ALBANY COUNTY LEGISLATURE
INFORMATION SESSION
ALBANY COUNTY NURSING HOME

STENOGRAPHIC MINUTES OF PROCEEDINGS conducted on January 29, 2013 at the Albany County Office Building, Cahill Room, 112 State Street, Albany, New York, commencing at 4:07 p.m.; before ELLEN J. FRANKOVITCH, a Shorthand Reporter & Notary Public within and for the State of New York.

BEFORE:

THOMAS MARCELLE, ESQ.
Albany County Attorney

DAVID FRIEDFEL, Commissioner
Albany County Dept. Management & Budget
BRADLEY FISCHER,
Albany County Director of Operations

CHRISTINE QUINN,
Deputy County Executive

P R O C E E D I N G S

MR. FISCHER: This is the final question and answer session that we had discussed prior to Audit & Finance. But, as we have stated many times, the exec's office and the Division of Management & Budget are always amenable in speaking with any member at any time.

At this meeting we have a stenographer present to provide transcription for those members that cannot make it. As such, I'm going to make a few requests of everyone present: When stating the question -- these are per the stenographer, Ellen, to make her job a little easier -- if you could speak slowly and clearly, and when you state the question, please state your name that so that she knows -- she can record who asked it. If you have any documentation that you are going to read from, please give the documents to Ellen and she will -- and if you put an email address or a physical address, she will then be able to scan them and then provide them back to you either in hard copy or electronically, whichever is most suitable to

you.

And at some point, if you pose a question that she was not able to hear, we may repeat the question prior to answer or ask of you to repeat the question yourself.

So with those easy ground rules aside, I will turn the floor over to the august County Attorney, the Supreme Court Winning Litigator Tom Marcelle.

MR. MARCELLE: Thank you, Mr. Fischer.

Just so you know, we have recorded the previous two meetings. They were given to a stenographer. They were -- the minutes were taken down yesterday; we asked for an expedited transcript that we believe will be done in about a week. And we will provide through counsel a PDF copy of the transcript of the prior -- it's approximately three and a half hours of dialogue.

We've been marching our way through 38 questions, and tonight we will continue on that journey. We finished last time at question 31. So what I would propose tonight is pick up at question 32, answer the

remaining interrogatories, and then certainly open it up to question and answers -- some more questions or some more answers.

Now, generally speaking, we've requested that we be given the questions in advance. Again, that simply allows us to be thoughtful and thorough in our answers, and that the answers we give you are as best we can be reflective of what the lease agreement provides.

So with that introduction, we are turning to question 32, which reads: Has the County requested/received a D&B report from the guarantor? Have the financial statements been audited by a recognized CPA firm?

And I'm going to turn question 32 over to our Director of Budget & Management.

MR. FRIEDFEL: We did request a D&B report directly from D&B. The information on D&B's part was no longer valid; it was stale. It's currently being updated; we expect to get an updated report in approximately a week, a week and a half. Obviously D&B does their own due diligence and it will operate on their own

time schedule.

Regarding the financial statements and whether we received a copy, we received this and we passed it to all of you a few weeks ago.

MR. MARCELLE: Any followup on that?

(Negative response.)

MR. MARCELLE: Question 33: Section 2.2 indicates that the lease term is less than that of the loan term. As a clarification of question 1, how is the negotiating team going to pursue changes to correct this or perhaps make the term the same as the amortization table plus five years?

Well, since this harkens back to question 1 and there's some new members here, question 1 referenced the local law that allows the County Legislature to enter into leases of 25 years. That right, as I noted before, is reserved for the Legislature. It is not a right that's reserved for the executive. I know sometimes the local law can be confusing, and certainly if you're not a lawyer, as you read through them, you may not

pick up the nuances, but it was an important nuance. Subsequent to that '96 law that reserve the right for the Legislature to enter into leases of 25 years, the Legislature the very next year passed a law that provided the County Executive may only enter into -- negotiate lease agreements for an original term not to exceed ten years.

