

STATE OF ILLINOIS )  
 ) SS:  
COUNTY OF C O O K )

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, CHANCERY DIVISION

BLUE ISLAND HOSPITAL COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. ) 2019 CH 10906  
 )  
ILLINOIS HEALTH FACILITIES, )  
et al., )  
 )  
Defendants. )

Record of proceedings before the  
Honorable Michael T. Mullen, Judge of the Circuit Court of  
Cook County, Illinois, commencing at approximately 10:30  
o'clock a.m. on the 18th day of October 2019, at the Daley  
Center, Room 2510, Chicago, Illinois, upon the hearing of  
the above-entitled cause.

A P P E A R A N C E S:

BARNES & THORNBURG, by  
MR. DANIEL J. LAWLER  
One North Wacker Drive, Suite 4400  
Chicago, IL 60606  
(312) 357-1313  
daniel.lawler@btlaw.com  
On behalf of the Plaintiff;

OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS, by  
MR. SUNIL BHAVE and  
MR. JASON A. KANTER  
100 West Randolph Street  
Chicago, IL 60601  
(312) 814-2098  
sbhave@atg.state.il.us

On behalf of the Defendants.

1 THE COURT: The attorneys who are involved in Blue  
2 Island Hospital Company versus Illinois Health Facilities  
3 and Services Review Board, everyone will identify themselves  
4 as well as who they represent starting with counsel to my  
5 right.

6 MR. LAWLER: Good morning, your Honor. Dan Lawler for  
7 the Plaintiff MetroSouth Medical Center.

8 MR. BHAVE: Good morning. Sunil Bhave, B-h-a-v-e, for  
9 the Defendants.

10 MR. KANTER: Good morning, your Honor. Assistant  
11 Attorney General Jason Kanter also for the Defendants.

12 THE COURT: Good morning to everybody. This matter  
13 here, it is here on an emergency motion having been brought  
14 by the Plaintiff. I've received several submissions. I  
15 just want to make it clear what I have and what I have  
16 reviewed. I've reviewed the motion from the Plaintiff and  
17 all the attachments, the response, the reply, as well as the  
18 verified complaint.

19 In addition, I've reviewed all of the  
20 exhibits. I've also received and reviewed the Defendants'  
21 motion to dismiss the complaint, which has been filed  
22 pursuant to Section 6.5. And, Counsel, it is your motion.

23 MR. LAWLER: Yes, your Honor. There are no disputed  
24 facts before the Court. The only question of law is whether

1 the Board's regulations directly conflict with the mandate  
2 of its governing statute as we contend or whether those  
3 regulations are perfectly consistent with the statutory  
4 mandate as the Board is arguing. There are two statutory  
5 provisions at issue here.

6 The first is the Planning Act says that the  
7 Board's review of exemption applications shall not exceed 60  
8 days from the date the application was declared complete.  
9 There is no dispute that our application was declared  
10 complete on June 12th. 60 days from June 12th is August  
11 11th. What had to be done by August 11th? The Board had to  
12 take final action on our application by then. The Board's  
13 own rules define what the review period is. The rule  
14 defines review period as the time from the date an  
15 application for permit or exemption is deemed complete by  
16 the board staff until the Board renders its final decision.

17 And what final decision is the Board required  
18 to take? The Planning Act says an exemption shall be  
19 approved when information required by the board rule is  
20 submitted. As an exemption applicant we had a statutory  
21 right to have our application acted upon and approved within  
22 60 days. The Board had a statutory obligation to approve  
23 our exemption application within 60 days. The Board failed  
24 to perform its statutory non-discretionary duty, and we are

1 entitled to an order of mandamus directing it to do so.

2 Your Honor, there is a board meeting next  
3 Tuesday, October 22nd, and we are on the agenda. We can be  
4 approved at that meeting if your Honor orders it. Otherwise  
5 we're going to be deferred ad infinitum. Thank you.

6 MR. BHAVE: Thank you, your Honor. So the action is  
7 brought under a theory of mandamus which requires that there  
8 be a clear right to relief, and the principal argument that  
9 we have advanced before the Court is that the two provisions  
10 that the Plaintiff has relied on we don't believe -- the  
11 Board does not believe show a clear conflict with the  
12 Board's administrative regulation, which is the deferral  
13 rule at 560(b)(2).

