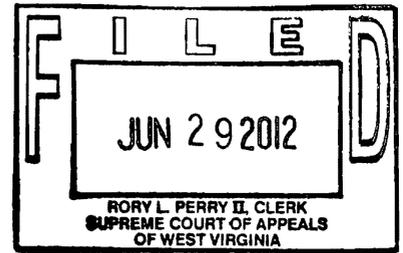


Docket No. 12-0205



**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**BRIEF FILED  
WITH MOTION**

**City of Fairmont, Defendant Below,**

**Petitioner,**

**v.**

**Fairmont General Hospital, Inc., Plaintiff Below,**

**Respondent.**

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**RESPONSE OF FAIRMONT GENERAL  
HOSPITAL, INC. TO PETITION FOR APPEAL**

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## **I. QUESTIONS PRESENTED**

The questions presented, as framed by the Petitioner, the City of Fairmont, (“the City”)

are:

A. WHETHER 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).

B. WHETHER 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 AMENDED BYLAWS ON NOVEMBER 22, 2010, JANUARY 24, 2011, AND FEBRUARY 28, 2011, WERE UNLAWFUL, INVALID AND OF NO FORCE AND EFFECT.

C. WHETHER 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.

D. WHETHER 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.

E. WHETHER 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.

F. WHETHER 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).

G. WHETHER 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.

H. WHETHER 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.

I. WHETHER 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**

FGH agrees with the procedural history outlined in the City's Petition.

## **B. STATEMENT OF THE FACTS**

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. (A.R. Vol. I, p. 54).

Effective September 19, 1985, FGH became a private, not-for-profit corporation (A.R. Vol. I, p. 61) and in anticipation of and preparation for the privatization of the hospital, the City passed Ordinance No. 689 (A.R. Vol. I, pp. 151-55) and 690 (A.R. Vol. I, pp. 156-71) 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. (A.R. Vol. I, pp. 243-44). FGH's Bylaws also provided for appointment of its Board by the City until the most recent amendments thereto in August of 2010. (A.R. Vol. I, p. 292).

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. (A.R. Vol. I, p. 17). City Council member, Robin Smith, appointed to sit on FGH's Board by the City, voted in favor of said amendments.<sup>1</sup> (A.R. Vol. I, pp. 326-28). At that time that the amended Bylaws were adopted, FGH's Board overlooked the corresponding provisions contained in FGH's Articles of Incorporation and inadvertently failed to amend said Articles when amending its Bylaws.

On January 24, 2011, in accordance with its amended Bylaws, FGH made its first appointment to its Board of Directors, re-appointing Robin Smith, and promptly notified City Council members of said appointment. (A.R. Vol. I, pp. 332-34). Dr. Smith, at all relevant times to this matter was and is a member of City Council and also a member of FGH's Board of Directors, both the City-appointed Board and FGH's self-appointed Board. FGH made its second appointment to the Board on February 28, 2011, appointing first-time director, Joedy Daristotle. (A.R. Vol. I, pp. 335-39).

On January 25, 2011, the day after FGH's first self-appointment to its Board and notification of same to City Council members, City Council purported to appoint two individuals to sit on FGH's Board under the auspices of Section 4.06 of the City Charter. (A.R. Vol. I, pp. 340-41). When FGH refused to seat the City's appointments, a dispute over whose appointments are legally valid led FGH to seek redress from the Circuit 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 Fairmont City Council has the right to appoint FGH's Board under the facts and circumstances described above.

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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. (A.R. Vol. I, pp. 326-28).

During the pendency of this action, FGH became aware of the inconsistencies between its Articles of Incorporation and its recently amended Bylaws. In an effort to rectify said inconsistencies, at a duly noticed meeting held on October 24, 2011,<sup>2</sup> FGH adopted Amended and Restated Articles of Incorporation, and filed the same with the Secretary of State on October 25, 2011. (A.R. Vol. I, pp. 141-48). The Amended and Restated Articles of Incorporation resolved any inconsistencies between the two corporate records. Notably, City Council member Smith voted in favor of the amendments.

The composition of FGH's Board of Directors when the Articles of Incorporation were amended in October of 2011, was substantially the same as its composition when the Bylaws were adopted by the City-appointed Board in August of 2010. The identity of the directors who voted on both the amended Articles (as part of the "new" board) and the amended Bylaws (as part of the former, City-appointed board) were sufficient in number to constitute a quorum and to vote to approve the amendments to the Articles of Incorporation, even if the attendance and/or vote of the members whose authority is challenged is disregarded.<sup>3</sup>

### **III. SUMMARY OF ARGUMENT**

#### **A. THE CIRCUIT COURT DID NOT ERR IN REJECTING THE CITY'S ARGUMENT THAT THE AMENDED BYLAWS ADOPTED BY FGH'S BOARD OF DIRECTORS IN AUGUST OF 2010 WERE VOID UPON ADOPTION AND SUBSEQUENTLY OF NO FORCE OR EFFECT.**

The Circuit Court properly refused to invalidate as an *ultra vires* (or legally void) act, FGH's adoption of amended Bylaws on August 23, 2010, as such a challenge is sustainable only

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<sup>2</sup> The meeting notice and agenda published for this meeting was identical in form, substance, and manner of publication, to other meeting notices historically published by FGH, with the exception of a clerical error in the October, 2011 agenda, listing the year as 2010. (A.R. Vol. I, pp. 357-58).

<sup>3</sup> Those present at the August, 2010 meeting during which the amended Bylaws were unanimously adopted were directors Banasso, Ciarrola, Dobbs, Fox, Martin, Nesselrotte, Osborne, Panza and Smith. Two directors (Seifrit and Elliott) were not present and could not be reached by phone. (A.R. Vol. I, pp. 326-28). Present at the October, 2011 meeting at which the Amended and Restated Articles of Incorporation were unanimously adopted were directors Banasso, Dobbs, Fox, Martin, Nesselrotte, Smith, Elliott and Daristotle. Director Panza was absent. (A.R. Vol. I, pp. 138-40).

if brought by certain narrowly defined categories of claimants, within which the City is clearly not included. The Circuit Court, therefore, properly determined that it need not decide the issue of whether or not FGH's newly enacted Bylaws were void, as the City had no standing to pursue that issue, and it was therefore not properly before the Court.

The Court further properly found that since the City's only argument to support the existence of standing depended upon imputing to the City the standing of certain individual City Council members who were also members of FGH's Board, such argument would also require that the actions of such City Council members in voting in favor of the amended Bylaws also be imputed to the City, thus operating as a waiver as to any claim the City may make in challenging their validity.

