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IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

FAIRMONT GENERAL HOSPITAL, INC.,

Plaintiff,

v.

CIVIL ACTION NO. 11-P-13  
(Hon. David R. Janes)

THE CITY OF FAIRMONT, WEST VIRGINIA,  
and THE FAIRMONT CITY COUNCIL,

Defendants.

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IN  
CIRCUIT COURT  
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DAVID R. JANES  
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**ORDER GRANTING PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND DENYING  
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

On the 29<sup>th</sup> day of November, 2011, came the Plaintiff, Fairmont General Hospital, Inc. ("FGH" or "the hospital"), by its representatives Robert Marquardt, Mike Martin and Toni Nesselrotte, and by counsel, Michael S. Garrison and Kelly J. Kimble of the law firm of Spilman Thomas & Battle, and came the Defendants, City of Fairmont ("the City") and Fairmont City Council by its representative Jay Rogers, and by counsel, Kevin Sansalone, to argue Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment. Also presented at this hearing were Defendants' Motion For Leave to Amend Or Supplement Counterclaim, which was granted in light of FGH voicing no objection and obtaining leave of the Court to file its Answer, and Defendants' Motion to Vacate Preliminary Injunction.

The Court has now had the opportunity to reflect upon the arguments presented, to examine the memoranda of law submitted in regard to these motions, and to consult pertinent legal authorities. As a result of these deliberations, the Court has concluded that the Plaintiff's Motion for Summary Judgment must be **GRANTED** and Defendants' Cross-Motion must be **DENIED** for the reasons set down in this Opinion Order. Upon the granting of the Plaintiff's

Motion for Summary Judgment and denial of Defendants' Cross-Motion for Summary Judgment, the remaining motion is deemed moot.

The relevant facts of this case are as follows.

The City of Fairmont is an incorporated municipal body politic located in Marion County, West Virginia, and currently operating under the Fairmont City Charter, as approved by voters on August 17, 1976, and as subsequently amended. The City Council is the governing authority of the City and is composed of nine council members elected by the voters of the City at large, one from each voting district of the City.

On April 3, 1984, at a time that Fairmont General Hospital was a municipal hospital, the City Council adopted Section 4.06 of the City Charter, which provided for appointments to the board of the "municipal hospital" to be made by City Council.

Effective September 17, 1985, FGH became a private, not-for-profit corporation, and in anticipation of and preparation for the privatization of the hospital, the City passed Ordinance Nos. 689 and 690 authorizing the transfer or lease of all the operations, assets, and liabilities of the municipal hospital to FGH. Since its incorporation in September of 1984, FGH has been and remains a private, not-for-profit, charitable organization as defined under Section 501(c)(3) of the Internal Revenue Code, existing under the laws of the State of West Virginia.

FGH's Articles of Incorporation were originally filed with the West Virginia Secretary of State on September 19, 1985, and provided, among other things, for the corporation's Board of Directors to be appointed by City Council. FGH's Bylaws also provided for appointment of its Board by the City.

On August 23, 2010, in an effort and with the clear intent of altering the manner in which its Board members are appointed, FGH amended its Bylaws, therein providing for appointment

of FGH's Board members by its own Board. City Council member, Robin Smith, appointed to sit on FGH's Board by the City, voted in favor of said amendments.<sup>1</sup> However, at that time the Board overlooked the corresponding provisions contained in FGH's Articles of Incorporation and inadvertently failed to amend said Articles when amending its Bylaws.

In an effort to rectify the inconsistencies between its Articles of Incorporation and its Bylaws, FGH later adopted Amended and Restated Articles of Incorporation on October 24, 2011, and filed the same with the Secretary of State on October 25, 2011. Where the original Articles of Incorporation provided that FGH's Board would be appointed by Fairmont City Council, the Amended and Restated Articles transferred that authority to FGH's own Board.

On January 24, 2011, in accordance with its amended Bylaws and prior to recognizing the inconsistencies that existed between said Bylaws and its Articles of Incorporation, FGH appointed two new members to its Board of Directors and promptly notified City Council members of said appointments. One such appointment was the reappointment of City Council member, Robin Davis.

The next day, January 25, 2011, notwithstanding the notification of FGH's Board appointments and amendments to the FGH Bylaws, City Council appointed two individuals to sit on FGH's Board under the auspices of Section 4.06 of the City Charter. FGH thereafter refused to seat the City's appointments, and the dispute over whose appointments are legally valid led FGH to seek redress from this Court in the form of: (1) a preliminary injunction to prevent the members appointed by City Council from acting as members of FGH's Board; and (2) a Declaratory Judgment Complaint seeking an Order stating whether FGH's Board or City

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<sup>1</sup> Deborah Seifrit, the second member of City Council sitting on FGH's Board at the time, did not attend the August 23, 2010, meeting, could not be reached by telephone, and did not vote on said amendments to FGH's bylaws.

