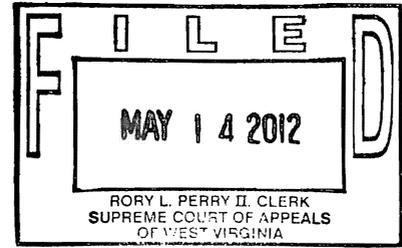


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

The City of Fairmont, Defendant Below,  
Petitioner.



vs.)

Appeal No. 12-0205  
(From the Circuit Court of Marion County,  
West Virginia, Civil Action No. 11-P-13

Fairmont General Hospital, Inc., Plaintiff Below,  
Respondent

BRIEF OF PETITIONER, DEFENDANT BELOW

Kevin V. Sansalone, Esq.  
City of Fairmont  
P.O. Box 1428  
Fairmont, WV 26554  
(304) 366-6211 ext. 336  
[ksansalone@fairmontwv.gov](mailto:ksansalone@fairmontwv.gov)  
State Bar Id # 3251

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## I. ASSIGNMENTS OF ERROR

1. The Circuit Court of Marion County erred in failing to find that the purported amended bylaws of Fairmont General Hospital, Inc., adopted August 23, 2010, were in direct conflict with the Articles of Incorporation of said hospital and that upon adoption said amended bylaws were void, unlawful and of no force or effect as stated in West Virginia Code §31E-2-205(b).

2. The Circuit Court of Marion County erred in failing to find that the self appointments made to Fairmont General Hospital, Inc., new board of directors pursuant to the void amended bylaws on November 22, 2010, January 24, 2011, and February 28, 2011, were unlawful, invalid and of no force and effect.

3. The Circuit Court of Marion County erred in failing to find that Fairmont General Hospital Inc's self- appointed new board of directors was without authority to adopt the Amended and Restated Articles of Incorporation of Fairmont General Hospital, Inc., on August 22, 2011, and on October 24, 2011, and that the adoption of the Amended and Restated Articles of Incorporation did not have the effect of ratifying the August 23, 2010, void amendments to the bylaws.

4. The Circuit Court of Marion County erred in failing to find that the purported adoption of the Amended and Restated Articles of Incorporation of Fairmont General Hospital on August 22, 2011, and on October 24, 2011, by the self appointed new board of directors was done in direct violation of West Virginia Code §16-5G-1 et seq., the *WV Open Hospital Proceedings Act*.

5. The Circuit Court of Marion County erred in finding that the individual members of defendant Fairmont City Council, as citizens of this State, lacked standing to challenge the action of the self-appointed new board of directors of Fairmont General Hospital, Inc., in adopting the Amended and Restated Articles of Incorporation of Fairmont General Hospital, Inc., under West Virginia Code §16-5G-1 et seq., the *WV Open Hospital Proceedings Act*.

6. The Circuit Court of Marion County erred in finding that Ronald Straight and Deborah Seifrit, members of Fairmont City Council, as duly appointed members of the governing board of Fairmont General Hospital, Inc., lacked standing to challenge the adoption of the Amended and Restated Articles of Incorporation of Fairmont General Hospital, Inc., on August 22, 2011, and October 24, 2011, pursuant to the provisions of West Virginia Code §31E-3-304(b)(1).

7. The Circuit Court of Marion County erred in holding that knowledge gained by an individual member of Fairmont City Council while participating in the meetings of the self-appointed new board of directors of Fairmont General Hospital, Inc., as a member of the board, could be imputed to the Council as whole and to the City of Fairmont.

8. The Circuit Court of Marion County erred in holding that the actions taken by an individual member of Fairmont City Council while participating in the meetings of the self-appointed new board of directors of Fairmont General Hospital, Inc., as a member of the board, could be imputed to the City of Fairmont and was the equivalent of active participation by the City of Fairmont.

9. The Circuit Court of Marion County erred in failing to hold that Section 4.06 of the Charter of the City of Fairmont, remains applicable to Fairmont General Hospital, Inc., and that the valid Articles of Incorporation of FGH, Inc, the Bylaws of FGH, Inc., the Lease Agreement and the Bill of Sale, read together, form a binding contract between the parties.

## II. STATEMENT OF THE CASE

### A. Procedural History

This action was filed pursuant to the provisions of the Uniform Declaratory Judgments Act, West Virginia Code §55-13-1 et seq., and Rule 57 of the West Virginia Rules of Civil Procedure. Through the pleadings, the parties sought a declaration from the Circuit Court of Marion County, West Virginia regarding the rights, status and other legal relations relative to the following:

1. Section 4.06 of the Charter of the City of Fairmont, hereinafter Fairmont;
2. The Articles of Incorporation of Fairmont General Hospital, Inc., hereinafter FGH, dated September 18, 1985;
3. The amended corporate bylaws of FGH dated August 23, 2010;
4. The Amended and Restated Articles of Incorporation of FGH dated October 24, 2011; and
5. The provision of West Virginia Code §16-5G-1 et seq., the West Virginia Open Hospital Proceedings Act.

On February 28, 2011, FGH filed its complaint seeking a declaration that Section 4.06 of the Fairmont's Charter was no longer applicable to FGH and for an injunction enjoining Fairmont City Council's appointees from attending the hospital board meetings. Fairmont and Council counterclaimed seeking a declaration that FGH's amended bylaws were in conflict with FGH's Articles of Incorporation and in violation of the laws of the State of West Virginia and that all appointments made by FGH pursuant to the authority of said amended bylaws were unlawful, invalid

and of no force and effect. Thereafter, on August 22, 2011 and October 24, 2011, the self-appointed new board of directors FGH took action in an attempt to amend and restate its Articles of Incorporation retroactive to August 23, 2010. As a result of said action, with leave of Court, Fairmont and Council filed a Supplemented Counterclaim seeking an additional declaration that the amended and restated Articles of Incorporation of FGH were null and void and of no force or effect. Moreover, Fairmont and Council asserted that FGH's action relating to the Amended and Restated Articles of Incorporation violated the provisions of West Virginia Code §16-5G-1 et seq., the *WV Open Hospital Proceedings Act*. FGH filed a reply to the Supplemented Counterclaim.

The parties filed Cross-motions for Summary Judgment, with supporting memoranda of law and exhibits. On November 29, 2011, the Circuit Court heard oral argument on the motions (*Appendix Vol IV*). On December 7, 2011, the Circuit Court issued a summary letter opinion stating that Section 4.06 of the City's Charter did not apply to FGH and that FGH had the legal authority to appoint its own board of directors by virtue of West Virginia law and its own governing documents. The Circuit Court rejected all of Fairmont's arguments, including Fairmont's argument that the hospital's self-appointed new board of directors was illegally constituted and had no power or authority to adopt the Amended and Restated Articles of Incorporation.

On January 13, 2012, the Circuit Court of Marion County entered an order adopting its ruling of December 7, 2012, (*Appendix Vol. I, p. 408*). It is from said Order that the City of Fairmont and Fairmont City Council prosecute this appeal.

#### B. Statement of Relevant Fact

Fairmont is a West Virginia Municipal Corporation organized and existing under the laws of the State of West Virginia, and particularly Chapter 8 of the West Virginia Code. Fairmont's current

Charter was approved by the voters on August 17, 1976. Fairmont City Council is the duly elected governing body of the City of Fairmont.

Section 4.06 of the Charter for the City of Fairmont (*Appendix Vol. 1, p. 241*) provides in part as follows:

(a) Management. The management, maintenance, administration, operation, custody and control of the municipal hospital and all the appurtenances thereof and grounds and site thereof, is hereby committed to a board of directors to be known as the “**Fairmont Hospital Board** (*emphasis supplied*)”.

(b) The Board shall consist of eleven members to be nominated and appointed by the Council. It shall be composed of two members of Council . . . .”

FGH is a non-profit, non-stock corporation organized and existing under the laws of the State of West Virginia, pursuant to a Certificate of Incorporation issued by the West Virginia Secretary of State’s Office on September 19, 1985.

FGH’s Articles of Incorporation (*Appendix Vol. 1, p. 242*) were filed with the aforementioned Secretary of State Office on September 19, 1985. Article IV states that the object and purpose of the corporation is “. . . to provide hospital care for **all the citizens of Fairmont, West Virginia.**

Article V, Section 2 of said Articles of Incorporation provides as follows:

“The Board of Directors of this corporation, which is called herein and shall be known as the “**Fairmont Hospital Board**” (*emphasis supplied*) shall consist of at least eleven persons, who shall be elected and appointed as follows:

a. Eleven or more members of the Fairmont Hospital Board shall be appointed by the City Council for the City of Fairmont, West Virginia, and shall have the following qualifications:

- i. they shall be bona fide residents of Marion County, West Virginia, who possess the qualifications and experience necessary for overseeing the operation of a hospital;
- ii. two of said directors shall be members of the City Council of the City of Fairmont;

- iii. at least 40% of the members shall represent, specifically organized labor, small business, elderly persons, and persons whose income is less than the national median. These persons shall be identified by category, and no persons shall represent more than one such category
- iv. They shall comply with such other qualifications as required by law.”