Finally, the Court properly reasoned that subsequent to the adoption of the amended Bylaws, FGH's Board composed of substantially the same individuals who initially amended the Bylaws, one of whom was a member of City Council, subsequently adopted Amended and Restated Articles of Incorporation and ratification, or re-adoption of the amended Bylaws, thus rectifying any prior issues that may have existed with respect to the validity of the amended Bylaws or any subsequent actions taken in accordance therewith.

**B. THE CIRCUIT COURT DID NOT ERR IN REJECTING THE CITY'S ARGUMENT THAT THE APPOINTMENTS MADE BY FGH'S BOARD OF DIRECTORS FOLLOWING THE ADOPTION OF, AND IN ACCORDANCE WITH, ITS AMENDED BYLAWS, WERE INVALID AND OF NO LEGAL FORCE OR EFFECT.**

As with the challenge to the adoption of the Bylaws, the Circuit Court properly refused to invalidate as *ultra vires* (or legally void) acts FGH's appointments to its Board of Directors, as such a challenge is sustainable only if brought by certain narrowly defined categories of claimants, within which the City is clearly not included. The Circuit Court, therefore properly

determined that it need not decide the issue of whether or not FGH's new Board appointments were void, as the City had no standing to pursue that issue, and it was therefore not properly before the Court.

The Court further properly found that since the City's only argument to support the existence of standing depended upon imputing to the City the standing of certain City Council members who were also members of FGH's Board, such argument would also require that the actions of such City Council members in voting for the challenged appointments also be imputed to the City, thus operating as a waiver as to any claim the City may make in challenging the validity of the appointments.

Finally, the Court properly reasoned that FGH's Board, composed of substantially the same individuals who initially amended the Bylaws in August of 2010, one of whom was a member of City Council, subsequently adopted Amended and Restated Articles of Incorporation and ratification, or re-adoption of the amended Bylaws, thus rectifying any prior issues that may have existed with respect to the authority of the newly appointed Board.

**C. THE CIRCUIT COURT DID NOT ERR IN REJECTING THE PROPOSITION THAT FGH'S NEWLY APPOINTED BOARD WAS WITHOUT AUTHORITY TO ADOPT THE AMENDED AND RESTATED ARTICLES OF INCORPORATION, OR THAT SAID AMENDED AND RESTATED ARTICLES WERE VOID OR OF NO FORCE OR EFFECT, OR THAT SAID AMENDED AND RESTATED ARTICLES DID NOT HAVE THE EFFECT OF RATIFYING THE AMENDED BYLAWS ADOPTED IN AUGUST OF 2010.**

The Circuit Court properly refused to invalidate FGH's appointments to its Board or that Board's adoption of Amended and Restated Articles of Incorporation, as being an *ultra vires* act, because such a claim can only be pursued by certain narrowly defined groups, of which the City is not one. As such, the issue was not properly before the Circuit Court, as no party with standing to make the claim had brought it before the Court.

The Court further properly found that since the City's argument for the existence of standing depended upon imputing to the City the standing of certain City Council members who were also members of FGH's Board, such argument would also require that the actions of such City Council members in voting for the challenged adoption of Amended and Restated Articles of Incorporation also be imputed to the City, thus operating as a waiver as to any claim the City may make in challenging the validity of said Amended and Restated Articles of Incorporation.

Moreover, the Court properly reasoned that FGH's Board that voted to amend the Articles of Incorporation was composed of substantially the same individuals who initially amended the Bylaws in August of 2010, one of which members on both the "old" and the "new" Board was a member of City Council. Therefore, the adoption of the Amended and Restated Articles of Incorporation and ratification, or re-adoption of the amended Bylaws, rectified any prior issues that may have existed with respect to the authority of the newly appointed Board.

**D. THE CIRCUIT COURT DID NOT ERR IN REFUSING TO NULLIFY FGH BOARD'S ADOPTION OF AMENDED AND RESTATED ARTICLES OF INCORPORATION, AND RATIFICATION OR RE-ADOPTION OF ITS AMENDED BYLAWS, BASED UPON ALLEGED VIOLATIONS OF THE WEST VIRGINIA OPEN HOSPITAL PROCEEDINGS ACT.**

The Court acted within its discretion in refusing to annul, as violative of West Virginia Open Hospital Proceedings Act ("WVOHPA"), FGH's adoption of Amended and Restated Articles of Incorporation. The Court properly found that the City's standing to raise a challenge based upon the WVOHPA, which would require imputing to the City the standing of individual members of City Council, as citizens of the State, would also require imputing said members' waiver of such claims to the City to the extent any of them had knowledge and actively participated in the acts complained of.

Moreover, the Court properly ruled that the form and substance of the contested meeting agenda and minutes did not violate the statutory requirements of the WVOHPA and they were substantially the same in form and substance as agendas and minutes historically generated under the City-appointed Board. Additionally, the City had actual notice that FGH's Board intended to take the actions that the City alleges to have been done "clandestinely" because FGH's attorneys had advised the City of its plans to amend its Articles of Incorporation in open court. Finally, the Circuit Court noted that at the time of the alleged attempts to keep information from the City, Council member Smith was on FGH's Board, was aware of all matters being considered by the Board, and voted in favor of the Amended and Restated Articles of Incorporation.

Given the evidence before it, the Circuit Court was well within the exercise of its broad discretion in not annulling the actions of FGH's Board on the grounds of the alleged WVOHPA violations.

**E. THE CIRCUIT COURT DID NOT HAVE BEFORE IT, AND MADE NO RULING UPON, WHETHER OR NOT ANY INDIVIDUAL MEMBERS OF CITY COUNCIL HAD STANDING TO CHALLENGE THE ADOPTION OF AMENDED AND RESTATED ARTICLES OF INCORPORATION AS BEING ULTRA VIRES ACTS OF THE CORPORATION.**

Because the individual members of City Council were not parties to this suit and did not raise any challenges to FGH's authority to adopt the Amended and Restated Articles of Incorporation, their standing was not an issue brought before the Circuit Court, and is not properly before this Court.<sup>4</sup> The standing of any member of City Council to challenge the

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<sup>4</sup> In fact, the suggestion that individual members of City Council were/are members of this action was first mentioned in the Petition for appeal. Petitioner has not heretofore raised this argument. Because the Supreme Court will not consider, in its review of circuit court orders, issues or arguments not raised in the proceedings below, the issue of individual City Council members' standing is not properly within the review of this Court. *See* Section V.E. *infra*.

validity of the Amended and Restated Articles of Incorporations was never before the Circuit Court, and is not properly before this Court on appeal.