So we actually felt bounded by the law. Even though the body is certainly permitted to enter into longer terms, our interpretation that the County Executive may not enter into agreements greater than ten years we felt was pretty plain on its face and we decided not to violate it.

Now, I know USG's principals, who will be the principals of the operator of the nursing home have appeared here. They have indicated to this body they would like a longer lease. We indicated, as from the executive's perspective, we would like a longer lease. I believe a -- certainly a significant number of this body has indicated that it would like a longer lease as well.

So I will make this suggestion: Given our negotiating partner's willingness to enter into a longer lease, should this body deem it wise and in the interest of the people of Albany County to lease the nursing home, I will recommend to you, as you are legal advisor, that you amend the terms of the lease to allow for a 20-year term of the lease. That will certainly meet with USG's hopes and expectations. It would meet with the executive's and certainly, as I view it, be in compliance with the law.

So I think ultimately the length of the lease, given the operator's position, is up to the Legislature. So I think I'll leave it at that, unless there is further followup.

Mr. Mendick?

MR. MENDICK: Thank you, Mr. Marcelle.

Richard Mendick, 36th District.

Is there any legislative action or resolution that needs to be placed before the Legislature in order to accomplish moving it from -- to a 20-year lease, or can that be done within just the contract itself?

MR. MARCELLE: As I read the local law, that's a prerogative reserved for you. So if you amend the lease to make the term 20 years, that would be a separate resolution; it would simply require an amendment from the floor. I think that's the best way to handle it. I just -- I mean, I get the sense that even members who may be opposed to the lease of the nursing home conceptually, if it were the will of the majority of the body to enter into, would prefer a 20-year lease.

I would -- you know, but for the local law, I would actually, in light of everything I heard, probably submit a 20-year lease to you, but I'm hesitant to do that. You know, it's probably more efficient to do that, but I want to make sure that I don't overstep my bounds. But I think it would just take a simple amendment from the floor to do that.

MR. MENDICK: The lease itself?

MR. MARCELLE: To the lease itself.

MR. MENDICK: Thank you.

MR. MARCELLE: Mr. Commisso.

MR. COMMISSO: Frank Commisso, 11th

Legislative District.

Tom, in conjunction -- the lease in conjunction with an LDC, I thought there was some regulation at the time of lease in conjunction with an LDC, and I thought it was five years with options for five-year renewals.

MR. MARCELLE: Sure. So the Majority Leader has asked, the not-for-profit law puts certain limits on how long an LDC may lease a property. And one aspect of this lease contemplates, should the Legislature choose, the LDC, the Elderly Aid and Care Corporation be the -- I guess, the author of the loan, the entity that makes the loan. And in many counties, what happens is the County leases the facility or the property to the LDC who then leases it to an operator. Our lease agreement doesn't contemplate that additional step, Mr. Leader.

So you're absolutely right. If our agreement was written a way that leased the property LDC and then the LDC turned around and leased it to the operator, they would be

under more restrictions than the Legislature itself would. So we tried to circumvent that problem, making -- instead of engaging the LDC directly, just thinking -- or giving the Legislature the option that the LDC be the entity that made the loan and the grant to the operator, but not the actual -- the entity that was the lessor. But, again, should that be the will of the body, we can certainly arrange a lease that allows the initial lease to be the LDC with the LDC, but to be constrained with shorter terms, I believe.

Yes, Mr. Leader.

MR. COMMISSO: I know it's getting late in the game, but have we looked at a land lease versus a lease such as we're doing?

MR. MARCELLE: We did not, no.

MR. COMMISSO: Is there any benefit to looking at a land lease? Because I'm thinking that the building's 41 years old right now; 20 years from now, the building's 61 years old. The life of the building at that time is done. They're not going to pick up the building and walk away, so we're still going to have the

building with the land lease. The dollar amount may change somewhat, but that's something that, you know, may be worth looking at.

MR. MARCELLE: You know --

MR. COMMISSO: Takes us out of the realm of things going forward.