Article IX of said Articles of Incorporation provides in part as follows:

“In the event the activities of this corporation in pursuance of the object and purpose set out herein are discontinued, or upon the dissolution of this corporation, **all property of this corporation or the proceeds of liquidation thereof shall be distributed to or for the benefit of the City of Fairmont, West Virginia, or to any successor thereof**, (*emphasis supplied*) to be used for the provision of health care services for members of the general public.”

In 1986, through a series of ordinances, the hospital real property was transferred by deed from Fairmont to the Fairmont Building Commission, which is a board or commission of Fairmont, (*Appendix Vol. 1, p. 247*). The real property was then leased to FGH for the nominal amount of \$100.00 per year, which lease, (*Appendix Vol. 1, p. 259*), is currently in place. At that time, the personal property used in hospital operations was sold to FGH for the sum of \$1.00 as evidenced by the bill of sale (*Appendix Vol. 1, p. 289*).

FGH’s corporate Bylaws, (*Appendix Vol. 1, p. 291*) particularly Article II Board of Directors, Section 2 Number, Appointment, Term and Qualifications of Board Members, were consistent with FGH’s Articles of Incorporation, and the bylaws and the Articles of Incorporation were consistent with Fairmont’s Charter. The relevant portion of said bylaws provided as follows:

“Section 2. Number, Appointment, Term, and Qualifications of Board Members

- A. Number: The Board shall consist of eleven (11) Directors. The President of the Medical Staff shall serve as ex-officio members of the Board, without vote.
- B. Appointment and Term: The City Council of the City of Fairmont, West Virginia (City Council) shall appoint all voting members of the Board. Two of the eleven Directors shall be members of City Council and their terms shall be established by Council. The

term of office of then nine remaining Directors shall be for a period of six (6) years with staggered terms. Each Director shall hold office for the term which he is appointed and until his successor shall have been appointed and qualified or until his earlier death, resignation or removal. Directors may be reappointed for no more than three (3) terms.

- C. Qualifications: All Directors shall be bona fide residents of Marion County, West Virginia, and shall possess the qualifications and experience necessary for overseeing the operation of a hospital. The composition of the Board shall be in compliance with all applicable local, state and federal laws, rules and regulations. The Board may submit written recommendations to City Council with regard to prospective members of the Board.” (*Appendix Vol. 1, p. 292*)

From January 21, 1986, through May 25, 2010, inclusive, defendant Fairmont City Council duly appointed the members of the Fairmont Hospital Board, FGH’s governing body.

On or about August 23, 2010, FGH’s governing body, the Fairmont Hospital Board, purportedly amended its corporate bylaws, which amendments, in relevant part, provided for a board of directors to appoint its own members to the board upon recommendation of the committee on governance and further provided for the deletion of the requirement that members of the board shall be bona fide residents of Marion County, West Virginia (*Appendix Vol. 1, p. 309, 310, 311*). The minutes of the August 23, 2010, meeting of the Fairmont Hospital Board (*Appendix Vol. 1, p. 328*) provide in relevant part under the heading **Amended Bylaws** as follows:

“Mr. Martin reported that a roll call vote will be held for the Amendments to the Bylaws. He noted it takes a 2/3 majority.

Ms. Nesselrotte moved the Board accept the Amendments to the Bylaws of Fairmont General Hospital, Inc. as presented to the Board pursuant to Article 13 of the Bylaws. Dr. Bonasso seconded. A roll call vote was held with the following results:

Dr. Bonasso	Yes
Dr. Ciarolla	Yes
Rev. Dobbs	Yes
Mr. Fox	Yes
Mr. Martin	Yes
Ms. Nesselrotte	Yes
Mr. Osborne	Yes

Mr. Panza                    Yes  
Dr. Smith                    Yes

Phone calls were attempted to the two absent members: Mr. Elliott and Ms. Seifrit, with no success. There was a majority of affirmative votes. Motion passed.”

Prior to, and importantly on the date of the adoption of the purported amendment to the bylaws of Fairmont General Hospital on August 23, 2010, the Articles of Incorporation were exactly as stated on September 19, 1985 (*Appendix Vol. 1, p. 242*).

On August 23, 2010, the Fairmont Hospital Board consisted of the following:

Patrick Bonasso  
David Ciarolla  
Rev. Wesley Dobbs  
David Fox  
Mike Martin  
Toni Nesselrotte  
Walter Osborne  
John Panza  
Robin Smith  
Randy Elliott  
Deborah Seifrit

Thereafter, David Ciarolla resigned from the board

On November 22, 2010, following the purported bylaw change, upon recommendation of the committee on governance and upon motion by Patrick Bonasso, specific, direct, intentional and overt action was taken under authority of the amended bylaw to self-appoint the members of a new board of directors as evidenced by the minutes of said meeting (*Appendix Vol. 1, p. 331*). After November 22, 2010, this self- appointed new board of directors<sup>1</sup> was comprised of the following persons:

Patrick Bonasso  
Rev. Wesley Dobbs  
David Fox

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<sup>1</sup> For purposes of this brief the term “new board of directors” is adopted as used by FGH in its complaint and is used to distinguish the Fairmont Hospital Board from the self-appointed board of directors.

Mike Martin  
Toni Nesselrotte  
Walter Osborne  
John Panza  
Robin Smith  
Randy Elliott  
Deborah Seifrit<sup>2</sup>

Thereafter, Robin Smith's term on FGH's self-appointed new board of directors which began on November 22, 2010, expired.

Thereafter, Deborah Seifrit's term on FGH's self-appointed new board of directors which began on November 22, 2010, expired.

On January 24, 2011, upon recommendation of the committee on governance, FGH's self-appointed new board of directors appointed Robin Smith to a new term on the board, as evidenced by the Minutes of said meeting (*Appendix Vol. 1, p. 333*). On January 24, 2011, Robin Smith was and is currently a member of Fairmont City Council.

At some point, between the January 24, 2011 meeting and the February 28, 2011 meeting, Walter Osborne resigned his position from the self-appointed new board of directors.

On February 28, 2011, on behalf of the committee on governance, the self appointed new board of directors appointed Joedy Daristotle the board, as evidenced by the Minutes of said meeting (*Appendix Vol. 1, p. 338*).

By its actions on November, 22, 2010, January 24, 2011, and February 28, 2011, FGH pursuant to the void amended bylaw had self-appointed an entire new board of directors replacing the Fairmont Hospital Board duly appointed by Fairmont City Council.

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<sup>2</sup> As of November 22, 2011, it does not appear that action was taken by the new board of directors to fill the vacancy created by the resignation of David Ciarolla.

After February 28, 2011, the composition of FGH's new board of directors, self appointed by the board of directors pursuant to the void amended bylaws, was as follows:

Patrick Bonasso  
Joedy Daristotle  
Rev. Wesley Dobbs  
Randy Elliott  
David Fox  
Mike Martin  
Toni Nesselrotte  
John Panza  
Robin Smith

On January 25, 2011, City Council appointed Councilman Ron Straight and Councilwoman Deborah Seifrit to the known vacancies on the Fairmont Hospital Board (*Appendix Vol. 1, p. 341*).

FGH refused to recognize City Council's appointments and refused to seat them and filed the complaint for declaratory judgment and the request for an injunction which underlies this appeal.

The fact that FGH had self-appointed a new board of directors pursuant to the void amended bylaws was set forth by FGH in its verified complaint at Paragraphs 12, 49, 50, and 59 (*Appendix Vol. 1, p.303, 308 and 309*).

On or about November 1, 2011, Fairmont and City Council received an Affidavit of Patrick Bonasso, with exhibits (*Appendix Vol. 1, p. 138*). The affidavit provides that on October 24, 2011, FGH's self-appointed new board of directors passed a resolution adopting Amended and Restated Articles of Incorporation intended to be ratified and effective August 23, 2010, the date of the adoption of the amended bylaws approximately one year earlier. One of the exhibits attached to the affidavit was the purported Amended and Restated Articles of Incorporation of FGH, (*Appendix Vol. 1, p. 141-146, 342-346*). Another exhibit attached to the Bonasso Affidavit is a resolution of the board of directors. This resolution recites that the board of directors ". . . at a meeting held on the

22<sup>nd</sup> day of August 2011 . . . approved Amended and Restated Articles of Incorporation that were later found to contain typographical errors” (*Appendix Vol. 1, p. 147, 347*).