14 The provisions that counsel has referenced,  
15 one is Section 12/8 of the Planning Act, and we don't  
16 dispute that 12/8 does say such reviews shall not exceed 60  
17 days from the date the application is declared to be  
18 complete, and we don't dispute that the board staff had  
19 declared the application to be complete. But the statute  
20 actually on the plain terms is silent as to what is the  
21 action that the Board has to take at the conclusion of the  
22 60 days.

23 It's not unreasonable to accept the  
24 Plaintiff's interpretation that some action should be taken

1 upon the conclusion of the review process and, generally  
2 speaking, I think that the -- you grant the application or  
3 you deny the application. But the statute from our reading  
4 of the statute is silent as to what happens in this third  
5 context which has arisen here where there's pending  
6 litigation, and there's a dispute as to whether the pending  
7 litigation that's brought by another hospital called  
8 People's Choice Hospital concerns the subject matter of the  
9 application to close MetroSouth.

10 The legislature we don't -- we contend did not  
11 foresee that scenario in the drafting of the Planning Act at  
12 the time that the application was submitted. Now, the  
13 legislature has accounted for instances where there is a  
14 pending lawsuit that concerns the subject of the application  
15 to close in a new provision, Section 8 point --

16 THE COURT: Let me stop you there and ask you a few  
17 questions about that lawsuit. The complaint was attached,  
18 and it's actually been amended, and it's pending here in the  
19 Chancery Division in front of Calendar 5. So are you as a  
20 representative of the State, are you saying that that  
21 complaint has merit?

22 MR. BHAVE: Well, as far as -- let me -- merit meaning  
23 should the relief be granted? I'm not saying that the  
24 relief should be granted.

1 THE COURT: Here's my concern, all right? Somebody  
2 files a case. One might call it frivolous. One might call  
3 it meritorious. It will take several years for that case  
4 most likely to be determined as a matter of law assuming  
5 that's appropriate, assuming there are no disputed facts.  
6 So let's say it is determined in one year, two years, three  
7 years. Are you saying that decision, assuming it was made  
8 by a judge, is then binding on the Board?

9 MR. BHAVE: I think -- not necessarily binding on the  
10 Board's ultimate determination, but what I think that the  
11 Board has recognized through promulgation of the  
12 administrative rule is when a lawsuit is filed pending  
13 before a judicial court that is making representations or  
14 allegations that there's either fraud or material  
15 misrepresentations with respect to the application that is  
16 pending before the Board, to give due diligence and to  
17 arrive at, you know, what we hope is the correct decision.  
18 I think that the Board had envisioned deferring so that the  
19 judicial process can play out and that the Board can then  
20 consider what are facts that had come to light in front of  
21 the judicial court because there's no administrative  
22 hearing. These types of cases with application for  
23 exemption of discontinued hospital, there's no ALJ. There's  
24 no fact finding process before the Court.

1 THE COURT: But let's talk about that. Is it the  
2 State's intent to intervene in that action that you're  
3 referencing as the basis for deferring any decision making?

4 MR. BHAVE: It's not. To my knowledge, the State has no  
5 indication of intervening in the People's Choice Hospital  
6 case.

7 THE COURT: So how long is the Board in your opinion  
8 going to defer any action based upon that case that you are  
9 not intervening in and you are not going to be participating  
10 in the discovery process? So how is it that you're going to  
11 acquire any information that will be of any assistance to  
12 the Board in making a determination as to this Plaintiff's  
13 application?

