

STATE OF NORTH CAROLINA
COUNTY OF BEAUFORT

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

11 CVS 29

JAMES RUSSELL BOYD, AND
PHYLLIS BOYD BOYD

Plaintiffs,

vs.

THE COUNTY OF BEAUFORT,
BEAUFORT COUNTY
COMMISSIONERS, AND BEAUFORT
COUNTY HOSPITAL BOARD

Defendants.

ORDER GRANTING
TEMPORARY INJUNCTION

2011 JAN 10 PM 2:55
BEAUFORT CO., C.S.C.
BY ABJ

FILED

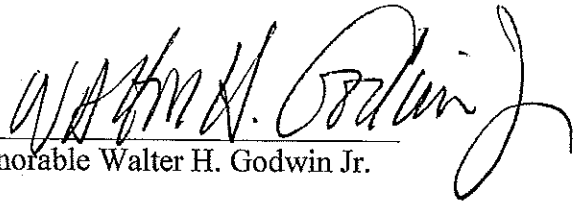
THIS MATTER HAVING come before this Court and was heard on January 10, 2011 upon plaintiffs' motion for temporary relief; based upon the showing of plaintiffs the Court makes the following findings:

1. That the status quo is preferred in this situation until the parties have a further opportunity to advise the Court on their respective positions.
2. That irreparable harm will occur to the plaintiffs and the citizens of Beaufort County if the scheduled vote by the County Commissioners happens before further proceedings.
3. That the harm to defendants, if any, is negligible.
4. That the plaintiffs are likely to prevail on the merits based on the open meetings law and due process violations.
5. That the public interest is significant in this case and further proceedings must be had in order to insure the public interest is properly served.

THEREFORE IT IS ORDERED, ADJUDGED, AND DECREED, that the Beaufort County Commissioners are temporarily enjoined from voting on the transfer of Beaufort

Regional Health Systems or Beaufort Medical Center and its facilities for 10 days or until further proceedings can be heard in this matter.

This the 10th day of January, 2011


Honorable Walter H. Godwin Jr.

STATE OF NORTH CAROLINA
COUNTY OF BEAUFORT

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

FILED
2011 JAN 10 PM 2:40
BEAUFORT CO., C.S.C.
// CVS-29
BHC

JAMES RUSSELL BOYD, AND
PHYLLIS BOYD BOYD

Plaintiffs,

vs.

THE COUNTY OF BEAUFORT,
BEAUFORT COUNTY
COMMISSIONERS, AND BEAUFORT
COUNTY HOSPITAL BOARD

Defendants.

MOTION FOR
TEMPORARY INJUNCTION
WITH SUGGESTIONS

NOW COMES THE PLAINTIFFS, by and through their attorneys, Mark D. Stewart and Timothy E. Burch of the Burch Law Office and respectfully move this Court pursuant to N.C.G.S. §1A-1 Rule 65, N.C.G.S §143-318.16 and N.C.G.S. § 131E to issue a **temporary restraining order** against the above named defendants. Plaintiffs offer the following:

SUGGESTIONS IN SUPPORT

A. FACTUAL BACKGROUND.

Citing an economic downturn the Board of Commissioners of Beaufort Regional Health Systems hired a consulting firm, HealthCare Appraisers Incorporated (hereinafter HAI), on April 20, 2010 to assist in planning a future for the hospital which was losing patients and income. The Board of Commissioners of Beaufort Regional Health Systems (hereinafter Hospital Board) is a public entity for purposes of N.C.G.S. §143-318.10 and must hold its meetings open to the public. In May of 2010 HAI began the process by issuing letters of interest to 37 organizations, meeting with the Hospital Board and discussing the Request for Proposals (hereinafter RFP) process and objectives. Between

May and July of 2010, 15 of the 37 organizations contacted by HAI expressed interest. The Hospital Board, on July 13, 2010 passed a resolution allowing HAI to issue solicitations on July 17 of the same year. HAI imposed a September 5, 2010 deadline for RFP proposals. Four organizations submitted timely proposals and those organizations were University Health Systems (UHS), Community Health Systems (CHS), Brim Healthcare Inc. (BH), and LHP Hospital Group (LHP). On October 12, 2010 HAI presented to the Hospital Board a summary of the proposals.

The Hospital Board set a public hearing for October 27, 2010. N.C.G.S §131E-13(d) mandates a 15 day publication notice be given before any public hearing concerning the transfer of hospital facilities. On October 26 at 7:38 p.m. Alice Mills Sadler sent an email declaring that CHS "has withdrawn their proposal in the RFP process." The public, however, was not privy to this information until the night of the public hearing. Some objectors to CHS came to Beaufort County from Washington State to be heard. The public hearing was opened by informing the gathered crowd that CHS had withdrawn its proposal and therefore no one spoke for or against CHS at the October 27, 2010 public hearing. News organizations from the area reported that CHS had removed itself from consideration. Shortly thereafter, CHS reinstated its proposal and the Hospital Board met and voted to recommend CHS to the Beaufort County Commissioners who ultimately decide the fate of the hospital. It is unclear what HAI's process for withdrawn and resubmitted proposals is and it is unclear who was notified that CHS was again interested in acquiring the hospital. What is clear is that CHS withdrew the day before a public hearing was scheduled then shortly thereafter re-submitted its proposal effectively sidestepping public scrutiny. The Washington Daily News reported that four Hospital Board members, one who concurrently serves as a county commissioner, conducted negotiations with the hospital's potential partners.