Moreover, were the individual members of City Council deemed to be parties to this action simply by virtue of the City's party status, thereby rendering them one in identity with the City for the purposes of this lawsuit, the same argument must operate to bar their claims under the doctrine of waiver, since a member of City Council actually participated in the actions complained of.

**F. THE CIRCUIT COURT DID NOT HAVE BEFORE IT, AND MADE NO RULING UPON, WHETHER OR NOT THE INDIVIDUAL MEMBERS OF CITY COUNCIL HAD STANDING TO CHALLENGE THE ACTIONS OF FGH'S BOARD UNDER THE WEST VIRGINIA OPEN HOSPITAL PROCEEDINGS ACT.**

Because the individual members of City Council were not parties to this suit and did not raise any WVOHPA to any action of FGH's Board, their standing was not an issue brought before the Circuit Court, and is not properly before this Court.<sup>5</sup> Further, were the individual members of City Council deemed to be parties by virtue of the City's status as a party (and standing therefore not at issue), the Circuit Court's refusal to annul the actions of FGH's Board on grounds of WVOHPA violations remains sound because: (1) the challenged notice and minutes were within the broad requirements of the Act; (2) the challenged notice and minutes were consistent with the form and substance that FGH Board meeting notices and minutes had historically contained under the City-appointed Board; (3) actual notice of the actions complained of was provided to the City's (and if parties, the individual City Council members') attorney in open court by FGH's attorney; and (4) nullification of acts based on WVOHPA, even if substantiated, is within the court's broad discretion, which in this instant was not abused.

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<sup>5</sup> See FN 4.

**G. THE CIRCUIT COURT PROPERLY HELD THAT TO ACCEPT THAT INDIVIDUAL FGH BOARD MEMBERS' STANDING TO CONTEST THE ACTS OF FGH'S BOARD IS IMPUTABLE TO THE CITY BY VIRTUE OF SAID MEMBERS ALSO BEING MEMBERS OF CITY COUNCIL, WOULD REQUIRE ACCEPTING THAT THE KNOWLEDGE OF SUCH INDIVIDUAL MEMBERS IN THEIR CAPACITY AS FGH BOARD MEMBERS IS IMPUTABLE TO THE CITY.**

Contrary to what Petitioner's assignment of error No. 7 suggests, the Circuit Court did not hold that the knowledge gained by City Council member, Robin Smith,<sup>6</sup> was necessarily imputed to the City. The Court merely held, and correctly so, that if the City were deemed to possess standing to challenge FGH's actions by virtue of the standing of those individual FGH Board members who were also members of City Council, so too must the City be deemed to possess knowledge obtained by such City Council members while acting in the capacity of FGH Board members.

**H. THE CIRCUIT COURT PROPERLY HELD THAT TO ACCEPT THAT INDIVIDUAL FGH BOARD MEMBERS' STANDING TO CONTEST THE ACTS OF FGH'S BOARD IS IMPUTABLE TO THE CITY BY VIRTUE OF SAID MEMBERS ALSO BEING MEMBERS OF CITY COUNCIL, WOULD REQUIRE ACCEPTING THAT THE ACTIONS OF SUCH INDIVIDUAL MEMBERS IN THEIR CAPACITY AS FGH BOARD MEMBERS IS ALSO IMPUTABLE TO THE CITY.**

Contrary to what Petitioner's assignment of error No. 8 suggests, the Circuit Court did not hold that the acts of City Council member, Robin Smith, were necessarily imputed to the City. The Court merely held, and correctly so, that if the City were deemed to possess standing to challenge FGH's actions by virtue of the standing of those individual FGH Board members who were also members of City Council, then so too must the City be deemed to have participated in the actions taken by such city council members while acting in the capacity of FGH Board members.

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<sup>6</sup> Mr. Smith voted in favor of both the amended Bylaws (in August of 2010) and the Amended and Restated Articles of Incorporation (in October of 2011).

**I. THE CIRCUIT COURT PROPERLY HELD THAT SECTION 4.06 OF THE CHARTER OF THE CITY OF FAIRMONT IS NOT APPLICABLE TO FGH.**

The Circuit Court properly found that the applicability of Section 4.06 of Fairmont's City Charter is limited by its own terms to the City's "municipal hospital" and has no applicability to Fairmont General Hospital, Inc., a private non-profit corporation. 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.

**IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

FGH submits that oral argument is unnecessary under Rule 18 because the dispositive issues have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record on appeal. The City suggests that Rule 19 argument is appropriate based on the lower Court's application of the law, a suggestion with which FGH disagrees. The City further suggests that argument may assist in the decisional process of this Court. While FGH does not necessarily agree, it certainly does not object, should this Court deem oral argument appropriate.

**V. ARGUMENT**

**A. THE CIRCUIT COURT PROPERLY REJECTED THE CITY'S CHALLENGE TO THE VALIDITY OF FGH'S AMENDED BYLAWS ADOPTED IN AUGUST OF 2010 AS VOID UPON ADOPTION, AND OF NO FORCE OR EFFECT.**

The crux of the City's argument is that FGH Board's adoption of amended Bylaws on August 23, 2010, was an *ultra vires* act because the bylaws of a corporation are required to comport with its Articles of Incorporation. As argued by the City in its Memorandum of Law In Support Of Cross Motion for Summary Judgment (A.R. Vol. I, pp. 212-39) and in its Brief submitted to this Court, an *ultra vires* act is one that the corporation lacked the authority to perform in the first instance, rendering such act void rather than simply voidable. Importantly, the City's argument depends upon the determination that FGH's act in amending its Bylaws was *ultra vires*, or void *ab initio*. Otherwise, as properly pointed out by the Circuit Court, FGH's subsequent adoption of Amended and Restated Articles of Incorporation, designed to rectify the prior inconsistency between its amended Bylaws and Articles of Incorporation, effectively accomplished what was intended, and the inquiry ends there. The Bylaws were effectively ratified and re-adopted. As cited by the City in its Brief filed with this Court, corporate acts that are voidable only, and not *ultra vires*, may be ratified. *Am. Jur. 2d Corporations* 1417.