14 MR. BHAVE: Correct. And I think that the way I would  
15 answer that is the assistance that would be proffered to the  
16 Board is findings of fact that the Court may make in the  
17 judicial determination in the pending lawsuit, but I  
18 recognize the concern of the Court that the pending  
19 litigation may last. I don't know. Litigation lasts a  
20 number of years often. A plain reading of that  
21 administrative regulation indicates that the Board will have  
22 to defer until the conclusion of the entire litigation. I  
23 think that's why the legislature --

24 THE COURT: So the entire litigation --



1 MR. BHAVE: That's the plain reading of the --

2 THE COURT: That is your position?

3 MR. BHAVE: That is our position.

4 THE COURT: So then if one party disagrees with the  
5 ultimate decision, it goes to the Appellate Court.

6 MR. BHAVE: Correct.

7 THE COURT: You're saying wait until the mandate comes  
8 down from the Appellate Court?

9 MR. BHAVE: I think so.

10 THE COURT: Then the PLA happens, doesn't it?

11 MR. BHAVE: Right.

12 THE COURT: Then the PLA is granted or denied.

13 MR. BHAVE: Understood.

14 THE COURT: All right. Then maybe a writ going to the  
15 U.S. Supreme Court. So you're saying that the Board is  
16 entitled to defer any determination based upon a case that  
17 you are not going to participate in in any way, and that is  
18 the sole basis for deferring a decision on this application.  
19 That's what I'm hearing. Am I wrong?

20 MR. BHAVE: I think that the -- facially I think -- and  
21 I understand the logical extension becomes a little  
22 unreasonable after a certain point in time, and we recognize  
23 that. Facially -- I think that facially the rule indicates  
24 until all litigation is concluded. That means all

1 litigation is concluded. Now, there may be a point in time  
2 after which as applied to a particular case the length of  
3 the duration becomes so unreasonable that there may be due  
4 process implications. Perhaps. We're -- the lawsuit that  
5 is involved in our case with People's Choice Hospital has  
6 only been alive for three weeks, maybe a little bit over  
7 three weeks. We don't know how long that case is going to  
8 go, but at some point I think I would have to concede that  
9 at some point there may be due process implications and the  
10 agency not issuing an administrative decision if the point  
11 of time goes too long, but I think that we have not arrived  
12 at that point.

13 And so as we framed our argument in response  
14 to the motion as we've kept it in the context of mandamus  
15 and where we are at this point in time, and at this point in  
16 time we contend that there's not a clear showing that the  
17 Board's rule as applied to MetroSouth where we are right now  
18 is in violation of the Planning Act, and so they need to  
19 identify some non-discretionary duty, either through  
20 regulation or statute, that compels the Board to take action  
21 immediately, right now, and so I think that the Court's --  
22 if I'm understanding the Court's concern is if we take this  
23 administrative rule to its logical extension, at some point  
24 it becomes -- it seems like it becomes absurd to continue to

1 defer indefinitely, but I don't believe we're at that point.  
2 I don't believe the mandamus is intended to rectify that  
3 problem because it's an extraordinary remedy to compel a  
4 state official or state agency to act in the moment.

5 THE COURT: My point is, and maybe we're not  
6 communicating, there is no doubt the State has an overriding  
7 interest in making sure that this application is in proper  
8 form, that all of the statutory requirements have been  
9 completed and that the Board has sufficient information to  
10 grant and/or deny. There's no doubt about that. There's  
11 also no doubt that the statute that you're citing as a basis  
12 for the deferment gives the Board some leeway in terms of  
13 delaying/deferring its decision making process as it  
14 pertains to the application.

15 Now, what you're saying is some entity files a  
16 lawsuit that the State is not involved in, has no intent in  
17 getting involved in and really doesn't have anything to do  
18 with the information that is before the Board. I'm not  
19 hearing that.

20 MR. BHAVE: So the allegation -- so we're only at the  
21 complaint stage in the People's Choice Hospital case, and  
22 the allegations do say that there were misrepresentations  
23 and fraud committed on the Board in the application process  
24 to close the hospital. That's in the complaint.

1 THE COURT: But you're not verifying that. You're not  
2 weighing in on that. You're not taking --

3 MR. BHAVE: Correct.

4 THE COURT: You're saying you have no intent to  
5 intervene in that action and support the Defendant, support  
6 the Plaintiff in the case. That is just a case that has  
7 been on file that involves the applicant. That's my  
8 concern. It's a different situation that you're talking  
9 about where the very application that is issued in terms of  
10 the merits of it is pending in the lawsuit. This is a third  
11 party that has brought this. This is not the State.