MR. MARCELLE: And, by the way, Mr. Commisso, I think that goes along with your asset purpose, and I just want to update you on that.

We actually entered into initial discussions on asset purchase for the assets, which just triggered a thought in my mind; I hope you don't mind me digressing.

But the operator is extremely interested in making an asset purchase, and we're going to -- while we may not be able to nail down exact terms of the agreement, I believe the lease agreement will reflect that the two parties will enter into good faith negotiations to enter into an asset purchase agreement of the assets of the nursing home. So we're going to put that -- that will be --

we were on the phone again today -- how much -- several times, as Mr. Fischer reminds me. So if -- we'll put that in the lease as an option, and if it's the will of the body to -- so if the lease that we'll present, you can either endorse it with the approval or strike it if that's not the will of the body.

So we will provide a lease that gives you that option, a lease subparagraph, and to the extent that the body does not want to enter into an asset purchase agreement, we'll assume there will be -- an amendment will be to strike that provision. If they do, it will leave it status quo.

Mr. Crouse.

MR. CROUSE: Peter Crouse, 24th Legislative District.

Just a point of clarification on the asset situation. When we speak of the interest of USG in purchasing the assets of the nursing home, you are excluding the land; is that correct?

MR. MARCELLE: Okay. Mr. Crouse, that's a hundred percent correct. And, again, this

is kind of a digression that's pulled out of context from an earlier discussion with the majority leader.

So right now under the lease, the operator is responsible for maintenance, upkeep of the physical property, all of the assets, medical equipment, beds, TV and the assort as well as the physical plant.

The majority leader, I think, made a very good point, a point I will say I confess I was a little obtuse on; I didn't quite grasp the meaning at first, but made the rather, I think, cogent point that at the end of the lease, even if the assets are maintained and updated, they're of little value to us. And we don't anticipate going back into the business of a nursing home operation, so aren't we -- isn't it more advantageous to wind up selling those assets rather than -- at the beginning, rather than selling them at the conclusion of the lease.

And I think that was a point well taken. I think our partners are -- were very interested in that. And it only includes --

to answer your question, it only includes those, what would be -- I don't know how to describe it accurately, but things like beds, medical equipment, TV, chairs, tables; all the stuff, if you had a moving company come in and take everything out that could fit in a moving truck, that would be the idea of what they would be entitled to.

A VOICE: Not fixed assets?

MR. MARCELLE: Not the fixed ones. So they wouldn't be able to take down the cell towers off the top of the roof, just filing cabinets. Although the ability to articulate it properly escapes me at the moment, upon sitting in front of the computer and a keyboard I'll try to pound out something that reflects that adequately.

Yes, Mr. Zilgme, minority counsel.

MR. ZILGME: In a word, it will be tangible personal property.

MR. MARCELLE: Thank you. That's certainly -- I'm well on my way now to having that accomplished. I appreciate that suggestion.

Mr. Crouse from Colonie.

MR. CROUSE: Is there a current assessment as to what the land is worth at the nursing home?

MR. MARCELLE: The answer to that is, I don't know. I know there was some figures bandied about when we were looking at Heritage Park, so I can't tell you for sure. I will tell you for sure there is no assessment of what the actual parcel that we'll be leasing to the operator is. In other words, the nursing home is part of a larger campus which may or may not have some -- at some point the County may or may not have assessed it. I suspect that the answer to that is yes, but I cannot say with any certitude. But this is certainly something -- as I see Ms. Williams in the back hopefully taking notes, as she often does, she'll make this an item to follow up on.

So I will provide you a definite, Mr. Crouse -- she always will shoot me an email the next day to please follow up X, Y and Z.

But more important and more, I think, accurate to your question is: Do we know what the value of the leasehold is? Is that a fair inference?

MR. CROUSE: That's fair.

MR. MARCELLE: I don't know that, either. So I'm full of ignorance tonight. We will certainly try to provide whatever knowledge we have on that and, if nothing else, provide you with our Department of Taxation maybe...