Friday, January 7, 2011 the County Commissioners held a public hearing, but the public was not allowed to speak and a majority, if not the entirety of the hearing was in closed session. Having had two public hearings previous to January 7, on the transfer of the hospital's facilities the County Commissioners do not plan to hold another public hearing wherein CHS or any other organization will be held to public scrutiny, rather a final vote is planned for Wednesday, January 12, 2011.

B. SUPPORTING LAW

1. North Carolina General Statute §131E-13(d) has been violated and only a temporary restraining order or temporary injunction will prevent irreparable harm. The above mentioned statute requires among other provisions that two public meetings be held and held only after proper notice has been given. Furthermore, the statute mandates that **all** interested persons shall be heard at the public hearing and that "medically underserved" groups be considered.

To comport with the statute a public hearing must be held on all proposals for lease or purchase that have been made. Incontrovertibly, CHS submitted a proposal by the September deadline. However, it was promulgated by email to the County Commissioners, the Hospital Board and verbally to a waiting crowd at a public meeting, that CHS had withdrawn its proposal. The public hearing continued but only UHS, BH, LHP were considered at the public hearing as being possible players in the competition. Because CHS had withdrawn its proposal, to the public's and plaintiff's detriment, no one spoke about CHS at the October 27, 2010 public meeting. However, shortly after the public meeting, approximately one week, CHS reentered its proposal. The prima facie conclusion about CHS's withdrawal and subsequent re-submission is it was designed to subvert public scrutiny. But, not only did the actions of CHS circumvent public scrutiny, it violated the requirement that a public hearing be held on all proposals. Justice so requires that another meeting be held involving all organizations being considered and until such a meeting takes place an injunction should issue enjoining a final vote by the County Commissioners. Withdrawing the day before a public hearing then reentering the competition a week later violates the spirit of the law and the letter of the law. If all organizations, including UHS, BH and LHP had withdrawn then reentered the bidding after the hearing no one would have been heard as required by statute. It stands to reason, then, that because CHS was allowed to reenter, another public hearing must be scheduled. N.C.G.S. §131E-13(d)(5) states

Not less than 45 days after adopting a resolution of intent and not less than 30 days after conducting a public hearing on the resolution of intent, the

municipality or hospital authority shall conduct a public hearing on proposals for lease or purchase that have been made. Notice of the public hearings shall be given by publication at least 10 days before the hearing. The notice shall state that copies of proposals for lease or purchase are available to the public.

The language clearly requires a public hearing on proposals that have been made. Since CHS withdrew its proposal and was not discussed at the public hearing, but is now not only in contention, but recommended by the Hospital Board, it must be discussed by the public at a hearing. If the County Commissioners vote and close the matter on Wednesday, it will be in violation of the above mentioned statute and will result in irreparable harm to the plaintiffs and Beaufort County.

The statute also requires that **all** interested parties be heard. Therefore, at any further public meeting every interested citizen who wishes to be heard should be afforded that opportunity.

Furthermore a prime facie review of the procedure would indicate that N.C.G.S §131E-13 (d)(7) has been violated. Nowhere does it appear in HAI's proposals or other documentation that the Hospital Board or the County Commissioners have made any findings regarding the needs of the medically underserved groups such as low income persons, racial and ethnic minorities, and handicapped persons, as required by law. The above mentioned section of the statute requires that the needs of these groups be considered before adopting a resolution conveying, selling, or leasing the hospital. Without proof that the needs of the medically-underserved have been considered the process must enjoin until that inquiry is made.

2. The closed session held by the Beaufort County Commissioners on January 7 violated North Carolina's open meetings law. "Except as provided in G.S. 143-318.11, 143-318.14A, 143-318.15 and 143-318.18 each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting." N.C.G.S §143-318.10. "The overriding intent of the open meetings law is that public bodies should act in open session because they serve the public at large." H.B.S. Contractors v. Cumberland County Bd. Of Education, 122 N.C. App. 49, 55 468 S.E.2d 517, 522 (1996). A motion was made by the Beaufort County Commissioners to go into closed

session citing N.C.G.S. §143-318.11(a) (3) to consult with the Commissioners' Attorney Robert L. Wilson Jr. who was hired to assist in this process. However, "General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant." N.C.G.S. §143-318.11(a) (3). The Beaufort County Commissioners merely cited attorney-client privilege and went into a closed session. "The burden is on the government body to demonstrate that the attorney-client exception in (a) (3) applies, and the government body can only meet its burden by providing some objective indicia that the exception is applicable under the circumstances; mere assertions by the body or its attorney(s) in pleadings will not suffice." Multimedia Publishing of N.C., Inc. v. Henderson County, 136 N.C. App. 567, 525 S.E.2d 786 (2000). This closed-session meeting occurred Friday, January 7, and was called as a special meeting. The Washington Daily News reported that more than 100 citizens showed up for the meeting but less than half remained after the hour and a half long closed-session. No public comment was heard at the Friday meeting, and it is unclear whether any public discussion was had by the Commissioners. According to the paper Commissioner Jerry Langley made it abundantly clear that at the next public meeting only 20 minutes is set aside for public comment.