The Circuit Court aptly concluded, though, that the very condition upon which the City's claim depended (the *ultra vires* nature of the act complained of, rendering it void rather than voidable) defeated the City's standing to pursue the claim. West Virginia Code is clear that as a general rule, and subject to only three discrete exceptions, the validity of a non-profit corporation's actions may not be challenged on the grounds that the corporation lacked the power to act (i.e., that its acts were *ultra vires*). The pertinent language is as follows:

§ 31E-3-304, Ultra vires

(a) Except as provided in subsection (b) of this section, the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(b) A corporation's power to act may be challenged:

(1) In a proceeding by a **member or director against the corporation to enjoin the act;**

(2) In a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or

(3) In a proceeding by the attorney general to dissolve the corporation or to enjoin the corporation from the conduct of unauthorized affairs.

(emphasis added). Clearly, the City does not meet any of the statutory criteria that would allow it to challenge FGH's action in amending its Bylaws "on the ground that the corporation... lacked power to act." Therefore, it has no standing to challenge FGH's adoption of amended Bylaws on August 23, 2010.

Importantly, all of the claims made by the City, with the exception two,<sup>7</sup> are based upon, and stem from, the alleged nullity of the amended Bylaws. The City has essentially argued that because the Bylaws were void, any action taken pursuant to them, beginning with the appointments made to FGH's Board thereunder, and presumably all actions taken by that Board, are also null and void and of no legal affect.<sup>8</sup>

The Circuit Court could have certainly and quite correctly and succinctly held that the City did not have standing to challenge FGH's adoption of amended Bylaws (nor any of the subsequent actions the City challenged on the basis of lack of authority) based on the clear statutory language of W. VA. CODE § 31E-3-304. However, the Court declined to rule upon whether or not the actions of FGH were void or merely voidable (and therefore, whether or not

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<sup>7</sup> The only exceptions are contained within Assignments of Error 4 and 5, wherein Petitioner takes the position that the Circuit Court should have nullified certain of FGH's actions taken at meetings that Petitioner claims were held in violation of the West Virginia Open Hospital Proceedings Act; and Assignment of Error 9, in which Petitioner argues that the Circuit Court should have found that City Charter provisions require appointment to FGH's Board by City Council.

<sup>8</sup> As such, all of these acts complained of based upon FGH's purported lack of authority to act (appointment of new members, adoption of Amended and Restated Articles of Incorporation), are subject to the same analysis and must lead to the same result.

the City had standing to challenge them), rather holding that such determination was unnecessary. Specifically, the Court stated:

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.

(A.R. Vol. I, pp. 413-14).

FGH urges that under the clear and unambiguous meaning of W. VA. CODE § 31E-3-304, the City had no standing to challenge FGH's Board's adoption of amended Bylaws and, by the same reasoning, the subsequent acts complained of. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. pt. 2, *State v. Elder*, 152 S.E.2d 571, 165 S.E.2d 108 (1968). If no standing exists, no further inquiry need be made with respect to the arguments that FGH's Board exceeding its power in: amending its Bylaws; appointing members to its Board; or adopting Amended and Restated Articles of Incorporation and ratifying or re-adopting its amended Bylaws.

However, the Court's ruling was certainly not in error. The Court correctly held that the allegedly *ultra vires* acts of FGH's Board were beyond the City's challenge by either the City's lack of standing to question them (if truly *ultra vires* and therefore not curable), or the

ratification, or correction of the challenged actions (if merely voidable) via amendment the Articles of Incorporation.

While the City argued that it possessed standing by virtue of individual City Council members who were also members of FGH's Board, and who could have individually sought to enjoin the Board's actions under § 31E-3-304(b)(1), such argument failed. The Circuit Court properly reasoned that:

[a]ny 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.

To establish waiver there must be evidence demonstrating that a party has intentionally relinquished a known right. Syl. Pt. 2, *Ara v. Erie Ins. Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989); See also *Dye v. Pennsylvania Cas. Co.*, 128 W. Va. 112, 118, 35 S.E.2d 865, 868 (1945). This intentional relinquishment, or waiver, may be expressed or implied. *Ara*, 387 S.E.2d at 323 ("Waiver may be established by express conduct or impliedly, through inconsistent actions" (citation omitted)).

In the instant case, if the City were to enjoy the standing to bring its claims via the standing of FGH Board members who also happened to be members of City Council, then the City through the vote of such FGH members who were also members of City Council (here, Robin Smith), expressed a clear intention to relinquish or abandon any right it might have to challenge the amendments to FGH's corporate documents (bylaws and Articles of Incorporation). Therefore, if the City has standing to challenge the authority of the FGH's Board

by and through individual City Council member(s), it has just as clearly waived its right to contest those actions by those same members' affirmative approval of such actions.

The Court further made the well-reasoned point, from a judicial fairness and common sense stand-point, that in this case it had the benefit of knowing what the "original" Board (i.e., the Board as comprised prior to any of FGH's self-appointments) would have done, if the clock could be turned back and that City-appointed Board given an opportunity to revisit the adoption of the amended Bylaws that set all of the actions the City now challenges in motion. The Board would clearly have amended the Articles of Incorporation to achieve consistency between its governing documents and, in fact, did so when FGH's self-appointed Board, made up of substantially the same individuals, adopted Amended and Restated Articles of Incorporation on October 24, 2011.<sup>9</sup>

Additionally, and of some significance is the fact that the directors who voted on both the amended Articles and the amended Bylaws were sufficient in number to constitute a quorum and vote to approve the amendments to the Articles of Incorporation, even if the attendance and/or vote of the members whose authority the City challenges were to be disregarded.

Amendments to Articles of Incorporation require a vote of at least 2/3 of the members present at a meeting at which a quorum is present. W. VA. CODE § 31E-10-1003(f). A quorum is a simple majority of the board as constituted when the vote is taken. W. VA. CODE § 31E-8-824. In the instant case, FGH's Board voted to amend its Articles of Incorporation in compliance with the cited Code Sections. There was clearly a majority of members present at the meeting held on October 24, 2011 (8 of 9), and all present voted in favor of amending the Articles of Incorporation. (A.R. Vol. I, pp. 138-40). Even if the Court were to ignore the presence and votes of the directors whose authority the City challenges, as if *ex officio* members of the Board,

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<sup>9</sup> See FN 3

and consider only the attendance and votes of those Board members who were seated at the time the Bylaws were amended, the result would be the same. A quorum was present at the meeting and sufficient votes in favor of the amendments were cast. As such, the same Board has simply ratified its earlier adoption of its amended Bylaws.