MR. FRIEDFEL: And given the exempt nature of the parcel currently, whatever the current assessed value is, because it's an exempt property, it's not likely to be the most accurate reflection of what it would be if it was a property subject to taxation where there would be challenges against the assessed value.

So, just a little nuance there. But we'll track down what the current estimate is now. We won't be able to carve out the property.

MR. O'BRIEN: Joe O'Brien, 25th District. Is the footprint of the acreage defined

at all?

MR. MARCELLE: So this is a question that's come up; it's an excellent question.

We've defined it to the extent that we've agreed upon with the parties what the area is. We've defined that area visually. Now, the actual metes and bounds and the layout states -- and, you know, to give the legal description -- and it's not been done -- we estimate a formal legal description would probably cost us north of $10,000. And before we engage into the actual metes and bounds, we will like to know whether it's the will of the Legislature to enter into the lease.

But we have an agreement; this will be attached to the lease as Exhibit A. It will give, certainly for most people, a more accurate description of what we're leasing than the formal legal description. At some point we will do that, because it's going to be required to make sure that there's a complete understanding and meeting of the minds between the parties. But this is our agreement. The operator has agreed that.

This is our understanding, and it will be attached as Exhibit A or A1 -- I forget which exhibit is attached to the lease -- to make sure that everyone has an understanding of exactly the metes and bounds of what we're leasing.

Venturing forward. 34: Since we are dealing with a for-profit entity, why doesn't the rent reflect a yearly increase at least tied to the CPI?

The method of rent payment is -- well, we'll leave 34A, so I'll ask that be stricken. We'll just leave that to the end of the question about the CPI.

Well, this is how we negotiated the lease. We negotiated it tied to Medicare reimbursement and the DOH formula. We felt, as we negotiated, that was the most -- easiest and fairest way to decide what the rent accounting was due. That was just, I suggest, a strategic choice that we made.

And I don't know if that answers the question.

MR. FRIEDFEL: I just want to clarify

1 that it's Medicaid reimbursement.
2 MR. MARCELLE: Did I say Medicare?
3 Medicaid. Okay.
4 Again, that was the subject, I believe,
5 of an earlier question as well. And when we
6 get the transcript, that was subject to a
7 back-and-forth debate, and it may provide more
8 elucidation on the issue than this brief
9 question.
10 34A questions the method of the rent
11 payment, calling it antiquated. I assume by
12 that, under the lease agreement, it requires
13 the rent to be sent -- which I think is
14 reasonably read and probably as I read it,
15 too -- it's certainly subject to
16 interpretation that the cheek will be in the
17 mail.
18 Now, yes, it's antiquated; I'm sure that
19 we will be able to make sure that it's done
20 electronically. I suspect whether or not this
21 body decides it's wise and efficient and a
22 good use of our limited resources of the
23 County to lease the nursing home, that it
24 probably doesn't turn upon whether the rent is

drawn through commercial paper or through electronic means.

But the point is well taken, that this is a time in human history that we're able to make transfers of funds without the chopping of trees. So we will, consistent with the County Executive's many green initiatives, request that the transaction of payment of rent be done electronically.

Are there any follow-up questions?

(Negative response.)

MR. MARCELLE: That brings us to question 35: Under Article 4.1, does this include water rents/tax? Okay.

So the question is fairly placed, who is responsible for water at the facility. Article 4 is entitled Payment of Rent and Utilities. If you look at the lease, paragraph 4.7 provides: "Lessee shall pay all expenses incidental to possession, use and operation, including all utilities, of the demised premise and leased assets."

I believe water is fairly described as a utility. I certainly haven't look at the case

law, but I believe that's the case. And certainly I can recall playing Monopoly and landing on Water Works, which was considered a utility in that board game. And while not precedent, I do believe water is included as a utility. But if not, I think the broad nature of the language, "Lessee shall pay all expenses incidental to possession, use and operation, including utilities." So it definitely contemplates payment of something more than utilities, but at a minimum, utilities. So even if water was deemed excluded, certainly water is incidental to possession, use and operation of a nursing home.