By order, the Circuit Court of Marion County required, as a condition of granting the preliminary injunction, that FGH provide Fairmont with the Agenda for its meetings and the minutes of said meetings. The Agenda provided to Fairmont pursuant to the Court’s Order, purportedly for the August 22, 2011, meeting of the board of directors, which meeting is noticed for August 22, 2010, fails to identify any action item regarding the proposed adoption of Amended and Restated Articles of Incorporation for FGH (*Appendix Vol. 1, p. 352-353*).

The minutes from what appears to be the August 22, 2011, meeting which are in part dated July 25, 2011, do not reflect any action taken by the self-appointed new board of directors to adopt Amended and Restated Articles of Incorporation for FGH ((*Appendix Vol. 1, p. 354-356*).

The minutes from what appears to be the August 22, 2011, meeting contain a recitation of certain non-descript generic action taken by the Board under the heading **Executive Session** and the sub-heading **Governance Committee** as follows:

“Ms. Nesselrotte moved, on behalf of the Governance Committee, for approval of the Governing Body policies as set forth, Mr. Elliott seconded, and the motion carried.

“Ms. Nesselrotte moved, on behalf of the Governance Committee, for approval of the Resolution of the Board of Directors of Fairmont General Hospital as presented. Rev. Dobbs seconded and motion carried”. (*Appendix Vol. 1, p. 356*).

The Agenda provided to defendants pursuant to the Court’s Order, purportedly for the October 24, 2011, meeting of the board of directors, which meeting is noticed for October 24, 2010, fails to identify any action item regarding the proposed adoption of amended and restated articles of incorporation for plaintiff as recited in the corporate resolution attached to the Bonasso Affidavit (*Appendix Vol. 1, p. 357-358*).

### III. SUMMARY OF ARGUMENT

1. On August 23, 2012, Fairmont General Hospital Inc.'s governing board, identified as the Fairmont Hospital Board, provided for certain amendments to its bylaws. The amendments were designed, in part, to defeat Fairmont City Council's right to appoint said board; to provide for a self-appointing board of directors upon recommendation of a committee on governance; and to provide for the removal of an obligatory residency requirement. On August 23, 2010, the date of adoption of said amended bylaws, the amendments were in direct conflict with the valid Articles of Incorporation of FGH adopted September 19, 1985, in that the Articles of Incorporation of FGH vested Fairmont City Council with the power to appoint the hospital's governing board and contained a clause that all members of the board must be residents of Marion County. The Circuit Court of Marion County erred in failing to hold that the challenged portion of the amended bylaws were, upon adoption on August 23, 2010, in violation of the provisions of West Virginia Code §31E-2-205(b), and void, unlawful and of no force or effect.

2. Pursuant to the void bylaw amendments and upon recommendation of the committee on governance, FGH made appointments to a "new board of directors" on November 22, 2010, January 24, 2011, and February 28, 2011, thereby replacing the duly appointed Fairmont Hospital Board with a self-appointed new board of directors. The Circuit Court of Marion County erred in failing to hold that the self-appointments made by Fairmont General Hospital Inc.'s board of directors to the new board of directors pursuant to said amended bylaws, on November 22, 2010, January 24, 2011, and February 28, 2011, were unlawful, invalid and of no force and effect.

3. On August 22, 2011, and again on October 24, 2011, the self-appointed new board of directors of Fairmont General Hospital adopted Amended and Restated Articles of Incorporation and further stated that the effective date of said Amended and Restated Articles was August 23, 2010, in an effort to ratify the August 23, 2010, amendments to the bylaws. The Circuit Court of Marion County erred in failing to hold:

A. That the self-appointed new board of directors of Fairmont General Hospital, Inc., was without authority to adopt Amended and Restated Articles of Incorporation for Fairmont General Hospital, Inc., on August 22, 2011, and again on October 24, 2011,

B. That the Amended and Restated Articles of Incorporation for Fairmont General Hospital, Inc., adopted on August 22, 2011, and again on October 24, 2011, were spurious, void and of no force and effect; and

C That the Amended and Restated Articles of Incorporation did not have the effect of ratifying the August 23, 2010, amendments to Fairmont General Hospital Inc.'s bylaws.

4. The Circuit Court of Marion County erred in failing to hold that the adoption of the Amended and Restated Articles of Incorporation of Fairmont General Hospital on August 22, 2011, and on October 24, 2011, by the self-appointed new board of directors, was done in direct violation of the provisions of West Virginia Code §16-5G-1 et seq., the *WV Open Hospital Proceedings Act*, insofar as:

A) The published agenda for both meetings was devoid of any action item which reasonably placed the public on notice that the board proposed to adopt Amended and Restated Articles of Incorporation;

B) The board conducted an unauthorized illegal governance committee meeting and executive session, from both of which the public was excluded, to discuss and act on the amendments; and

C) The board prepared, adopted and disseminated minutes which did not reflect the action taken and were designed to conceal said action and mislead the public.

5. The Circuit Court of Marion County erred in failing to hold that the individual members of Fairmont City Council, as citizens and residents of Fairmont and Marion County, West Virginia, had standing to challenge the action of Fairmont General Hospital, Inc., in adopting the Amended Bylaws of August 23, 2010 and the Amended and Restated Articles of Incorporation of Fairmont General Hospital, Inc., on August 22, 2011, and again on October 24, 2011, pursuant to the provisions of West Virginia Code §16-5G-1 et seq., the *WV Open Hospital Proceedings Act*, which provides “any citizen of this state” with standing to enforce the provisions of the Act and to seek redress for a violation thereof in the circuit court in the county where the hospital is located,” West Virginia Code §16-5G- 6.

6. The Circuit Court of Marion County erred in failing to hold that Ronald Straight and Deborah Seifrit , members of Fairmont City Council, as duly appointed members of the governing board of Fairmont General Hospital, Inc., had standing to challenge the adoption of the Amended Bylaws of August 23, 2010 and the Amended and Restated Articles of Incorporation of Fairmont General Hospital, Inc., on August 22, 2011, and again on October 24, 2011, pursuant to the provisions of West Virginia Code §31E-3-304(b)(1).

7. The Circuit Court of Marion County erred in holding that knowledge gained by an individual member of Fairmont City Council while participating in the meetings of the self-appointed board of directors of Fairmont General Hospital, Inc., as a member of the board, could be imputed to the Council as whole and to the City of Fairmont.

8. The Circuit Court of Marion County erred in holding that the actions taken by an individual member of Fairmont City Council while participating in the meetings of the self-appointed board of directors of Fairmont General Hospital, Inc., as a member of the board, could be imputed to the City of Fairmont and was the equivalent of active participation by the City of Fairmont.

9. The Circuit Court of Marion County erred in failing to hold that Section 4.06 of the Charter of the City of Fairmont, remains applicable to plaintiff and the valid Articles of Incorporation of Fairmont General Hospital Inc, the valid Bylaws of said hospital, the Lease Agreement between the City of Fairmont Building Commission and FGH, and a Bill of Sale, read together, form a binding contract between the parties that entitle the Council for the City of Fairmont

to appoint the members of the Fairmont Hospital Board, Fairmont General Hospital, Inc's governing body.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18 of the Rules of Appellate Procedure, Fairmont and City Council state as follows:

- (1) No party has waived oral argument;
- (2) This appeal is meritorious;
- (3) The dispositive issues have been authoritatively settled; however, the lower court ignored settled law in making findings of fact and conclusions of law and arriving at the decision embodied in the order of January 13, 2012.
- (4) The facts and legal arguments are well presented in petitioners' brief; however, oral argument may aid the decisional process.

Upon information and belief, this case involves assignments of error in the application of settled law as described in Rule 19 of the of the Rules of Appellate Procedure

ARGUMENT

A circuit court's entry of summary judgment is reviewed de novo by this Court. When undertaking its plenary review, this Court should apply the same standard for granting summary judgment as applied by the circuit court, *Subcarrier Communications v. Nield*, 624 S.E. 2d 729, 218 W.Va. 292 (2005). Likewise, this Court's review of a denial of a motion for summary judgment is de novo, *Hicks ex rel. Saus v. Jones*, 617 S.E. 2d 475, 217 W.Va. 107( 2005).

The well established standard for granting summary judgment provides that a motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law and that judgment should be granted as a matter of law. Although no genuine issue of fact exists in this case

and no inquiry into the facts need be made, the Circuit Court of Marion County erred in granting FGH's motion for summary judgment and in failing to grant the City of Fairmont and Fairmont City Council's motion for summary judgment. In particular, the Circuit Court of Marion County erred insofar as the undisputed facts reveal that the City of Fairmont and Fairmont City Council were entitled to judgment as a matter of law in that:

**1. The purported amended bylaws of FGH of August 23, 2010, were in direct conflict with the Articles of Incorporation of Fairmont General Hospital, Inc. , when adopted, and upon adoption said amended bylaws were void, unlawful and of no force or effect.**

The Circuit Court of Marion County in its order on January 13, 2012, found that

“The City’s argument is essentially that FGH’s Board’s actions in [adopting the amended bylaws on August 23, 2012] were *ultra vires* . . . . [T]he 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 ratified by subsequent ratification of the Articles of Incorporation.” (*Appendix Vol.1, p. 413*)

After properly framing the issue and recognizing that *ultra vires* acts are void, the Circuit Court erroneously concluded that it was not necessary to address it (*Appendix Vol. 1, p.413*). Had the Circuit Court addressed the issue, it would have been forced, based on authoritatively settled principles of law, to conclude that the challenged amended bylaws were void *ab initio* and that summary judgment for Fairmont and Fairmont City Council was warranted.