**B. THE CIRCUIT COURT PROPERLY REJECTED THE CITY'S CHALLENGE TO THE VALIDITY OF THE APPOINTMENTS MADE BY FGH'S BOARD OF DIRECTORS IN ACCORDANCE WITH ITS RECENTLY AMENDED BYLAWS.**

The City's argument that FGH's Board had no authority to appoint new directors is based solely upon the City's contention that the amended Bylaws, which vested FGH's Board with the power to self-appoint, were legally void and did not effectively provide the Board with power to make said appointments. Again, the argument is one that the act of appointing the new members was *ultra vires*. As such, as with the adoption of the Bylaws themselves, the appointments are not contestable by the City per the provisions of W. VA. CODE § 31E-3-304.<sup>10</sup>

As with the issue of the amended Bylaws, and based upon identical analysis, the Court correctly held that the allegedly *ultra vires* act of FGH's Board in appointing its own Board members was beyond the City's right to challenge due to lack of standing, or alternatively was merely voidable and was therefore subsequently rectified through the Board's amendments to its Articles of Incorporation.<sup>11</sup>

**C. THE CIRCUIT COURT PROPERLY REJECTING THE PROPOSITION THAT FGH'S NEWLY APPOINTED BOARD WAS WITHOUT AUTHORITY TO ADOPT THE AMENDED AND RESTATED ARTICLES OF INCORPORATION, THAT SAID AMENDED AND RESTATED ARTICLES WERE VOID OR OF NO FORCE OR EFFECT, AND THAT SAID AMENDED AND RESTATED ARTICLES DID NOT HAVE THE EFFECT OF RATIFYING THE AMENDED BYLAWS ADOPTED IN AUGUST OF 2010.**

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<sup>10</sup> See discussion contained in Section V.A. *supra*

<sup>11</sup> *Id.*

Here again, the Circuit Court properly determined, under identical analysis as was conducted with respect to the City's challenges to FGH's authority to amend its Bylaws and appoint new Board members thereunder, that the issue FGH's authority to adopt new Articles of Incorporation was beyond the City's right to challenge as an *ultra vires* act (meaning that it was void from its inception), and that the City could not be imputed standing via individual members of City Council without also being imputed the actions of such members in participating in the acts complained of, including voting in favor of the Amended Articles of Incorporation. (A.R. Vol. I, pp. 138-40). As such, the City's claims would be barred by the doctrine of waiver.<sup>12</sup>

**D. THE CIRCUIT COURT DID NOT ERR IN REFUSING TO NULLIFY FGH BOARD'S ADOPTION OF AMENDED AND RESTATED ARTICLES OF INCORPORATION AND RATIFICATION OR RE-ADOPTION OF ITS AMENDED BYLAWS BASED ON ALLEGED VIOLATIONS OF THE WEST VIRGINIA OPEN HOSPITAL PROCEEDINGS ACT.**

The Circuit Court acted within its discretion in declining to nullify FGH's adoption of Amended and Restated Articles of Incorporation based upon alleged violation of The West Virginia Open Hospital Proceeding Act ("WVOHPA").

That cited Section goes on to provide that, "[t]he court is empowered to compel compliance or enjoin noncompliance with the provisions of this article and to annul a decision made in violation of this article." While the Marion County Circuit Court had the discretion to annul FGH's adoption of Amended and Restated Articles of Incorporation, and ratification of its amended Bylaws if the Court deemed a violation of the WVOHPA had occurred, the language of the statute does not mandate annulment.

**1. The City Had No Standing to Sustain a Claim Under the WVOHPA.**

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<sup>12</sup> *Id.*

The WVOHPA confers jurisdiction upon the circuit court in the county where the hospital is located to enforce the its provisions “upon civil action commenced by any citizen of this state within one hundred twenty days after the action complained of was taken or the decision complained of was made.” W. VA. CODE §16-5G-6. The WVOHPA does not define the term “citizen of the state” and research of the State’s case law revealed no definition assigned by the courts. Black’s law dictionary defines a citizen as, “[a] person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges. BLACK’S LAW DICTIONARY, (9<sup>th</sup> ed. 2009).

The City does not appear to take issue with FGH’s argument that the City and City Council, as entities, are not citizens as that word is defined in the WVOHPA. Rather, the City seems to presume that because it and its governing body were parties to the suit below, so are the individual members of City Council. As will be discussed more fully herein,<sup>13</sup> there is absolutely no legal basis for such a contention. As has also been discussed in the context of any argument that standing is somehow imputed to the City by virtue of the standing of City Council members, the Court correctly explained that any validity of any such argument would equally apply to impute such members’ actions in participating in the contested actions to the City. In this case, if the City had standing because of the citizenry of its Council members, then it also waived its right to complain of any defects in the meeting procedures because of Council member Robin Smith’s participation in the same. Again, the Circuit Court did not hold that Mr. Smith’s actions were attributed to the City. It merely articulated that standing could no more be imputed to the City than the actions of those Council members through whom the City claimed standing. Such was not reversible error.

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<sup>13</sup> See Section V.E., *infra*.

## **2. There Was No Violation Of The WVOHPA.**

There exists no statutory or regulatory legal authority setting forth any criteria or minimum requirements with respect to the required content of written agendas of hospital board meetings. The claim that the meeting agendas were legally insufficient is without merit and legally unsupportable. All agendas, including the one noticing the meeting on October 24, 2011, included the date, time, place and general issues to be addressed. (A.R. Vol. I, pp. 357-58). Moreover, the challenged agenda<sup>14</sup> were completely consistent with FGH's historical Board meeting agendas, with which the City was very familiar.

The same is true of the minutes of the August 22, 2011 meeting of FGH's Board of Directors, which Defendants baselessly allege to be contrary to law. A reading of the statute clearly demonstrates that FGH's meeting minutes are consistent with its requirements. Section 16-5G-5 of the Act addresses the required content of hospital board meeting minutes, and states, in relevant part:

Each governing body shall provide for the preparation of written minutes of all of its meetings. Subject to the exceptions set forth in section four of this article, minutes of all meetings 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

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<sup>14</sup> There were two meetings at which amendments to the Articles of Incorporation were considered, the first being held on August 22, 2011 and the second on October 24, 2011. The August meeting did not result in finalization of the Amended Articles of Incorporation because the same contained typographical errors which were discovered shortly after the meeting. (See A.R. Vol. I, p. 147).