Counsel has the right to appoint FGH's Board under the facts and circumstances described above.

Based upon the facts above, the record as a whole and the applicable law, summary judgment must be **GRANTED** in favor of Plaintiff Fairmont General Hospital, Inc. and against Defendant, City of Fairmont and Fairmont City Council. Summary judgment is appropriate where the moving party shows by the affidavits and evidence on file that "there is no genuine issue as to any material fact" and that "inquiry concerning the facts is not desirable to clarify the application of the law," such that "the moving party is entitled to a judgment as a matter of law." Williams v. Precision Coil, Inc., 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995) (quotations omitted) (affirming lower court's grant of summary judgment to defendant); see also Wilkinson v. Duff, 212 W. Va. 725, 730, 575 S.E.2d 335, 340 (2002).

Summary judgment is appropriate in favor of Plaintiff in the instant case because there is no genuine issue of material fact with respect to the matters in dispute – specifically, there are no disputed facts material to the determination of whether Section 4.06 of Fairmont's City Charter is applicable to Fairmont General Hospital, Inc., or whether Fairmont General Hospital, Inc. had the authority to amend its governing documents with respect to the authority to appoint its Board of Directors. Applying existing law to the undisputed facts relative to those questions of law, both must be resolved in favor of Plaintiff and against Defendants.

The applicability of Section 4.06 of Fairmont's City Charter is limited by its own terms to the City's "municipal hospital." At the time of the passage of Section 4.06, the entity known as Fairmont General Hospital was a City-owned "municipal hospital." However, with the formation in 1985 of Fairmont General Hospital, Inc., a private non-profit corporation, and the City's corresponding transfer of assets and liabilities of the municipal hospital and lease of the

hospital property to said corporation, the “municipal hospital” ceased to exist. Therefore, Section 4.06 of the Charter has no present applicability to Plaintiff, Fairmont General Hospital, Inc. Nor does the fact that Plaintiff allowed Fairmont City Council to continue appointing its Board of Directors operate as a waiver or estoppel that would preclude FGH from ever ceasing that practice. There was no evidence presented to the Court to support that FGH displayed an intention to forever relinquish its right to change the manner in which its Board is appointed, which evidence is required for waiver to exist. Hoffman v. Wheeling Sav. & Loan Ass'n, 57 S.E.2d 725, 735 (W. Va. 1950) (“A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.” (Citation omitted)). In fact, it was explained to the City when the privatization of the hospital was being considered that the new hospital’s Board of Directors would have the right to amend its Articles of Incorporation which were the initial source of the City’s appointment power.<sup>2</sup> The same evidence defeats any theory that the City had a reasonable belief that it would continue to have the right to appoint FGH’s Board into perpetuity, or that it took any action to its detriment in reliance upon such belief, as is a necessary element of estoppel. Ara v. Erie Ins. Co., 387 S.E.2d 320, 324 (W. Va. 1989) (citations omitted).

Defendants’ next theory, that at the time it amended its Articles of Incorporation, the FGH Board was without authority to do so because its members were invalidly appointed under void Amended Bylaws, must also fail. FGH’s failure to amend its Articles of Incorporation at the time it amended its Bylaws did not render the Amended Bylaws or the Amended and Restated Articles of Incorporation legally void or of no legal force or effect. The fact that FGH’s

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<sup>2</sup> Plaintiff presented evidence in the form of minutes from a public hearing held by the City at the time it was considering divesting itself of the municipal hospital operations, during which meeting City Counsel inquired and was advised that FGH would retain the right to amend its Articles of Incorporation, which was the source of the City’s right to appoint FGH’s Board.

Board overlooked adopting amendments to its Articles of Incorporation prior to or contemporaneously with adoption of the Amended Bylaws did not invalidate such amendments of the Bylaws or the subsequent adoption of the Board appointed thereunder to correspondingly amend the Articles. The City's argument that the Amended Bylaws were void *ab initio*, thus rendering void all actions taken by the Board appointed thereafter, is without merit.

The City's argument is essentially that FGH's Board's actions in this respect were *ultra vires*. In fact, given the inapplicability of Section 4.06 of the City Charter, the City's success in this matter is dependent upon the correctness of its contention that the FGH's amendments to its Bylaws were void *ab initio* and could not therefore be later be ratified by subsequent rectification of the Articles of Incorporation. The position is flawed for two reasons.