12 MR. BHAVE: Correct.

13 THE COURT: And in a way I just don't understand how  
14 that can be the basis for the deferment, so you have to  
15 convince me that there's some reason why this Board cannot  
16 go forward.

17 MR. BHAVE: Right.

18 THE COURT: Is there any other reason?

19 MR. BHAVE: This is the reason. It's just the plain  
20 terms of the regulation, and I think it's the Board's  
21 concern -- maybe inartfully drafted -- Board's concern that  
22 there is litigation. It touches upon the application by  
23 making references to misrepresentations. The legislature  
24 had nothing in the statute at the time that this application

1 was filed that provided a process by which the Board should  
2 proceed where there is litigation in this context. I think  
3 the Board tried to do its best with drafting this  
4 administrative rule. Now, the legislature has amended the  
5 statute in July of 2019, so prospectively going forward  
6 there's explicit authority from the legislature to defer for  
7 a maximum of six months under the statute.

8 But you're absolutely correct. The Board is  
9 not intending to interject itself or intervene into the  
10 pending lawsuit, so it's not affirmatively attempting to --

11 THE COURT: Let's say they did, okay, just to make it  
12 clear. They intervene. They participate in discovery for a  
13 year and a half, right? And they submit proposed findings  
14 of fact and conclusions of law to Judge Cohen who presently  
15 is assigned to your case, and the judge agrees or disagrees  
16 with one party. Going back to one of my prior questions, is  
17 that determination of Judge Cohen then binding on the Board?  
18 Of course not. Of course not.

19 MR. BHAVE: Right, right, but I think it would be rather  
20 persuasive.

21 THE COURT: So what does this lawsuit that you keep  
22 citing to have anything to do with this application?

23 MR. BHAVE: Right. And so further facts may be  
24 discovered in the process of that lawsuit, you know, through

1 the discovery process that the Board could utilize to better  
2 inform itself as to whether this application for exemption  
3 is proper or not, and the Board itself is reviewing the  
4 application and it does an investigation. It's supposed to  
5 review. The legislature lays out that there's a review  
6 process. There's all kinds of criteria in the  
7 administrative regulations that the Board is supposed to  
8 consider.

9 THE COURT: Which is a discretionary thing, and I  
10 recognize that. That's part of your argument.

11 MR. BHAVE: That's our secondary argument, correct. So  
12 the Court does disagree. There is a hearing on the 22nd,  
13 but we would ask the Court not to go so far as to order the  
14 Board to actually grant the application.

15 But going back to the Court's primary concern,  
16 I think where the Board is coming from with this regulation  
17 is that it wants completeness of information, and although  
18 the judicial findings are not binding on the Board's  
19 ultimate administrative decision, more information is  
20 probably better than less information. I believe with the  
21 administrative regulation the way it's written, it does say  
22 will defer until all litigation related to the application  
23 has been completed. Facially that's probably okay. As  
24 applied there may come an instance -- I completely

1 understand the concern that it looks a little absurd after a  
2 little while that --

3 THE COURT: It does.

4 MR. BHAVE: -- the lawsuit is pending continuously. We  
5 recognize that point. We do.

6 THE COURT: Thank you. Counsel, are you adding  
7 anything?

8 MR. KANTER: No, your Honor.

9 THE COURT: Thank you.

10 MR. LAWLER: Your Honor, this Board has independent fact  
11 finding powers. They have the power to sanction an  
12 applicant that makes fraudulent misrepresentations to it.  
13 That is this process called allegations of noncompliance.  
14 It's a formal proceeding. They file a formal complaint. We  
15 would have a right to a hearing before the administrative  
16 law judge. Nobody -- the Board's -- neither board staff nor  
17 the Board itself is claiming that we made any fraudulent  
18 misrepresentation to the Board in connection with this  
19 application. Now, is there some plaintiff's attorney out  
20 there who has made that allegation in talking to the media  
21 asserting that? Yes, but so what? This Board, if it was  
22 really concerned about us making misrepresentations, could  
23 initiate an action against us, and they haven't done that.  
24 That speaks for itself.