- (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 of the August 22, 2011 meeting of the FGH's Board of Directors clearly meet the applicable legal requirements stated in the above-quoted statute. (A.R. Vol. 1, pp 354-356).<sup>15</sup>

**3. The Challenged Minutes And Agendas Comport In Substance And Form with Agendas And Minutes Historically Generated By FGH**

In addition to being legally sufficient, the format and general content of the meeting minutes, as the agendas, are no different from the format and general content that FGH's Board has historically employed. The City, which has served as the historical appointers of FGH's Board members, and having continually had at least one Council member sitting on said Board, are very familiar with the standard format and general content of the FGH Board meeting agendas and minutes. The City's characterization of the agendas and minutes as "intentionally designed to conceal the board's real agenda and to mislead defendants" (Petitioner's Brief, p. 26) is disingenuous at best.

**4. The City Had Actual Knowledge Of The Actions It Claims To Have Been Kept From The Public.**

The Circuit Court no doubt took note of the fact that at all times relevant to the acts that the City complained of, there was and continues to be a sitting Fairmont City Council member who was on FGH's Board and participated in the meetings and actions that the City contests. There can be little doubt that the City was completely informed of any and all actions of the FGH Board – both in regular and executive session - by virtue of Council member Robin Smith's attendance and participation in the meetings in question. There can certainly be no question that

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<sup>15</sup> It should be noted that by the time the meeting minutes were prepared, a typographical error in Resolution adopting the Amended and Restated Articles of Incorporation had been detected, thus prompting the necessity to revisit the amendment at a later meeting, which ultimately occurred on October 24, 2011. (See A.R. Vol I, p. 147). Also, as the October 24, 2011 meeting minutes had not yet been prepared at the time of the parties submission of dispositive motions in this matter, the same are not at issue.

FGH was not intentionally attempting to keep information from the City. By its own assertion, the reason Fairmont City Council has historically appointed one or more of its own members to FGH's Board of Directors is to remain informed and to protect the interests of the City. (A.R. Vol. III, pp. 9-10). The notion that FGH's Board, with the participation of a sitting City Council member, purposely withheld or hid information from the City, is a pure fiction and was seen as such by the Circuit Court.

Moreover, the City was directly informed of FGH's intention to amend its Articles of Incorporation because such intention was expressly stated in open Court at the hearing held in this matter on May 16, 2011, during which counsel for FGH stated in relation to the Articles of Incorporation, "... [I] do agree with the analysis that if they are changed – and they will be changed – that that argument is moot." (A.R. Vol. III, pp. 12-14). For the City to claim surprise or allege "bad faith" on the part of FGH in amending its Articles of Incorporation is, in the City's own words, spurious.

This West Virginia Supreme Court noted in a case involving alleged violations of the West Virginia Open Governmental Proceedings Act, which contains identical enforcement language as the WVOHPA as follows:

[a] finding that a violation occurred. . . does not necessarily require invalidation of all actions taken during or following from the wrongfully held private meeting. The relevant statutory authority, W. Va. Code, 6-9A-6 (1993), leaves such matters in the court's discretion: "The court is empowered to compel compliance or enjoin non-compliance with the provisions of this article and to annul a decision made in violation thereof."

*McComas v. Board of Educ.*, 197 W. Va. 188, 201, 475 S.E.2d 280, 293 (1996). The Circuit Court of Marion County under the circumstances of the instant case acted well within its discretion in refusing to annul the FGH's adoption of Amended and Restated Articles of Incorporation.

**E. THE CIRCUIT COURT DID NOT HAVE BEFORE IT, AND MADE NO RULING UPON, WHETHER OR NOT ANY INDIVIDUAL MEMBERS OF CITY COUNCIL HAD STANDING TO CHALLENGE THE ADOPTION OF AMENDED AND RESTATED ARTICLES OF INCORPORATION.**

The issue of the standing of individual members of City Council to challenge FGH's authority to adopt Amended and Restated Articles of Incorporation was not before the Circuit Court, is not part of the Order appealed from, and is not properly before this Court, as the individual members of City Council were not parties to this civil action and did not raise any such challenge.

The City goes to great lengths in its Brief submitted to this Court to emphasize the point that a City acts only through its governing body and not through the individual members of that body, who, alone, have no authority to bind it. In its appeal to this Court, the City continues, as it did in the underlying case, to blur the lines between the entities (City and City Council) and individual members of City Council, finding complete unity of identity where it wishes (such as in its argument that individual members of City Council are parties to this action), and urging complete distinction and separateness where unity does not serve its purposes (such as not wishing Council members' actions or knowledge to be imputed to it).

In a blatant and utterly unsupportable attempt to establish the City's standing in the underlying suit to challenge FGH's board's power to change its corporate documents, Petitioner unilaterally rewrites the procedural history of this lawsuit and, for the purposes of the appeal, references individual "defendants" who were never parties to the underlying action, and who are not parties to this appeal.<sup>16</sup>

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<sup>16</sup> The City in its Brief submitted with this Court contends that:  
"West Virginia Code 31E-3-304 is not a bar to Fairmont City Council member Ronald Straights and Deborah Seifrit's challenges to the amended bylaws of Fairmont General Hospital, Inc."

The City of Fairmont and Fairmont City Council, by the through which the City acts, were named by Plaintiff, FGH as defendants in the underlying action. FGH did not name any individual members of City Council, nor were any joined, nor did any intervene. The City now for the first time, wishes to rewrite the history of this lawsuit, including the identity of the parties, asserting without support that certain named individual members of City Council were/are parties. It would appear that the purpose and design of this bald and baseless assertion is to establish standing that would give the Defendants legal footing to pursue claims that the City and City Council as entities have no standing to pursue.<sup>17</sup>

FGH's Board has historically included, and continues to include, at least one director who is also a member of City Council. As such, one can only assume that the City's sudden assertion that individual City Council members are parties to this action is designed to establish standing without necessarily imputing it to the City, thus avoiding the waiver of claims that the Circuit Court held would result by virtue of the same logic that would allow standing to be imputed (i.e., if standing is imputed to the City based on the standing of its Council members, then waiver is imputed to the City for the acts of its Council member who participated in the actions complained of in his capacity as FGH Board member).

The City asserts in its Brief that City Council members Ronald Straight and Deborah Seifrit were/are defendants in this action (again, presumably because the City and City Council as entities were named parties, although the City offers no explanation). The City then argues that Mr. Straight and Ms. Seifrit were, based upon the City's purported appointments to FGH's

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<sup>17</sup> Per the Circuit Court's Opinion Order, any standing the City might have to challenge alleged ultra vires acts of FGH would necessarily be imputed to it through the standing of individual City Council members, which the Circuit Court found would also result in imputing Council members actions in participation in the challenged actions to the City, resulting in a waiver of the City's challenges.