I don't think we need to enumerate all the possibilities of what they may be responsible for. And, again, as I explained last session, a couple of points in this lease, we had decisions to make whether we would engage in the enumerations of specifics, such as you shall be responsible for XYZ as opposed to being responsible for maintenance. We're talking about an historical mission, so

you shall be responsible for these types of patients.

Just as a matter of, I think, protecting the County, as the County Attorney, and as a matter of how I deem it's most efficient to enter into a lease to protect my client, generally I don't like enumeration, because as a matter of the canons of statutory interpretation, once you enumerate, those items which you don't include are deemed excluded. I'd much rather have, from our perspective, broader provisions that enable us to seek remedies even if we hadn't contemplated them initially. Generally speaking, the enumeration of provisions tend to benefit in this case the operator, because then they know the entire universe. And if something happens that wasn't contemplated at the moment of execution of the lease, we would be responsible.

So, again, obviously the Legislature is going to weigh whether or not this lease adequately protects the County interest. It's certainly my advice that it does. And I think

that that was the intent behind the negotiation.

I should probably invite follow-up to that question -- or that answer, with other questions.

(Negative response.)

MR. MARCELLE: Okay. Well, in the ecstasy of answering that question, I lost my question and answer sheet which contains my answers. Okay.

There is a three-part question dealing with insurance. As I explained last time, there will be an insurance rider that goes along with it, the lease that we're currently negotiating, that will make more explicit.

But I will answer these questions; I think their answer -- the lease, 6.1, requires that the operator maintain casualty insurance, fire, anything that would render the property destroyed. We obviously -- they're also required to submit the insurance binder to us so we know what it is.

The one point I do concede that is probably less than clear is that the -- making

sure that the insurance -- make sure that it covers replacement cost and not actual value of the structure; right? So we can have it insured actually what the -- what everything is worth currently, or we can insure it against replacement cost. And I think we should make that clear, although that question -- I think that's a fairly inferred question.

I also just want to point to the members who are here tonight that certainly it's very inclusive language of who's responsible for the risk of all loss, damage, theft and destruction to the demised premise or any of the lease assets shall be borne and assumed by the lessee.

So the only question I think that remains under this provision is whether the policy needs to be replacement costs or needs to be the value of what the assets are. And we'll have to negotiate that.

Mr. O'Brien from Colonie?

MR. O'BRIEN: What about the loss of rent?

MR. MARCELLE: There is a provision for loss of rent in there.

MR. FISCHER: Business interruption insurance, extra loss of rent for up to 12 months.

MR. O'BRIEN: Up to 12 months?

MR. FISCHER: Yes.

MR. MARCELLE: Mr. Leader, Frank Commisso, Majority Leader.

MR. COMMISSO: Tom, about a timetable -- let's say they had a fire out there -- for them to get the building up and going and functional; otherwise, it could stay three years, four years and just leave it down. There's usually a clause in there; it gives a timetable as to restoring it, because if the business interruption runs out in 12 months, then we're left holding the bag. So there should be a timetable, 12 months or 18 months, whatever it may be, they have to have the building up and going.

MR. MARCELLE: Mr. Leader, I think that's a good point. Some of these issues, we're going to have to address the insurance rider.

1 I think that is a very perceptive point and
2 certainly one that we will include --
3 negotiate a time frame and include a time
4 frame for restoration.
5 36B -- 36A. We went over this last time,
6 whether the limits for the liability
7 insurance, which is under 6.3, is sufficient.
8 We believe, as we asked around $1 million per
9 occurrence and $3 million per bodily injury
10 and property damage, which is different from
11 the casualty insurance, is sufficient. But
12 we've already discussed as today, Mr. Fisher
13 and I believe we've reached an agreement, at
14 least in principle, to up those limits to
15 three per occurrence and five in the
16 aggregate. So we will increase those
17 insurance limits. They are going to check
18 with their underwriters to see exactly what
19 the additional expense is. We don't
20 anticipate it to be a stumbling block.
21 But that was subject to an earlier
22 question. And, again, I will say that
23 certainly we are much appreciative of the
24 input from the members and staff on this. The

object here is to try to make this the best lease for the County. And there's a depth and wealth of experience from the membership that go beyond the limited staff of the executive office. So when certain expertise is brought to bear upon this, it's a wonderful and just tremendous ability for the separate branches of legislature -- separate branches of government to work together to achieve a wonderful harmony and to accomplish something that's in the best interests in the people of Albany County.