It is well settled that:

“Generally, the bylaws [of a corporation] may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation. Bylaws must be reasonable and fair, clear and definite, and for a corporate purpose, and always within the limits of the charter or articles of incorporation. They must be strictly subordinate to the Constitution and general law of the land, and may not infringe the policy of the state or be hostile to public welfare. All bylaws which are inconsistent with the charter or articles of incorporation of a corporation or with the governing law are void”.

*18A Am. Jur. 2d Corporations §265*

“Unquestionably, the bylaws of a corporation may not contain provisions which are inconsistent with the articles of incorporation, and any bylaw conflicting with the articles is void”.

*18A Am. Jur. 2d Corporations §261*

“A bylaw of a corporation may not conflict with the articles of incorporation and where there is a conflict, the articles of incorporation control and the bylaw is void”. *18 Am. Jur. 2d §16*

“By-laws inconsistent with the charter, articles of association or incorporation, or governing statute are void. Bylaws inconsistent with statutory law, the common law, or with public policy or good morals, are void, even though they may have been assented to by the stockholders or members. Thus, where a corporation’s bylaws conflict with the statute under which the corporation was organized, the statute controls. Similarly, the articles of incorporation establish the purposes and governance of a corporation, and where the by-laws are in conflict with the articles, the articles control.

The requirement that by-laws be consistent with law is frequently expressed in the statute or charter by a provision empowering corporations to make by-laws not inconsistent with any existing law, or not contrary to law, or declaring that by-laws shall be subject to the general law of the state.

A corporation cannot, by adopting or amending by-laws, make an altogether new and different society or corporation. Further by-laws whereby the members of a corporation undertake to acquire or to exercise powers or franchises not granted by their charter or governing statutes, or to diminish the corporate powers as set forth in the certificate of incorporation are void.”

*18 C.J. S. Corporations §163*

The State of West Virginia adheres to the general principles of law stated above. The West Virginia Legislature has adopted Chapter 31E *The West Virginia Non-profit Corporation Act*. The Act in §31E-2-205 *Bylaws* provides as follows

“(a) The incorporators or board of directors of a corporation shall adopt initial bylaws for the corporation.

(b) The bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation.”

Statutes such as West Virginia Code §31E-2-205 “. . . clearly indicate a legislative perception that by-laws are not equivalent to articles [of incorporation], but rather are the lowest element of a three-tiered hierarchy. The corporation law is at the top, then come the articles of incorporation, the by-laws. The lowest tier cannot be inconsistent with either of the higher tiers” *Oceanside Properties, Inc., v. Bankers Trust Company* (United State Bankruptcy Court D. Hawaii) 14 B.R. 95, 106 (1981). Bylaws inconsistent with law or articles of incorporation are void. *Boatmen’s First National Bank of West Plains v. Sothern Missouri District Council*, 806 S.W.2d 706 (1991). A bylaw of a corporation may not conflict with the articles of incorporation and, if a conflict exists, the bylaw is void, *Sabre Farms, Inc., v. H.C. Jordan*, 78 Or.App. 323, 717 P2d 156 (1986).

The undisputed facts in this case reveal that on the date of adoption of the challenged amendments to FGH’s bylaws, that said amendments were clearly in conflict with FGH’s Articles of Incorporation. Specifically, the undisputed facts reveal that on August 23, 2010, FGH’s governing body amended its corporate bylaws to provide, in part, for the board of directors to appoint its own members upon recommendation of the committee on governance, and to provide for the deletion of the requirement that members of the board shall be bona fide residents of Marion County, West Virginia (*Appendix Vol.1, p 309-311*). Said facts further reveal that on August 23, 2010, Article V, Section 2 of FGH’s Articles of Incorporation contained the following mandatory provisions:

“The Board of Directors of this corporation, which is called herein and shall be known as the “**Fairmont Hospital Board**” (*emphasis supplied*) shall consist of at least eleven persons, who shall be elected and appointed . . . by the City Council for

the City of Fairmont, West Virginia, and . . . shall be bona fide residents of Marion County, West Virginia . . .” (*Appendix Vol.1, p 242*)

Clearly, the challenged amendments to plaintiff’s bylaws were upon adoption in direct conflict with the Articles of Incorporation.

The principles of law stated above are without question applicable to FGH and when applied to the undisputed facts of this case leave no doubt that Fairmont and City Council were entitled to judgment as a matter of law and that Fairmont and City Council are entitled to a declaration that the amended by-laws of FGH adopted on August 23, 2010, are void, unlawful and of no force or effect to the extent that said amended bylaws conflicted with the Articles of Incorporation of FGH, as stated in 1985, and in effect on the date of the adoption of said amended bylaws. Moreover, the vain attempt of FGH by amending its bylaws, to acquire or exercise powers or franchises not granted by said Articles of Incorporation is equally void, unlawful and of no force or effect.

In light of all of the above, the Court’s determination that

“The fact that FGH’s Board simply “overlooked adopting amendments to is 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** (emphasis supplied) to correspondingly amend the articles. The City’s argument that the Amended Bylaws were void *ab initio*, thus rendering all actions taken by the Board appointed thereafter, is without merit. (*Appendix Vol. 1, p.413, 414*)

is wholly unfounded and erroneous: and must be reversed.

**2. FGH’s self- appointed new board of directors was without authority to adopt the Amended and Restated Articles of Incorporation of Fairmont General Hospital, Inc., and the adoption of the Amended and Restated Articles of Incorporation did not have the effect of ratifying the August 23, 2010, amendments to the bylaws.**

**A. The new board of directors appointed pursuant to the void bylaws is without authority to adopt Amended and Restated Articles of Incorporation for Fairmont General Hospital, Inc., or to provide for the ratification of said Amended and Restated Articles effective to August 23, 2010.**

The Circuit Court of Marion County in its order on January 13, 2012, found that

“[E]ven if the Court were to consider Defendants’ assertion that FGH’s amendments to its bylaws was *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 Reinstated Articles of Incorporation, and ratification and 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.” (*Appendix Vol. 1, p. 413*)

The Circuit Court further found that FGH merely “went through a technical exercise of re-appointing members (albeit pursuant to the provisions of the challenged Amended Bylaws) who had been previously seated by the City . . . .” (*Appendix Vol. 1, p. 415*)

In so finding, the Circuit Court rejected the fact that “a new board” (See Complaint ¶¶12, 49, 50, and 59) (*Appendix Vol. 1, p.303, 308 and 309*) had been appointed and reasoned that to so hold was to elevate substance over form,

The above findings and the ruling predicated thereon are erroneous and should be reversed.

On November 22, 2010, following the purported bylaw change, upon recommendation of the committee on governance and upon motion by Patrick Bonasso, specific, direct, intentional and overt action was taken under the perceived authority of the amended bylaws to self-appoint FGH’s new board of directors (*Appendix Vol. 1, p. 331*). Thereafter, on January 24, 2011, upon recommendation of the committee on governance, the new board of directors appointed Robin Smith to a term on the board (*Appendix Vol. 1, p. 333*), and on February 28, 2011, on behalf of the committee on governance, the new board of directors appointed Joedy Daristotle to a term on the board. (*Appendix Vol. 1, p. 338*)

By its actions on November, 22, 2010, January 24, 2011, and February 28, 2011, FGH pursuant to the amended bylaw had appointed an entirely new board of directors replacing all of the Fairmont Hospital Board duly appointed by City Council.

After February 28, 2011, the composition of FGH's self-appointed new board of directors pursuant to the amended bylaws, was comprised of the following person:

Patrick Bonasso  
Joedy Daristotle  
Rev. Wesley Dobbs  
Randy Elliott  
David Fox  
Mike Martin  
Toni Nesselrotte  
John Panza  
Robin Smith

It is of no consequences that some of these persons were persons formerly appointed to the Fairmont Hospital Board by City Council pursuant to Article V, Section 2 of FGH's Articles of Incorporation, as stated in 1985 and in effect on August 23, 2010, the date of the amendment to the corporate bylaws. These persons legal status from validly constituted members of the Fairmont Hospital Board appointed by defendant City Council was destroyed by the actions of plaintiff's new board of directors as reflected in the corporate minutes from November 22, 2010, January 24, 2011, and February 28, 2011 and as pleaded by FGH in its sworn complaint and admitted by Fairmont and Fairmont City Council in its answer.