1                   And as far as what has to be done within the  
2     60 days, counsel indicated the Board doesn't have to take  
3     final action. Well, that's not what the Board's rule says  
4     itself. The Board's rule says the review period, the 60-day  
5     review period starts when the application is deemed complete  
6     by the board staff until the Board renders its final  
7     decision. The Board's own rule required it to make a final  
8     decision 60 days after its staff deemed the application  
9     complete. There's no ambiguity to that.

10           THE COURT: Anything else, Counsel?

11           MR. BHAVE: Just one point. The Board's rule also has a  
12     specific provision when there's pending litigation. So when  
13     we have a broad rule and a more narrow rule in the context  
14     of the pending litigation, I think the narrow rule -- I  
15     think the way to read those two regulations consistently is  
16     to rule that, yes, generally under a review period the Board  
17     has to make a final decision, but when there's pending  
18     litigation the Board now has a specific rule in that  
19     context. But again we would urge the Court not to order  
20     mandamus to direct the agency to exercise its discretion in  
21     any particular way --

22           THE COURT: Thank you, both.

23           MR. BHAVE: -- if it does order it to exercise  
24     discretion.



1 THE COURT: Thank you both for your positions and your  
2 arguments. As indicated previously, I've had an opportunity  
3 to review all of the submissions of the parties, and they've  
4 been very helpful in terms of identifying exactly what the  
5 issue or issues are as set forth. So it is clear and once  
6 again I have reviewed the verified complaint as well as all  
7 attachments. I've reviewed the emergency motion that we  
8 have just discussed at length, as well as the response from  
9 the State and the reply. And so it is also clear, I did  
10 review the 615 motion that has been presented by the  
11 Defendant/Board.

12 Mandamus is not an order of right. A mandamus  
13 is generally issued to enforce a clear duty imposed by law  
14 involving no discretion in its exercise. A complaint for  
15 mandamus must allege facts which establish the following  
16 elements: One, a clear right to the relief requested. Two,  
17 a clear duty of the respondent to act and, three, clear  
18 authority of respondent to comply with the writ. That  
19 passage is lifted directly from our Supreme Court's decision  
20 in Noyola, N-o-y-o-l-a, versus Board of Education and the  
21 City of Chicago. The cite is 688 Northeast 2nd at 81. That  
22 passage is from Page 86. It's a 1997 decision.

23 The Court begins its analysis by looking to  
24 the applicable statutes. The process for which to close a

1 hospital once an application for exemption is received by  
2 the Board is governed by the Illinois Health Facilities  
3 Planning Act. It's set forth at 20 ILCS 3960/1. Once an  
4 application for exemption to discontinue a hospital is  
5 submitted to the Board, the Board staff, quote, shall review  
6 an application for exemption to determine whether all  
7 required information and application processing fees have  
8 been submitted, end of quote. That's at 77 Ill.  
9 Administrative Code, Section 1130.550, Subparagraph B.

10 Once the board staff deems the application  
11 complete, then it forwards the application to the chairman  
12 of the Board for review and action. That's the same  
13 section, Subparagraph C. The chairman of the Board reviews  
14 the application and has the authority to approve it, deny it  
15 or refer to the Board for review and action. That is the  
16 same section, Subparagraph A. The Board reviews the  
17 application and, quote, shall approve an application for  
18 exemption that it determines to be in compliance with the  
19 requirements. And that again is at the same section,  
20 Subparagraph B, Subparagraph 1.

21 Under Section 12/8 of the Act, the Board,  
22 quote, shall not prevent the conduct of a public hearing. I  
23 said that incorrectly. Quote, shall not prevent the conduct  
24 of a public hearing upon a timely request of an interested

1 party, end of quote.

2           Additionally, such reviews shall not exceed 60  
3 days from the date the application is declared to be  
4 complete. That again is in our state statutes, 20 ILCS  
5 3960/12, Paragraph 8. If during the review it comes to the  
6 Board's attention that there is litigation pending regarding  
7 the facility, the Board, quote, will defer consideration of  
8 the application for exemption when the application is the  
9 subject of the litigation until all litigation related to  
10 application has been completed. That's at Section B,  
11 Subparagraph B2. Here in this case the application was  
12 deemed complete on June 12th, 2019.