36B: "Under 6.5, why isn't the lease required to submit renewals annually to the lessor no later than 15 days prior to the policy's annual expiration date?"

Under 6.5 currently, as we read it, it's the renewals are due upon the expiration date. This suggests that the renewals be given not upon the expiration date, but 15 days prior. Again, I think that's certainly an issue we'll bring up with USG. And I don't anticipate a problem, whether it's upon expiration date or upon 15 days. They have to renew the policy

and provide us with the new policy under the lease.

So that will be done -- I'm not sure. I hope that answers the question. I think it's a legitimate concern, and certainly if 15 days gives the body more comfort, we'll make sure we get some time prior to the expiration for the renewal of insurance.

37: "Under Article 15, Section 15.2, What is the probability that the license would be transferred by DOH" -- which means Department of Health -- "back to the County?"

We've somewhat at least danced around this question. I think we've had an awful lot of discussion with respect to what happens should there be a default or should the operator be unable to operate the nursing home for whatever the reason. So, this is something we discussed with the Department of Health.

I know Mr. Fischer has developed a certain amount of expertise, so momentarily I will defer to his brilliance on the subject. But the 10,000-foot view is simply this: When

a nursing home operator is unable to operate, be it for financial reasons or otherwise, the Department of Health steps in and appoints a receiver to operate the nursing home, which could or could not be the County, depending upon the desires of, I guess, this body, whether we made an application to DOH.

So with that most general answer, I will turn this over to Mr. Fischer.

MR. FISCHER: Brad Fischer. The question speaks to the possibility that it would be, I think, somewhat difficult, if not a little speculative, for us to speak to the probability of that. I can just say procedurally if, you know, the County wished to -- for some reason USG failed to abide by the terms of the lease and somewhat was found to be in breach or they were closed, they could no longer operate, the County would then submit a CON application to DOH to be reviewed and adjudicated by the Public Health and Health Planning Council. There is no per se transfer of a license; it is incumbent on whomever assumes the operations of that

facility to make their own independent CON, Certificate of Need, application.

As Mr. Marcelle so cogently stated, if it is the desire of the County and this body to see operations maintained if USG's acting as a CRNC were to fail for some reason, the County could into enter into talks with the Department of Health to look to have a receiver appointed such that operations could continue to be maintained. Or if the County looked to insert themselves back into the operations, then it would been incumbent on the County to make a CON application itself.

MR. MARCELLE: The Majority Leader, Frank Commisso.

MR. COMMISSO: Tom, what you're saying, then, four years down the road their board makes a decision that they're getting out of business -- let's say the five-year lease, and they make a decision we're going to get out of the business, do you think maybe -- they don't have to come to us; they have a year remaining, they do not have to come back to us 30 days beforehand, 60. Do you think maybe it

1 would be good to put a clause in there if and
2 when it comes time for renewal, they have to
3 give us six months' notice as to their
4 intentions?
5 MR. MARCELLE: I will check the renewal
6 notice. Yeah, the short answer to that,
7 Mr. Commisso, is yes. I'm not sure what our
8 renewal notice provides, but let me take a
9 look at it and provide you, through majority
10 counsel, an answer to that question, if you
11 will permit me, rather than trying to answer
12 you on the spot. Ms. Williams, I'm sure, will
13 make a note of that and I will follow up on
14 that as well. Let me just -- it's
15 Section 2.2, but I'll make sure I follow it
16 up, Mr. Leader.
17 Let me just go back to something, because
18 I guess we didn't really answer the nature of
19 the question in some respects. I take it
20 there may be a concern that the operator is
21 insubstantial, that they may go out of
22 business, that the nursing home and all our
23 patients will be left in the lurch.
24 I've tried to explain this before, and I

think it merits the repetition at this juncture. USG isn't a company that the County Executive engaged in at random. It was a result of a search, an exhaustive search, one that relied heavily upon the Department of Health, to make sure that we engaged with a partner. And the reason, by the way, that this is such an important question because, as I said before, I think there's two questions that you've got to answer as Legislature.