After February 28, 2011, all of persons seated by FGH had been self-appointed by FGH's new board of directors upon recommendation of the committee on governance. To recognize the source of the board's power to self- appointment as the amended bylaws and then to categorize the board's action of November 22, 2012, January 24, 2011, and February 28, 2011, as "a technical

exercise” is contradictory and without support. To rule that a usurpation of power pursuant to a void amended bylaw is “substance over form” is error.

The new board of directors had no legitimate power to act since the entire board had been self appointed pursuant to the void amended by-laws. Without power to act, the members of the new board of directors could not lawfully adopt the amended and restated articles of incorporation on August 22, 2011, and again on October 24, 2011, or to ratify them effective to August 23, 2010, in a vain attempt to legitimize themselves.

Since the new board of directors was illegally constituted, it had no authority to adopt the amended and restated articles of incorporation on August 22, 2011, and again on October 24, 2011 or to ratify them effective to August 23, 2010. For the Fairmont Hospital Board to be properly constituted, its members must be appointed by defendant City Council. Until the members of the Fairmont Hospital board are again so appointed, the self-appointed board of directors cannot ratify any action it has allegedly and illegally taken pursuant to power and authority it usurped.

**B. The challenged portion of the amendment to the bylaws adopted on August 23, 2010, was void and unlawful upon adoption and is therefore not subject to ratification.**

Generally, it has been held that a transaction which conflicts with the statutory obligations of a corporation can not be ratified. Moreover, a void act cannot be the subject of ratification. See *Michies Jurisprudence Corporations* §181.

A corporation or its stockholders cannot ratify illegal acts. A corporation’s void act cannot be ratified by any vote of the stockholders because the act is beyond the lawful power of the corporation itself. Accordingly, no amount of shareholder ratification validates acts repugnant to public policy and which are therefore void *ab initio*. Similarly, a board of directors cannot ratify a

void or illegal act, *18B Am. Jur. 2d Corporations §1416*. Generally, a corporation cannot ratify an ultra vires act that in the first instance the corporation did not have the power, under the circumstances, to do. *18B Am. Jur. 2d Corporations §1417*. On the other hand, acts done in the interest of the corporation that are voidable only, and not void or ultra vires, may be ratified. *18B Am. Jur. 2d Corporations §1415*.

An ultra vires act, in the proper sense, is an act beyond the powers conferred by the legislature. It is not only voidable but wholly void, and of no legal effect. An ultra vires act of a corporation cannot be ratified since it could not have been authorized. Nothing can give the unlawful act any validity or be the foundation of any right. Moreover, the essential distinction between voidable and void acts is that the former are those which may be bound to have been performed in the interest of the corporation but beyond the authority of management, as distinguished from acts which are *ultra vires* . . . . The practical distinction is that voidable acts are susceptible to cure . . . while void acts are not. *Michelson v. Duncan* 407 A.2d 211, 219 (DE 1979). Void acts are those acts that the board, or more generally the corporation, has no implicit or explicit authority to undertake or those acts that are fundamentally contrary to public policy. The list of void acts, while not exclusive, is nonetheless very restricted. Void acts include *ultra vires* acts. **No amount of . . . ratification validates acts repugnant to public policy**, (*emphasis supplied*), *Denver Area Meat Cutters and Employers Pension Plan v. Clayton* 120 S.W3d 841, 852 (TN 2003). Void acts are non-ratifiable because the corporation cannot lawfully accomplish them. Such void acts are often described in conclusory terms such as *ultra vires*, *Harbor Finance Partners v. Huizenga* 751 A.2d 879 (DE 1999).

West Virginia Code §31E-2-205 establishes the public policy of this State.

Although, the West Virginia Legislature has empowered plaintiff with the ability to adopt bylaws that may contain provisions for managing the business and regulating the affairs of the corporation, that power is not without limitation. The legislature has limited this power by prohibiting a bylaw that is inconsistent with law or the articles of incorporation, West Virginia Code §31E-2-205. This prohibition is applicable to plaintiff.

Insofar as the purported amended bylaws of August 23, 2010, were in direct conflict with the Articles of Incorporation of Fairmont General Hospital, Inc., upon adoption, said amended bylaws were thus ultra vires, *void ab initio*, and of no force or effect, and given the principles of law cited above, said amended bylaws cannot be ratified retroactive to the date of adoption by a subsequent act of the corporation.

Any findings or conclusions contained in the Circuit Court of Marion County's ruling of January 13, 2012, to the contrary to the above principles are erroneous and any ruling predicated thereon should be reversed.

**3. The purported adoption of the Amended and Restated Articles of Incorporation of Fairmont General Hospital on August 22, 2011, and on October 24, 2011, by the new board of directors was done in direct violation of West Virginia Code §16-5G-1 et seq., the *WV Open Hospital Proceedings Act*.**

On or about November 1, 2011, Fairmont and Fairmont City Council received an Affidavit of Patrick Bonasso, with exhibits (*Appendix Vol. I, p. 138*). The affidavit provides that on October 24, 2011, FGH's self-appointed new board of directors passed a resolution adopting Amended and Restated Articles of Incorporation intended to be ratified and effective August 23, 2010. One of the exhibits attached to the Bonasso Affidavit is a resolution of the board of directors (*Appendix Vol. I,*

p. 147,347). This resolution recites that the board of directors “. . . at a meeting held on the 22<sup>nd</sup> day of August 2011 . . . approved amended and restated articles of incorporation that were later found to contain typographical errors”.

The Agenda provided to Fairmont and City Council, purportedly for the August 22, 2011, meeting of the board of directors, which meeting is noticed for August 22, 2010, fails to identify any action item regarding the proposed adoption of amended and restated articles of incorporation for FGH. (*Appendix Vol. I, p .352, 353*). The minutes from what appears to be the August 22, 2011, meeting which are in part dated July 25, 2011, do not reflect any action taken by FGH’s new board of directors to adopt amended and restated articles of incorporation for plaintiff (*Appendix Vol. I, p. 354-356*).

The Agenda provided to Fairmont and City Council purportedly for the October 24, 2011, meeting of FGH’s new board of directors, which meeting is noticed for October 24, 2010, fails to identify any action item regarding the proposed adoption of amended and restated articles of incorporation for FGH as recited in the resolution attached to the Bonasso Affidavit (*Appendix Vol. I, p. 357, 358*).

FGH is subject to the *West Virginia Open Hospital Proceedings Act*, §16-5G-1 et seq., (the Act)<sup>3</sup>. FGH’s new board of directors, in adopting the Amended and Restated Articles of Incorporation knowingly and intentionally disregarded the provisions of the Act.

The West Virginia Legislature has declared the purpose of the Act.

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3. WV Code 16-5G-1 et seq., and WV Code 6-9A-1 et seq., the Open Government Proceedings Act, are similar statutes. Although the WV Ethics Commission’s advisory authority does not extend to 16-5G-1, it has provided Advisory Opinions relating to WVC 6-9A-1 et seq., which are meaningful to this discussion and provide guidance. Of particular import are Opinion Nos. 2006-14; 2008-17; 2009-04; and 2009-09. Moreover, the similarities between WVC 16-5G-1 et seq., and WV Code 6-9A-1 et seq., have been recognized by this Court in *Hamrick v. CAMC* 648 S.E.2d 1; 220 W.Va. 495 (2007). See Also 102 W.Va. L. Rev. 131 Fall 1999.

Section §16-5C-1 Declaration of Legislative Policy provides as follows:

“The legislature hereby finds and declares that hospitals owned or operated by nonprofit corporations, nonprofit associations or local governmental units are relied on by citizens of this State for services essential to their health and well-being. The legislature further finds and declares that public funds from various sources and various means contribute significantly to the revenues and operations of such institutions. Therefore, it is in the best interest of the people of this State for all proceedings of the boards of directors or other governing bodies of such hospitals to be conducted in an open and public manner so that the people can remain informed of the decisions and decision making processes affecting the health services on which they so vitally depend and which they help support through tax exemptions, public funding and other means.”

In discussing the legislative declaration of public policy in the Act, this Court in *Hamrick v.*

*Charleston Area Medical Center* 648 S.E. 2d 1; 220 W.Va. 495, 500 (2007) stated that:

“[T]he stated purpose of the Hospital Act is to ensure that the public may observe in a meaningful fashion the decision-making processes of nonprofit hospitals. The resolution of uncertainty about the Hospital Act’s application in a given instance should be in accord with this principle. Dr. Caveny’s article put it well: “. . . when in doubt . . . take the advice of Justice Cleckley to heart and err on the side of openness. For the good of all of its citizens, let the sun shine brighter in the Mountain State”.