3. A temporary restraining order is an "extraordinary remedy" and should be granted only in limited circumstances. MicroStrategy Inc. v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001). (citing Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 816 (4th Cir. 1991). A temporary restraining order requires a Court to balance the following four factors:
 - a. The likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied;
 - b. The likelihood of harm to the defendant if requested relief is granted;
 - c. The likelihood that the plaintiff will succeed on the merits; and
 - d. The public interest. Direx, 952 F.2d at 812.

The burden is on the plaintiff to establish these factors. In the present matter the irreparable harm to the plaintiffs coincides with the public interest. If relief is not here granted, the citizens of Beaufort County and the plaintiffs will have been denied due

process. N.C.G.S §131E-13 (d) requires at least two public hearings before a municipally owned hospital or its facilities may be transferred. By subverting the only public hearing which involved actual named organizations proposing to lease or buy the hospital, CHS was never subjected to the public's scrutiny; effectually rendering null the conclusion that a public hearing was in fact had. Therefore, without enjoining the Wednesday vote, the Commissioners will have acted in violation of North Carolina law. Furthermore, in not having its voice heard at a public gathering Beaufort County and the plaintiffs will suffer irreparable harm if then a vote is had by the County Commissioners on Wednesday, January 12, 2011.

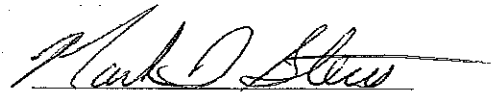
The harm to any defendant is de minimis. The plaintiffs request only that an injunction against a Wednesday vote be granted until the public is properly noticed and heard. A delay in voting will not harm the defendants, if anything it will allow the Commissioners to properly proceed in accordance with N.C.G.S. §131E-13(d), and allow them to hear from their constituents. A delay in voting will not cost the defendants monetarily and will still allow a vote once due process is complete.

Succeeding on the merits is highly probable if not certain in that the plaintiffs will be able to show that North Carolina's General Statutes were disregarded as to both transferring a hospital and its facilities and open meetings law.

The public interest in this matter is palpable. One only has to tune into any local news broadcast or publication be it radio, television, newspaper or internet to see the concern and passion which engulfs this community. On Saturday the public held its own gathering to demonstrate its frustrations and concerns about the above mentioned process and the way in which the process is being handled. The public has also started a petition to present to the County Commissioners to slow down if not stop the fast-paced proceedings. Moreover, by simply reading any venue for public comment it is clear that the overwhelming majority of Beaufort County disagrees with the Hospital Board's endorsement of CHS. Couple that sentiment with the fact that the public has been denied a public forum in front of the County Commissioners and it becomes clear how the irreparable harm to the public coincides with its interests.

WHEREFORE, the plaintiff respectfully moves this Court to issue a Temporary Restraining Order enjoining the Beaufort County Commissioners to vote on any proposed sale, lease, or other conveyance on Wednesday, January 12, 2011; that the Court enjoin any further action until such time it can be ascertained the extent, if any, of violations of North Carolina law; and for reasonable attorney's fees.

This the 10th day of January, 2011



Mark D. Stewart

Attorney for the Plaintiffs

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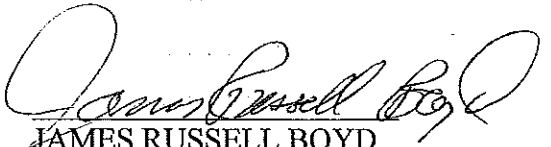
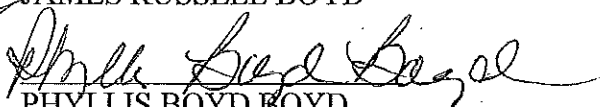
mark@burchlawoffice.com

VERIFICATION

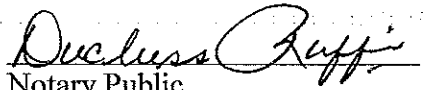
NORTH CAROLINA
BEAUFORT COUNTY

JAMES RUSSELL BOYD AND PHYLLIS BOYD BOYD, being first sworn,
says that they have read the foregoing Motion and that the same is true of their own
knowledge except as to those matters and things therein stated upon information and
belief, and as to those he believes them to be.

This the 10th day of January, 2011.


JAMES RUSSELL BOYD

PHYLLIS BOYD BOYD

After proper identification,
Sworn to and subscribed before me,
This the 10th day of Jan, 2011.


Notary Public
My commission expires: 5/26/2015