First, in order for a corporate act to be void, rather than voidable, it must have been an *ultra vires* act. In other words, as aptly pointed out by Defendants in their memorandum of law, citing 18B Am. Jur. 2d Corporations Section 1417, an act is void, and not merely voidable, when the corporation lacked the authority to perform the act in the first instance. The Court need not rule on the issue of whether or not the challenged actions in the instant case were void or voidable. If merely voidable, they were ratified by FGH's Board by subsequent ratification. If void, the law is clear that Defendants are without standing to challenge them per W. Va. Code Section 31E-3-304, which limits standing to challenge the validity of corporation's power (i.e., alleged *ultra vires* acts) to a very narrowly defined group, of which the City is clearly not a part. While subsection 304(b) of the cited statute provides that a member or director has standing to challenge a corporation's authority to act, any argument that the City derives standing through a City Council member who sits on the FGH Board of Directors is unpersuasive. Were the Court to accept that argument, it would also have to conclude, by virtue of the same logic, that the

active participation of said member in the challenged actions operates as a waiver of any right the City might have otherwise had to object to the same. The City cannot claim to be indistinguishable from its council members for purposes of standing, and then distinguish or distance itself from them for purposes of the actions it wishes to invalidate. The same conclusion must be reached with respect to Defendants' claim based on the alleged deficiencies in FGH's meeting notices and meeting minutes relative to the amendments to the Articles of Incorporation. If standing to raise such claim is conferred upon the City by virtue of the residency of the individual members of City Council, as alleged by Defendants, then actual knowledge of participation in the said meetings by a member of City Council must also be attributed to the City. In essence, the City cannot be heard to complain of an action in which it actively participated.

Moreover, even if the Court were to consider Defendants' assertion that FGH's amendments to its Bylaws were *ultra vires*, and Defendants had standing to pursue such theory, the Court would not be persuaded to invalidate the subsequent adoption of FGH's Amended and Restated Articles of Incorporation and ratification, or re-adoption of the Amended Bylaws, because the Board as composed prior to the amendments to FGH's Bylaws was essentially the same Board that amended the Articles of Incorporation.<sup>3</sup> The "uncontested" Board of Directors, as comprised prior to any of the actions that the City disputes, amended the Articles of Incorporation and ratified the prior amendments to FGH's Bylaws that had for a brief time been inconsistent with the Articles.<sup>4</sup> The City's attack on the very validity of the Board based solely

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<sup>3</sup> The composition of the Board of Directors on August 22, 2011, when the Articles of Incorporation were amended, was substantially the same as when the Bylaws were adopted, and those directors who voted on both the amended Articles and the amended Bylaws were sufficient in number to constitute a quorum and to vote to adopt the Amended Articles even if the new (contested) members' attendance and votes were to be disregarded.

<sup>4</sup> The Court also notes that but for the technical oversight of FGH's Board in failing to amend the Articles of Incorporation when it amended its Bylaws, the City's only argument in support of its position would be the applicability of Section 4.06 of the City Charter, which argument is clearly without legal support.

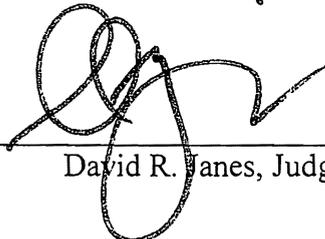
upon the fact that FGH went through the technical exercise of re-appointing members (albeit pursuant to the provisions of the challenged Amended Bylaws) who had been previously seated by the City is without legal support and cannot be given credence. This Court rejects the City's position that the entire Board be disregarded as invalid and a new Board be seated by City Council. Such result would clearly elevate form over substance and lead to a result repugnant to the spirit of the law and the clear intentions of the unchallenged Board of Directors.

Based upon the record contained in the Court file, the Court is of the opinion that summary judgment is appropriate in this case, inasmuch as such record taken as a whole could not lead a rational trier of fact to find for the Defendants. Because this case is decided upon the threshold issue of summary judgment, the Court is disinclined to address the Defendants' Motion to Vacate Preliminary Injunction, finding it to be rendered moot. Likewise, the Defendants' Motion for Summary Judgment is foreclosed by the Court's action undertaken in this Opinion Order.

**WHEREFORE**, it is hereby **ORDERED, ADJUDGED, and DECREED** that Plaintiff, Fairmont General Hospital, Inc.'s Motion for Summary Judgment is **GRANTED**, that Defendants' City of Fairmont and Fairmont City Council's Cross-Motion for Summary Judgment is **DENIED**, and that this case is therefore **DISMISSED**, with prejudice.

This is a final order. The Defendants' objections to the findings and rulings set forth in this opinion order are noted and preserved. The Clerk is directed to provide an attested copy of this order to counsel of record and to remove this action from the trial docket.

ENTER this **ORDER** this the 13<sup>th</sup> day of January, 2012.

  
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David R. Jones, Judge

A COPY                      TESTE  
  
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CLERK OF THE CIRCUIT COURT  
MARION COUNTY, WEST VIRGINIA

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**CERTIFICATE OF SERVICE**

I, Kevin V. Sansalone, Counsel for the City of Fairmont and Fairmont City Council, do hereby certify that on the 7<sup>th</sup> day of February, 2012, I served a true and accurate copy of the foregoing "Notice of Appeal" upon the following by such service as indicated:

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