Applying the legislative purpose in the instant case, we see that the inclusion of an entity like the [Medical Staff Executive Committee] within the Hospital Act’s purview is consistent with the Legislature’s stated purpose in enacting the act —“so that people can remain informed of the decisions and decision making processes . . .” of a hospital. To permit public access only to CAMC Board of Trustees meetings, when the undisputed record indicates that many of the decisions that are thrashed out in the MSEC are ratified pro forma by the Board, would be contrary to the Hospital Act’s legislatively-stated purpose.”

Section §16-5G-3 of the Act provides that “[e]xcept as expressly and specifically provided by law and except as provided in section four of this article, all meetings of the governing body of a hospital shall be open to the public. The exceptions to the rule provide that an executive session may be held only upon a majority affirmative vote of the members present of the governing body of a

hospital for one of the stated reasons. Section 4 of the Act (WVC §16-5G-4) sets out 10 enumerated exceptions.

FGH cites as authority for the executive sessions held on August 22, 2011 (*Appendix Vol. I, p. 352,353*) and on October 24, 2011, (*Appendix Vol. I, p. 357,358*) the exceptions set out in exceptions 1, 3, 4, and 10 of the enumerated subparts of the Act. The four cited by plaintiff are as follows.

1. The appointment, employment, retirement, promotion, demotion, disciplining, resignation, discharge, dismissal or compensation of any officer or employee, or other personnel matters, or for the purpose of conducting a hearing on a complaint against an officer or employee, unless the officer or employee requests an open meeting.

3. Investigations and proceeding involving the issuance, denial, suspension or revocation of the authority or privilege of a medical practitioner to use the hospital and to engage in particular kinds of practice or to perform particular kinds of operations, unless the person seeking the authority or privilege or whose authority or privilege was denied, suspended or revoked requests an open meeting

4. Matters concerning the failure or refusal of a medical practitioner to comply with reasonable regulations of a hospital with respect to the conditions under which operations are performed and other medical services are delivered.

10. Matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving competition which, if made public, might adversely affect the financial or other interest of the State or any political subdivision or the hospital.

None of the exceptions cited by FGH can even remotely be construed as applicable to corporate action providing for the adoption of amended and restated articles of incorporation. Clearly, the executive sessions held on August 22, 2011 and October 24, 2011 were held in violation of the Act and were knowingly and intentionally designed to mislead the public including the Fairmont and City Council and keep them in the dark.

Clearly, FGH's use of executive session and committee meetings are the equivalent of CMAC's use of its Medical Staff Executive Committee discussed in *Hamrick*. FGH's executive sessions and committee meetings are where the real decisions are thrashed out, which decisions are then merely ratified pro forma by the board. This Court, in *Hamrick*, rejected this secretive mode of operation as contrary to the Act's legislatively-stated purpose.

Additionally, FGH's meeting agenda for each of the August 22, 2011, and October 24, 2011, meetings was knowingly and intentionally designed to mislead the public including Fairmont and City Council. Neither Agenda contains any reference to an action item that would reasonably place the public on notice that FGH proposed to adopt amended and restated articles of incorporation.

A meeting agenda involves more than simply setting out the order of business that FGH's governing body will follow. Any matter requiring official action by the governing body must be listed on the agenda. The agenda must employ language that will reasonably place the public on notice of the particular items that will be considered during each meeting. Generic descriptions are insufficient to satisfy this requirement. A substantial proposed change in the ultimate governing document, in this case the Articles of Incorporation, is a matter which requires official action by the governing body. Any proposed change would have had to be included on the Agenda to be actionable. To permit FGH to act otherwise would be to permit it to defeat the stated policy underlying the Act. Clearly the Agendas from the meetings of August 22, 2011, and October 24, 2011, were designed to mislead the public and the defendants.

Finally, FGH's meeting minutes from the August 22, 2011, (*Appendix Vol. I, p. 354- 356*) meeting are inconsistent with the provisions of the Act and were intentionally designed to mislead the public and the defendants.

Section 5 of the Act, WVC §16-5G-5, provides as follows:

“Each governing body shall provide for the preparation of written minutes of all of its meetings. Subject to the exception set forth in section four (16-5G-4) of this article, minutes of all meeting except minutes of executive sessions, if any are taken, shall be available to the public within a reasonable time, after the meeting and shall include, at least, the following information:

1. The date, time and place of the meeting;
2. The name of each member of the governing body present and absent;
3. All motions, proposals, resolutions, orders, ordinances, and measures proposed, the name of the person proposing the same and their disposition; and
4. The results of all votes and upon the request of a member, pursuant to the rules, policies or procedures of the governing board for recording roll call votes, the vote of each member, by name.

The minutes from what appears to be the August 22, 2011, meeting which are in part dated July 25, 2011, are devoid of any action whatsoever which was taken by the Board to adopt amended and restated articles of incorporation for FGH.

The minutes from what is assumed to be the August 22, 2011, meeting contain certain non-descript generic action taken by the Board under the heading **Executive Session** and the sub-heading **Governance Committee** as follows:

“Ms. Nesselrotte moved, on behalf of the Governance Committee, for approval of the Governing Body policies as set forth, Mr. Elliott seconded, and the motion carried.

“Ms. Nesselrotte moved, on behalf of the Governance Committee, for approval of the Resolution of the Board of Directors of Fairmont General Hospital as presented. Rev. Dobbs seconded and motion carried”.

The fact that FGH intentionally designed the minutes to mislead the public and the Fairmont and City Council is palpable.

The difference between the minutes of August 22, 2011, (*Appendix Vol. I, p. 353-356*) and the meeting from August 23, 2010 (*Appendix Vol. I, p. 328*), when the board adopted the amended

bylaws further evidences FGH's intention to knowingly conceal the fact that it had attempted to amend and restate its articles of incorporation. The minutes from August 23, 2010, clearly identify action taken by the board on the amended bylaws and record for posterity a roll call vote and the vote of each member by name.

The minutes of the August 23, 2010, meeting of the Fairmont Hospital Board provide that, in Open Session, under the heading **Amended Bylaws**, the Board took the following action:

“Mr. Martin reported that a roll call vote will be held for the Amendments to the Bylaws. He noted it takes a 2/3 majority.

Ms. Nesselrotte moved the Board accept the Amendments to the Bylaws of Fairmont General Hospital, Inc. as presented to the Board pursuant to Article 13 of the Bylaws. Dr. Bonasso seconded. A roll call vote was held with the following results:

Dr. Bonasso	Yes
Dr. Ciarolla	Yes
Rev. Dobbs	Yes
Mr. Fox	Yes
Mr. Martin	Yes
Ms. Nesselrotte	Yes
Mr. Osborne	Yes
Mr. Panz	Yes
Dr. Smith	Yes

Phone calls were attempted to the two absent members: Mr. Elliott and Ms. Seifrit, with no success. There was a majority of affirmative votes. Motion passed.”

FGH's new board of directors, in adopting the Amended and Restated Articles of Incorporation knowingly and intentionally disregarded the provisions of the Act, in that: 1) the board's Agendas were devoid of any action item which reasonably placed the public, including Fairmont and City Council, on notice that FGH proposed to adopt amended and restated articles of incorporation; 2) the board conducted an unauthorized illegal secret governance committee meeting and executive session to discuss and act on the amendments; and 3) the board prepared, adopted and

disseminated minutes which were intentionally and knowingly designed to conceal the aforementioned action and mislead the public, including Fairmont and City Council

Although the Circuit Court of Marion County was empowered to compel compliance or enjoin noncompliance with the provisions of the Act and to annul a decision made in violation of the Act and to award necessary attorney fees, it instead found that the members of City Council lacked standing to raise such claims (*Appendix Vol. I, p.414*). Instead, the Circuit Court of Marion county should have taken the advice of this Court set out in *Hamrick at p. 500*, which provides “when in doubt . . . take the advice of Justice Cleckley to heart and err on the side of openness. For the good of all of its citizens, let the sun shine brighter in the Mountain State.”

The principles of law stated above are without question applicable to FGH and when applied to the undisputed facts of this case leave no doubt that Fairmont and City Council were entitled to judgment as a matter of law and that Fairmont and City Council were entitled to a declaration that the Amended and Restated Articles of Incorporation of Fairmont General Hospital, Inc., purportedly adopted on August 22, 2011 and October 24, 2011, and claimed ratified effective August 23, 2010, were void, unlawful and should be annulled.

**4. The defendants have standing to challenge the action of the new board of directors of Fairmont General Hospital, Inc., in adopting the Amended Bylaws of August 23, 2010, and the Amended and Restated Articles of Incorporation of Fairmont General Hospital, Inc.**

The Circuit Court of Marion County in its order of January 12, 2012, held that § 31E-3-304 of the West Virginia Code precluded any challenge by the individual members of Fairmont City Council to the actions of FGH at issue in this proceeding. (*Appendix Vol. 1, p.412*).

