOR MARK ECKERT

- Members of the Board, I am Mark Eckert, Mayor of the City of Belleville and I am very pleased to be here today to support Memorial's CON application
- This project proposes a \$118 million expenditure in Shiloh and moving 100 beds from Belleville to Shiloh . . . I support that
- Memorial's primary campus will always be in Belleville – reference \$30 million investment currently under construction
- Private beds are needed to compete with St. Louis/reduce out-migration and keep people in Illinois for their healthcare
- Memorial always has been a primary provider of charity care and Medicaid services
- Tremendous community support (two-way) . . . reap what you sow . . .
 - Memorial has been a great community partner
 - In turn, they are highly respected and have great community support
- Disappointed by the self-serving opposition levied by St. Elizabeth's
- Thank you for the opportunity to address you today and express my full support of this project

MEMORIAL

June 30, 2011

The Honorable Mark W. Eckert
Mayor, City of Belleville
101 S. Illinois St.
Belleville, IL 62220-2105

Dear Mayor Eckert:

As you probably know by now, Memorial's certificate of need application to build a new 94-bed satellite hospital in Shiloh was unanimously approved Tuesday by the Illinois Health Facilities Services and Review Board.

I wanted to take this opportunity to express my appreciation to you – on behalf of myself and our boards of directors – for taking the time to write and submit a letter of support for this project. We were honored and certainly very humbled by the broad-based level of community support we received – and we know that the review board members were impressed with these strong endorsements.

Again, I want to extend my sincere thanks to you for your support. As we move ahead, I hope that I can count on your continued partnership with Memorial Hospital.

Sincerely,



Mark J. Turner
President and CEO