One is certainly the global question, whether or not the deal makes financial sense for the County of Albany; that is; whatever the cost of running a nursing home is versus the cost of leasing, that economic global question, whether this is a good deal financially.

But equally important because, look, the touchstones of our institutions, the thing which makes us great as a society, isn't just driven purely by financial motives. And so one of the fundamental questions that you've, I think, got to grapple with is whether not only is the deal financially sound, but can we

trust USG to take care of the people of Albany County, the elderly who need nursing home assistance.

I've said this before: The Executive Office feels very comfortable answering that in the affirmative. We have done our diligence with DOH. If you look at Onondaga County and ten other nursing homes, which include several other counties, have decided to associate and partner with USG. We believe that USG is a company and operator who will care for the patients of Albany County.

But, again, that's something the executive did. That's something he felt -- look, most of you know the executive. He served with you in the legislative body for a number of years. You know where his heart is with respect to caring for the sick and needy of this county. He sat among you and certainly championed for the longest time that a new nursing home should be built. As the executive, he came to the painful conclusion that that wasn't any longer possible for the taxpayers of Albany County. But unlike his

predecessor in office, his solution wasn't simply saying, we're out of business and these people can fend for themselves. He made a concerted effort to find someone who we could trust the elderly and the sick and the needy of this county to. He was diligent in this exercise. It is something he cares deeply and passionately about. I can assure you, as I sit here tonight, he didn't do it as some expedient means to sacrifice the sick and elderly of this county on the altar of financial solvency. That wasn't his motive.

So I can tell you, at least as best as I can represent to you, that USG, the probability of them going out of the nursing home business is close to zero as anything we could hope to get. So I don't take this as some flip question. It's really important. And, again, we'll make available to you everything we can to help make you comfortable with that fact. The executive's office is open to you around the clock to answer these questions as you engage in this debate.

My judgment can't be a substitute for

your judgment; Mr. McCoy's judgment can't be a substitute for your judgment. But certainly we'll provide you all that is in our possession and knowledge to help you make that judgment.

Okay, enough -- as I said last time -- prattling.

Yes, Mr. Dawson from Bethlehem.

MR. DAWSON: Now that you've mentioned both the head and heart of the Thomas Jefferson issue, the heart aside for a second -- we all seem to be in the same place there. But what -- and maybe Dave can handle this question.

You mentioned that the County Executive's concerned about the taxpayers and that's in part the reason for this exchange. What is the difference in our outlays on average after the sponsorship fees, the loans, and all that? What are we going to be, quote, "saving" from the way we're doing business today under this lease? I just want a number.

MR. FRIEDFEL: $15.6 million, 2016. And going forward, that number will grow.

MR. DAWSON: Per year?
MR. FRIEDFEL: Correct.
MR. DAWSON: $15 million per year off of the current way we're doing business?
MR. FRIEDFEL: Correct. This year --
MR. DAWSON: IDTs aside, bank funds --
MR. FRIEDFEL: Correct. Based on the current statute regarding the intergovernmental transfer, it would be $2.5 million in 2013; $3.3 million in 2014; $9.9 million in 2015. That's the last year of our commitment to USG. And $15.6 million in 2016.
MR. DAWSON: And next year when we have to deal with the property tax cap again, what was the number again? I just want this for the record.
MR. FRIEDFEL: $3.3 million.
MR. MARCELLE: Dr. Dawson, that's exclusive of rent and repayment of loan, as well. That doesn't account for the revenues that we'll receive.
MR. DAWSON: What I'm trying to account for is the other discussion we're having about changing the sales tax share for community

college charge-backs, because if that is not going to be necessary because it's savings, then so much the better. And if there's going to be funds that will also be available to help our other senior citizens so that they can stay in a home, which is not without great cost as well, then I would like to know that as well.