West Virginia Code §31E-3- 304 is not a bar to Fairmont City Council members Ronald Straight’s and Deborah Seifrit’s challenge to the amended bylaws of Fairmont General Hospital, Inc.,

adopted August 23, 2010, or their challenge to the amended and restated articles of incorporation purportedly adopted on August 22, 2011 and October 24, 2011, and claimed to be ratified effective to August 23, 2010.

The provisions of West Virginia §31E-3-304 b(1) are fully satisfied in this instance.

Ronald Straight and Deborah Seifrit, who were made defendants to this proceeding by FGH, meet the definition of lawfully appointed members of FGH's legitimate governing body, the Fairmont Hospital Board, who are challenging the action of the corporation in adopting the amended bylaws and the Amended and Restated Articles of Incorporation. Moreover, Robin Smith, who was made a defendant to these proceeding by the action of FGH, is a member of Fairmont City Council and a member of the self-appointed new board of directors of FGH. There is no requirement outlined in the provisions of West Virginia §31E-3-304 b(1) that Mr. Smith had to have voted with the minority in order to bring a subsequent challenge. The statute merely requires that he be a member or director of the corporation, a qualification which he is deemed by FGH to clearly and unquestionably possess.

Lastly, Fairmont City Council, as a whole, has standing to maintain the action which underlies this appeal as Fairmont City Council possesses the power and authority to appoint FGH's governing board, under FGH's valid, lawful and enforceable Articles of Incorporation dated September 1985, and said Council has been effectively denied the right to exercise said power of appointment by the improper, invalid and unlawful actions of FGH.

**5. The Circuit Court of Marion County erred in finding that the individual members of defendant Fairmont City Council lacked standing to challenge the action of the new board of directors of Fairmont General Hospital, Inc., in adopting the Amended and Restated Articles of Incorporation of Fairmont General Hospital, Inc., under West Virginia Code §16-5G-1 et seq., the *WV Open Hospital Proceedings Act*.**

The Circuit Court of Marion County has held that the individual members of Fairmont City Council, as citizens and residents of this State lacked standing to challenge the action of Fairmont General Hospital, Inc., in adopting the Amended Bylaws of August 23, 2010 and the Amended and Restated Articles of Incorporation of Fairmont General Hospital, Inc., on August 22, 2011, and again on October 24, 2011, pursuant to the provisions of West Virginia Code §16-5G-1 et seq., the *WV Open Hospital Proceedings Act*, , (*Appendix Vol. 1, p.414*).

Section 6 of the Act specifically provides that “any citizen of this state” shall have standing to enforce the provisions of the Act and to seek redress for a violation thereof in the circuit court in the county where the hospital is located,” West Virginia Code §16-5G- 6.

The citizenship, or lack thereof, of the members of City Council, each of whom by virtue of his seat on council must be a “qualified voter” was not an issue. However, the Court by its ruling, without any proof of non-citizenship, determined that they lacked standing under the Act. Said ruling is erroneous and must be reversed.

**6. The knowledge gained by an individual member of Fairmont City Council while participating in the meetings of the self-appointed board of directors of Fairmont General Hospital, Inc., as a member of the board, can not be imputed to the Council as whole or to the City of Fairmont.**

**7. The actions taken by an individual member of Fairmont City Council while participating in the meetings of the self-appointed board of directors of Fairmont General Hospital, Inc., as a member of the board, can not be imputed to the City of Fairmont and was the equivalent of active participation by the City of Fairmont.**

The Circuit Court of Marion County in its order of January 13, 2012 concluded that:

“ . . . the active participation of said member of City Council [Robin Smith] in the challenged actions [adoption of the void amended bylaws on August 23, 2010, and the amended and restated articles of incorporation on August 23, 2011 and October

24, 2011] 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 itself or distance itself from them for purposes of 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 said meeting by a member of City Council [Robin Smith] must also be attributed to the City. In essence, the City cannot be heard to complain of an action in which it actively participated. (*Appendix Vol. 1, p.414*)

The above conclusion is not supporting by and is contrary to well settled existing principles of West Virginia law.

As early as 1918, in *Ray v. City of Huntington*, 81 W.Va. 607, 95 S.E. 23 (1918) this Court said "ordinarily a municipality acts only through its assembled council, whose will can be expressed only by a vote embodied in some distinct and definite form."

In 1956 this Court decided *Daugherty v. Ellis*, 142 W.Va. 340, 97 S.E. 2d 33 (1956). In *Daugherty*, Judge Haymond at Syllabus Points 2, 3 and 4 outlined the law relating to how a public body must proceed to take action.

"2. A county court, a corporation created by statute, can do only such things as the law authorizes it to do, and it must act in the manner prescribed by law.

"3. A county court can exercise its powers only as a court, while in legal session with a quorum present, and it must follow that procedure and enter its proceedings of record to make its actions valid and binding.

"4. The members of a county court can not separately and individually give their consent or enter into a contract and in that manner obligate the court as a corporate entity. *Daugherty* at p. \_\_\_\_.

In 1960, this Court, in *Edwards v. Hylbert*, 146 W.Va. 1, 118 S.E.2d 347 (1960), stated “the members of a fiscal body such as a municipal council may act only as a group, and that such members can not bind the fiscal body by acting separately and individually”

Recently, In *City of Fairmont v. Hawkins*, 340 S.E.2d 824 \_\_\_\_ W.Va. \_\_\_\_ (1983) this Court affirmed its decisions holding that powers lodged with legislative branch of a municipality cannot be exercised by an individual member, and that ordinarily a municipality acts only through its assembled council, whose will can be expressed only by a vote embodied in some distinct and definite form.

Given the principles of West Virginia law cited above, the Circuit Court of Marion County committed error when it charged the City and Fairmont City Council, as a whole, with the knowledge gained by Robin Smith, one of its individual members, when Mr. Smith participated in FGH board meetings. Moreover, the Circuit Court erred in imputing to the City of Fairmont the actions taken by Robin Smith as a member of the FGH Board, and said Court erred in determining that such action was the equivalent of active participation by the City of Fairmont.

**8. Section 4.06 of the Charter of the City of Fairmont, remains applicable to plaintiff and the valid Articles of Incorporation of FGH, Inc, the Bylaws of FGH, Inc., the Lease Agreement and the Bill of Sale, read together, form a binding contract between the parties.**

From 1938 through 1985, the City of Fairmont owned and operated Fairmont General Hospital at the existing location on Locust Avenue. The facility was upgraded through public funding, in the 1950's and 1971. In 1986, as a result of changes in health care, through a series of transactions, the City divested itself of the daily operations of Fairmont General Hospital. The real property was transferred to the Fairmont Building Commission, which is a statutory board of the City, created by ordinance for that purpose. The real property was and is currently leased under the

1986 lease to Fairmont General Hospital Inc., a nonprofit 501(c)(3) corporation, for the nominal amount of \$100.00 per year. At the time of the divestiture of daily operations, the personal property was sold to Fairmont General Hospital Inc., as evidenced by a bill of sale. In 1986, through community donations and the sale of bonds by the Fairmont Building Commission, a public expansion of the hospital facility was undertaken. The community continues to provide financial support to the hospital and public funding has always been a major revenue source for Fairmont General Hospital, Inc. Until 2011, Fairmont General Hospital, Inc., provided an annual report to the Fairmont Building Commission. Although the City divested itself of the daily operation of the hospital, it retained the power to appoint the Hospital Board of Directors. The appointments to the board are made by City Council pursuant to the provisions of Section 4.06(b) of the City Charter.

It is important to note that subsection (a) of Section 4.06 of the City Charter provides that “the management, maintenance, administration, operation, custody, and control of the municipal hospital and all the appurtenances thereof and grounds and site thereof, is hereby committed to a board of directors to be known as the “Fairmont Hospital Board.” The term “municipal hospital” is not defined in the charter. It is the City’s position that in defining whether the operation of Fairmont General Hospital is a municipal hospital for purposes of the City’s charter, consideration must be given to such issues as public funding, historical perspective and past practices, community interest & support, municipal ownership of real estate and improvements, municipal statutory authority, principals of waiver & estoppel, and protection of valuable municipal property rights.

Although periodically there was discussion of amending the Charter, during the period from 1986, through the fall of 2010, Fairmont General Hospital, Inc., recognized the City’s authority to appoint the board of directors and this was reflected in the corporation’s bylaws. Between January

21, 1986, and May 25, 2010, on 37 occasions the City appointed Fairmont General Hospital's Inc's board members. Moreover, on documented occasions, the board recognized that any conflict between the bylaws of FGH and the City's charter rendered the bylaws null and void and of no force and effect.