Board made on January 25, 2011, duly appointed members of FGH's Board, and entitled to seek to enjoin the acts complained of under W. VA. CODE § 31E-3-304(b)(1).

First, Mr. Straight has never been a legally recognized member of FGH's Board of Directors. Indeed, the issue of his purported appointment in the face of FGH's self-appointment powers per its amended Bylaws was a core issue in the declarations sought by the City and rejected by the Circuit Court. (A.R. Vol. pp. 68-73). Moreover, Mr. Straight did not seek to be made a party to the suit, which he certainly could have done via a motion to intervene had he wished to do so. As such, the issue of his standing under 31E-3-304(b)(1) was not an issue before the Circuit Court, nor properly before this Court on appeal. It is well established law that this Court will not consider evidence or arguments that were not presented to the circuit court for its consideration in its ruling. In reviewing a lower court's decision in a summary judgment proceeding, this Court held that its review in such cases "is limited to the record as it stood before the circuit court at the time of its ruling." *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 700, 474 S.E.2d 872, 880 (1996).

Deborah Seifrit, who was a member of FGH's Board at the time the amended Bylaws were adopted on August, 23, 2010, also failed to seek any redress with the Court by motion to intervene or otherwise. Like Mr. Straight, she has never been a party to this civil action and is not properly before this Court as a party on appeal. *Id.*

The City cannot, simply because Mr. Straight and Ms. Seifrit are members of City Council, presume to act on their behalf, and certainly not in the capacity of a board member of FGH. Indeed, Ms. Seifrit and Mr. Straight may not even take issue with the actions of FGH's board.

FGH has consistently taken the position, and continues to urge, that the City and City Council as entities are completely separate and distinct from their members for all purposes. The law supports this proposition. See, e.g. *City of Fairmont v. Hawkins*, 172 W. Va. 240, 304 S.E.2d 824 (1983), *Edwards v. Hylbert*, 146 W. Va. 1, 118 S.E.2d 347 (1960), *Daugherty v. Ellis*, 142 W. Va. 340, 97 S.E.2d 33 (1956). Thus, the individual members of City Council were never parties to this action and are not parties now. Whether or not they would have had standing under any of the legal theories upon which the City bases its challenges to FGH's actions is of no moment and is not properly before this Court to determine.

**F. THE CIRCUIT COURT DID NOT HAVE BEFORE IT AND MADE NO RULING UPON WHETHER OR NOT ANY INDIVIDUAL MEMBERS OF FAIRMONT CITY COUNCIL HAD STANDING TO CHALLENGE THE ACTIONS OF FGH IN ENACTING ITS AMENDED BYLAWS AND AMENDED AND RESTATED ARTICLES OF INCORPORATION, AS VIOLATIVE OF THE WV OPEN HOSPITAL PROCEEDINGS ACT.**

The issue of the standing of individual members of City Council to challenge FGH's actions based on the WV Open Hospital Proceedings Act was not before the Circuit Court, is not part of the Order appealed from, and is not properly before this Court, as the individual members of City Council were not parties to this civil action and did not raise any such challenge.<sup>18</sup>

**G. THE CIRCUIT COURT DID NOT ERR IN HOLDING THAT IF INDIVIDUAL FGH BOARD MEMBERS' STANDING TO CONTEST THE ACTS OF FGH'S BOARD WERE IMPUTABLE TO THE CITY BY VIRTUE OF SAID MEMBERS ALSO BEING MEMBERS OF CITY COUNCIL, THEN THE KNOWLEDGE OF SUCH INDIVIDUAL MEMBERS IN THEIR CAPACITY AS FGH BOARD MEMBERS WOULD ALSO BE IMPUTABLE TO THE CITY.**

The City's Assignment of Error No. 7 is misleading as it cites as error a holding that the Circuit Court did not make. Specifically, the City states, "The Circuit Court of Marion County erred in holding that knowledge gained by an individual member of Fairmont City Council while

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<sup>18</sup> See Section V.E. *supra*.

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.” The assignment mischaracterizes the Court’s opinion wherein the Court simply pointed out that to accept the City’s argument that it stands in the shoes of its Council members for purposes of standing, which standing is based on those members’ status as FGH directors, would require the Court to also accept that the City stood in its Council members’ shoes for purposes of knowledge possessed by those members in their capacity as FGH directors.

As FGH has consistently argued, the issue of imputability is of no moment because under the clear and unambiguous language of the controlling statute, the City has no standing. Simply put, and in keeping with the Court’s rulings, standing can no more be imputed to the City than can the knowledge of the individual Council members.<sup>19</sup>

**H. THE CIRCUIT COURT DID NOT ERR IN HOLDING THAT IF INDIVIDUAL FGH BOARD MEMBERS’ STANDING TO CONTEST THE ACTS OF FGH’S BOARD WERE IMPUTABLE TO THE CITY BY VIRTUE OF SAID MEMBERS ALSO BEING MEMBERS OF CITY COUNCIL, THEN THE ACTIONS OF SUCH INDIVIDUAL MEMBERS IN THEIR CAPACITY AS FGH BOARD WOULD ALSO BE IMPUTABLE TO THE CITY.**

As with Assignment of Error No. 7, the City’s Assignment of Error No. 8 is misleading as it cites as error a holding that the Circuit Court did not make. Specifically, the City states, “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

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<sup>19</sup> FGH would note that knowledge of the Council member Smith with respect to the allegations involving the WVOHPA is relevant for the purposes of evidencing no intention of FGH to hide anything from the City. While Dr. Smith’s knowledge may not be imputable to the City, FGH certainly had every reason to believe that the specifics of its actions were known to the City, since the purpose of the City historically having at least one Council member on FGH’s Board was to keep the City informed and protect the City’s interests. (A.R. Vol. III, pp. 9-10).

Fairmont.” The assignment mischaracterizes the Court’s opinion wherein the Court simply pointed out that to accept the City’s argument that it stands in the shoes of its Council members for purposes of standing, which standing is based on those members’ status as FGH directors, would require the Court to also accept that the City stood in its Council members’ shoes for purposes of actions taken by those members in their roles as FGH Board members.

As FGH has consistently argued, the issue of imputability is of no moment because under the clear and unambiguous language of the controlling statute, there is no standing. Simply put, and in keeping with the Court’s rulings, standing can no more be imputed to the City than can the actions of the individual Council members.