13           Consequently, the Board's review shall not  
14 exceed -- could not exceed 60 days from the date the  
15 application was declared to be complete. That's consistent  
16 with Section 12/8. The State argues the Act is silent as to  
17 when the application should be granted or denied. I  
18 disagree. I think it's quite clear. It's 60 days from that  
19 date. The parties also disagree with the phrase subject of  
20 litigation. The Plaintiff argues that since the complaint  
21 does not name the Board that it is not the subject of the  
22 litigation, and the Board shall therefore approve the  
23 application for exemption. The State argues that the  
24 Board's deferral rule does not require that the application

1 for exemption be the central focus of the pending litigation  
2 or even that the claim in the pending litigation seeks to  
3 nullify the application; rather, as long as the application  
4 is part of the, quote, subject, end of quote, litigation  
5 there is a basis to defer this. And the -- as we talked  
6 about during our argument this morning, the People's Choice  
7 lawsuit makes a misrepresentation in its -- it makes an  
8 argument that there was a misrepresentation by this  
9 Plaintiff in its application. The State does not in any way  
10 indicate that those allegations are correct or incorrect.

11 The State makes it clear that it is not going  
12 to in any way participate in that litigation. Consequently,  
13 it's hard for me to conclude that that litigation is in any  
14 way relevant to the application that is before the Board.  
15 So it's hard for me to conclude that that litigation is in  
16 any way related to or should be used as a basis for the  
17 deferral of the Board's decision.

18 It's my determination that it is appropriate  
19 to grant the requested relief in one sense. It is clear  
20 based upon the statutory requirements that the Plaintiff has  
21 complied with the statutory requirements in all respects and  
22 it is entitled to a decision. However, it would be  
23 inappropriate for the Court to require a specific decision  
24 be made. That is not for -- that is not appropriate for the

1 Court as that involves certain discretionary functions.  
 2 That is not the purpose of a mandamus, a writ of mandamus,  
 3 as there are a number of factors that would be incorporated  
 4 into the decision whether to grant and/or deny. I am not  
 5 going that far as it would be inappropriate. I am granting  
 6 the writ as requested in the sense of requiring a decision  
 7 based upon the application which has been deemed to be fully  
 8 complete as of June 12th, 2019.

9 Do we need any clarification of my order?

10 MR. LAWLER: Your Honor, could we have a direction that  
 11 that be taken at the October 22nd board meeting?

12 MR. BHAVE: I think that would be okay.

13 THE COURT: That will be part of the order. Anything  
 14 else from the parties that is less than clear?

15 MR. BHAVE: Not from the State.

16 THE COURT: Gentlemen, good luck with this case. I hope  
 17 it works out for everybody. It's a significant case to our  
 18 entire community in the sense of providing medical care and  
 19 services to a particular area of the community which is  
 20 certainly in need of medical services. So good luck to  
 21 everybody. Have a good day.

22 MR. LAWLER: Thank you.

23 MR. BHAVE: Thank you.

24 MR. KANTER: Thank you.

STATE OF ILLINOIS )

)SS:

COUNTY OF C O O K )

The within and foregoing proceedings of the above-entitled cause was reported in shorthand by Linda M. Benda, CSR, Notary Public, within and for the County of Cook and State of Illinois, on the 18th day of October 2019, at the hour of approximately 10:30 o'clock a.m. at the Daley Center, Room 2510, Chicago, Illinois.

There were present during the proceedings Mr. Daniel J. Lawler on behalf of the Plaintiff; and Mr. Sunil Bhavé and Mr. Jason A. Kanter on behalf of the Defendants.

The undersigned is not counsel for nor in any way related to any of the parties to this hearing nor in any way interested in the outcome thereof.

Witness my official signature and seal as Notary Public in and for Cook County, Illinois, on this 21st day of October 2019.



LINDA M. BENDA, CSR, Notary Public

License No. 084-003550

<b>&amp;</b>	<b>560</b> 5:13	10:10,23 13:4 14:7,19,21 15:15 18:9	<b>applied</b> 10:2,17 14:24
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