In the fall of 2010, the City became aware of the amendments to the corporation's bylaws. A review of revised Article II of the bylaws confirmed that FGH no longer recognized City Council as possessing the power to appoint the Hospital Board and deleted the requirement that all members of the board be bona fide residents of Marion County, among others. In addition, the current bylaws do not make any provisions for the appointment of two (2) board member from the ranks of City Council. It is important to note that in amending the bylaws, Fairmont General Hospital, Inc, recognized that "[t]he composition of the Board shall be in compliance with all applicable local, state and federal laws, rules and regulations.

It is the City's position that Section 4.06 of the City's Charter remains viable and has meaning and purpose underlying it and is applicable to the current corporate structure of Fairmont General Hospital, Inc. Succinctly stated, the City's position is predicated upon the following:

1. Nonprofit corporations in West Virginia are subject to West Virginia Code §31E-1-1 et seq., the West Virginia Nonprofit Corporation Act. Section 4.06 and the provisions of West Virginia Code 31E-1-1 et seq., are not in conflict. In addition, Section 4.06 is not in conflict with the legislative rule providing for hospital licensure, being 64 CSR 12, and a higher or superior authority to that of the board of directors is recognized in the governing body section of the Accreditation Manual for Hospitals.

2. The City of Fairmont has the power to exercise all authority which has been delegated to it

by the West Virginia Legislature. West Virginia Code §8-12-5 provides that any municipality may “establish, construct, acquire, maintain, and operate hospitals within its corporate limits. West Virginia Code §8-16-1, §8-16-2, and §8-16-4, when read together, provide that every municipality may own, equip, maintain and operate a hospital and that such supervision and control may be vested in a board or commission. Although the City has delegated its authority in some respects to Fairmont General Hospital, Inc., it did not do so in the entirety. It continues, via the Fairmont Building Commission, to own the hospital grounds, structures, improvements, and appurtenances. More importantly, it retained the power to appoint the board as provided by Section 4.06 of the City Charter.

3. The composition of the board as prescribed by Section 4.06, which was adopted in 1984, mirrors the requirements of West Virginia Code §16-5B-6a which was passed by the West Virginia Legislature in 1983. §16-5B-6a dictates the composition of hospital boards for nonprofit hospitals and hospitals owned by local governments. In adopting §16-15B-6a, the Legislature declared that “a crisis in health care exists, that one important approach to deal with the crisis is to have widespread citizen participation in hospital decision making and that many hospitals in West Virginia exclude from their boards important categories of consumers, including small business, organized labor, elderly persons, and lower income consumers”. In adopting this provision, the legislature recognized that nonprofit hospitals and hospitals owned by local governments receive major revenue from public sources and are crucial to health planning and that the boards of directors of these hospitals must represent the communities they serve. This legislative mandate is more particularly described in the legislative rule providing for hospital licensure, being 64 CSR 12. Fairmont General Hospital recognizes the role of the community in its operations as evidenced by its bylaws but refuses to

recognize City Council as representative of the community as required by the Charter.

4. The retention of the ability of the Council for the City of Fairmont to appoint the board of directors of Fairmont General Hospital, Inc., following the divestiture, was and continues to be a *quid pro quo* for the nominal rents of \$100.00 per year for the real estate, improvements and appurtenances.

5. Legal principles of waiver and estoppel apply. On at least two documented occasions, previous hospital administrations have proposed amendments to the corporate bylaws which conflicted with the provisions of Section 4.06 and each time the proposed amendments were modified to conform to the City's Charter (*Appendix Vol. I, p. 359*). Moreover, the Articles of Incorporation of Fairmont General Hospital, Inc., vest in the City of Fairmont the right to distribution of all property of the corporation or the proceeds of liquidation thereof upon dissolution of Fairmont General Hospital Inc., and was and continues to be a *quid pro quo* for the nominal rents of \$100.00 per year for the real estate, improvements and the sale of the personal property for a nominal amount.

6. The Charter of the City of Fairmont is entitled to a presumption of validity.

7. There are valid public policy considerations underlying Section 4.06 of the City's Charter:

a. The City of Fairmont, via its building commission, owns the real estate and permanent improvements and appurtenances. The ability of the Council to appoint the board of directors provides the City with the ability to protect a valuable property right;

b. Fairmont General Hospital was a city owned and operated hospital from 1938 until the divestiture of the daily operations in 1986. By retaining the power to appoint the board of directors, the City has the ability to ensure that its citizens and the citizens of Marion County will continue to have the availability of local hospital/medical services and thus not be forced

to look exclusively to regional hospitals for anything more than primary care; and

c. Fairmont General Hospital, Inc., is a major local employer and although it is exempt from paying business and occupation tax for its services, its vendors, suppliers, and providers are subject to said tax. By retaining the power to appoint the board of directors, the City has the ability to secure this aspect of its tax base.

8. The Lease, the Bylaws, the Articles of Incorporation and the Bill of sale when read together form a contract binding and enforceable as whole on the parties and that the relationship between the several documents clearly manifests the intent of the parties and clearly establishes the written agreement

Considering issues of public funding, historical perspective and past practices, community interest & support, municipal ownership of real estate and improvements, municipal statutory authority, principals of waiver & estoppel, and protection of valuable municipal property rights, it becomes apparent that Fairmont General Hospital was and remains a municipal hospital for purposes of the Charter and although plaintiff if a nonprofit, nonstock corporation existing under the laws of the State of West Virginia, it is nonetheless treated differently than most general nonprofit, nonstock corporations and is subject to public scrutiny.

The undisputed facts of this case leave no doubt that Fairmont and Council were entitled to judgment as a matter of law and that Fairmont and Council were entitled to a declaration that Section 4.06 of the City's Charter remains applicable to FGH, and that FGH's valid Articles of Incorporation, Bylaws, Lease Agreement, Bill of Sale, read together, form a binding enforceable contract between the parties. The Circuit Court of Marion County's findings of fact, conclusions of law and ruling of January 13, 2012, to the contrary are erroneous and should be reversed.

## CONCLUSION & PRAYER FOR RELIEF

Given all of the above, it is clear that the Circuit Court of Marion County erred in granting FGH's motion for summary judgment and in failing to grant the City of Fairmont and Fairmont City Council's motion for summary judgment, insofar as the undisputed facts reveal that the City of Fairmont was entitled to judgment as a matter of law.

Wherefore, the City of Fairmont and Fairmont City Council pray that that this Court reverse the Order of the Circuit Court of Marion County, West Virginia entered January 13, 2012, and remand the matter to said Circuit Court for the entry or an order granting the City of Fairmont and Fairmont City Council's motion for summary judgment and for an order:

1. Declaring that the corporate bylaws of FGH purportedly as amended on August 23, 2010, inconsistent with the terms and conditions of FGH's valid and lawful Articles of Incorporation as stated September 19, 1985, contrary to and in violation of the laws of the State of West Virginia, spurious, and of no force and effect to the extent that: A) said amended bylaws purport to provide FGH's board of directors with the authority to appoint it's own members; B) said amended bylaws no longer require members of the board to be bona fide residents of Marion County; and C) said amended bylaws are otherwise inconsistent with said Articles of Incorporation;

2. Declaring all appointments made by FGH's board of directors to its self-appointed new board of directors on November 22, 2010, January 24, 2011, and February 28, 2011, unlawful, invalid and of no force and effect;

3. Directing and requiring FGH to recognize and seat all duly made appointments to the Fairmont Hospital Board made by the Fairmont City Council pursuant to the aforementioned Articles

of Incorporation as stated September 19, 1985, and all such appointments which shall thereafter made pursuant to Articles; and

4. Declaring the Amended and Restated Articles of Incorporation purportedly adopted on August 22, 2011 and re-adopted on October 24, 2011, claimed ratified effective to August 23, 2010, null and void and of no force or effect.

Respectfully submitted this the 11<sup>th</sup> day of May, 2012.

THE CITY OF FAIRMONT, and  
FAIRMONT CITY COUNCIL,  
Defendant below, Petitioners by Counsel



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Kevin V. Sansalone, Esq. WVSB # 3251  
City of Fairmont  
P.O. Box 1428  
Fairmont, WV 26554  
(304) 366-6211  
Counsel for Petitioners, Defendants below.

## CERTIFICATE OF SERVICE

I, Kevin V. Sansalone, Counsel for the City of Fairmont and Fairmont City Council, do hereby certify that on the 11<sup>th</sup> day of May, 2012, I served a true and accurate copy of the foregoing "Notice of Appeal" upon the following by such service as indicated:

Michael S. Garrison, Esq.  
Spilman Thomas & Battle, PLLC  
Attorneys at Law  
P.O. Box 615  
Morgantown, WV 26507-0615  
(304) 291- 7979  
First Class U.S. Mail Postage Prepaid

  
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Counsel for the City of Fairmont