**I. THE CIRCUIT COURT PROPERLY HELD THAT SECTION 4.06 OF THE CHARTER OF THE CITY OF FAIRMONT IS NOT APPLICABLE TO FGH.**

The Court properly held that Section 4.06 does not apply and is not binding upon FGH. As the Court noted, 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.

In its enactment of Ordinance Nos. 689 (A.R. Vol. I, pp. 151-55) and 690 (A.R. Vol. I, pp. 156-71), the City clearly illustrated its intention to voluntarily divest all control of the municipal hospital, by authorizing the transfer or lease of all the operations, assets, and liabilities

of the municipal hospital to the successor entity, FGH. Ordinance No. 689 essentially created a public commission known as the Fairmont Building Commission. The language of Ordinance No. 690, entitled “Ordinance for the Sale and Conveyance of Certain Property Used in the Operation of Fairmont General Hospital,” makes clear that the commission was created to allow the City to transfer the then City-owned real estate and personal property used in the operation of the municipal hospital without the necessity of a public auction, as would have been required for a transfer directly to FGH as a private corporation. Specifically, the Ordinance states:

Whereas, West Virginia Code §8-11-3 requires the enactment of an ordinance prior to the sale of property belonging to a municipality; and

Whereas, West Virginia Code §8-12-18 and §1-5-3 provide that a municipality may sell, lease, or dispose of any of its real or personal property or any interest therein or any part thereof to any *public body*, which includes a commission of a municipality, without the necessity of a public auction as long as the use by the recipient is for a public purpose; and

Whereas, West Virginia Code §8-33-9 empowers and authorizes an municipality to convey or transfer to a commission which it has created and established property of any kind owned by the municipality to carry out the purposes of said commission; ...

(A.R. Vol. I, p. 156). Following the above-quoted recitals, the language of Ordinance No. 690 confers authority upon the City Manager to execute such instruments of conveyance as needed in order to convey the real and personal property of the City d/b/a Fairmont General Hospital to the Fairmont Building Commission. The City’s intent in passing these two Ordinances is clear-- to transfer the property of the municipal hospital without the necessity of a public auction, which would have been necessary had the property been conveyed directly to the newly formed private hospital, a non-public body. By creating the Building Commission, a public body, the City could convey the property without the necessity of public auction. In turn, the Commission could and did lease the property to FGH for the operation of the hospital, and FGH took possession and

control of the hospital property and assumed its liabilities. The described plan devised by the City and facilitated through the referenced Ordinances evinces not only the City's divestiture of the hospital property, but also its acknowledgment that FGH would no longer be a "municipal hospital." Had it remained a municipal hospital, the City could have transferred the property directly to FGH. There would have been no need to create the building commission.

The Court further correctly held that the fact that FGH allowed Fairmont City Council to continue appointing its Board of Directors after it became a non-profit corporation did not operate as a waiver or estoppel that would preclude FGH from ever ceasing that practice. As the Court noted, 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 Say. & Loan Ass'n*, 133 W. Va. 694, 712-13, 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. (A.R. Vol. I, pp. 392-93). In a public hearing held in September of 1985 before City Council on the issue of privatization of Fairmont General Hospital, following a discussion and review of the proposed Articles of Incorporation, then Council Member Bowyer inquired who would have the authority to change the "Articles" and was informed, along with all present, that "the Board of Directors of Fairmont General Hospital changes the Articles." (A.R. Vol. I, p. 393). Under these circumstances, FGH can certainly not be said to have expressed an intention to relinquish the right.

Likewise, the Court properly made no finding of estoppel, as there was no evidence to support the same presented in the proceedings below.

Estoppel applies when a party is induced to act or to refrain from acting to [his/]her detriment because of [his/]her reasonable reliance on another party's misrepresentation or concealment of a material fact.... Estoppel is properly invoked to prevent a litigant from asserting a claim or a defense against a party who has detrimentally changed his[/her] position in reliance upon the litigant's misrepresentation or failure to disclose a material fact.

*Ara v. Erie Ins. Co.*, 387 S.E.2d 320, 324 (W. Va. 1989) (citations omitted). In order for an estoppel argument to prevail, the City would have to have proved that its divestiture of the hospital property was induced by its reliance upon such misrepresentation. Put simply, there was absolutely no evidence to support that such representation was made, that the City relied upon it, or that the City has been harmed by such reliance. In fact, at the time the City divested itself of the hospital property, FGH had not yet adopted the documents by which it evinced its intent to even temporarily assign the City the right to appoint its Board. With not a shred of evidence of either any misrepresentation by FGH or any detrimental reliance thereon by the City, there can be no estoppel, as the Circuit Court correctly found.

## VI. CONCLUSION

The issues presented to and decided by the Circuit Court in this matter are, despite Petitioner's seemingly intentional obfuscation of the same, are well settled matters of law, the determination of which could only have been made in favor of the Plaintiff below. All of the material facts are undisputed, as evidenced by the motions for summary judgment filed by both parties. In applying the settled law to those facts, the Court correctly determined that the City's challenges to FGH's amendments to its governing documents must fail.

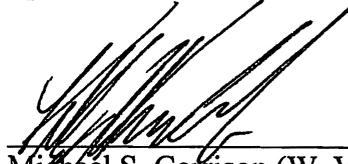
FGH, a non-profit corporation since 1985, was no longer the "municipal hospital" to which the Charter of the City of Fairmont applied. Under West Virginia law, FGH's Board had

the power to amend its governing documents and did so. The City was without standing to challenge the acts of the corporation in amending its governing documents, and the lower Court was within its discretion in holding that there was no evidence of a violation of the Open Hospital Proceedings Act that would warrant the Court annulling the actions challenged by the City.

Fairmont General Hospital, Inc., requests that this Court deny the requested Petition for Appeal and affirm the Order of the Circuit Court of Marion County.

**FAIRMONT GENERAL HOSPITAL, INC.,**

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**Docket No. 12-0205**

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**City of Fairmont, Defendant Below,**

**Petitioner,**

**v.**

**Fairmont General Hospital, Inc., Plaintiff Below,**

**Respondent.**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 28<sup>th</sup> day of June, 2012, a true and correct copy of the **Response of Fairmont General Hospital, Inc., to Petition for Appeal** was served upon counsel via facsimile (304) 366-0228, and U.S. Mail, first class, as follows:

Kevin V. Sansalone, Esquire  
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