So there are advantages, strategic advantages, to this deal. That doesn't necessarily mean we're going to be saving money; we can apply it to other purposes. That will also save us and maybe keep some people out of a nursing home.

MR. FRIEDFEL: Correct.

MR. DAWSON: Thank you.

MR. FRIEDFEL: The Public Works Committee meeting is starting now, if anyone wants. 5:00 o'clock.

MR. MARCELLE: Well, as the clock strikes midnight, we are down to, I believe, the final question, 38.

Under Article 19, Section 19.2, the rate suggested is not consistent with that which

would be granted to commercial entities for unsecured loans. Why hasn't this been addressed prior to presenting it to the Legislature? The term and amortization table are inconsistent and have a strong tie-in to the lease term. There are no specifics as to the balloon payment, prepayment, extensions, et cetera. Please provide clarification on this point.

This question has been asked in this forum before. And not to really go too deep to the well, but this isn't a commercial transaction. This isn't simply leasing a business operation to another business entity. We have required that the operator not operate a purely private sector model, that they are required to operate the facility as a safety net. Requiring them to operate the facility in a manner that isn't optimized for profit, means we can't negotiate the deal like this was a business transaction.

Therefore, the best model we could agree upon with our negotiating partner was a model like HUD. So the interest rate wasn't a

commercial rate; it was a rate based upon what the government does in certain similar situations like HUD. That's where we got the number from.

Additionally there's questions about the more detailed structure of the loan. The lease references a loan agreement. The loan agreement has not been drafted yet because the body has an option of whether to make the loan itself or enter into -- or creating a -- I shouldn't say enter into -- creating an LDC, which would be the entity that made the loan.

If the LDC -- if that's the choice and the will of the body, the LDC would be required to enter into the loan agreement. Any loan agreement -- once this lease is approved, any loan agreement would come back to this body for approval. So in some real terms it's premature to go into the nuances of the loan agreement. That would be something that, once the body directs the County Executive to enter into a lease, the terms of the loan would thereafter be provided and subject to approval.

Mr. Crouse from Colonie.

MR. CROUSE: Mr. Marcelle, I have a question about that. It's difficult, I think, for a number of us to agree to provisions of an agreement without fully understanding the costs associated with the loan. It sounds to me as though you're asking us to agree to the agreement and then we will revisit how we structure the loan. And for a lot of us, how we structure that loan may have an impact on how we view the agreement.

MR. MARCELLE: Let me answer it this way: Certainly the LDC avenue, it would be -- if the Legislature would fund the LDC and the LDC thereafter -- once you give the money to the LDC, it's the LDC's money and they would structure the loan. So that would just be -- the loan itself would be $12 million. The County would authorize to give it to the LDC, and the LDC would operate it. And then how that Local Development Corporation, what they used the money for thereafter, would be how you constructed the LDC.

MR. DAWSON: Are they going to take a

cut? I mean, generally there's going to be fees associated with a loan. And they can be substantial. Is the LDC going to waive its costs?

MR. MARCELLE: Well, that would be up to the LDC.

MR. DAWSON: You've still got to deal with the banking community, and if there's going to be a charge, it's going to reduce what's available in that loan.

MR. MARCELLE: Sure. Well, that's a matter for the LDC, and it may require some more funding of the LDC.

But let me -- well, certainly for our loan, it would be a direct authorization. There would be no bank, so there would be no fee that requires a lending -- a lending -- if the County did it directly, no lending institution would be involved.

But the superstructure of the loan -- it's the only thing I -- I'll tell you the superstructure: 15-year term over whatever the time period is, a $12 million loan, 2.35 percent interest rate --

MR. FRIEDFEL: 2.38.

MR. MARCELLE: I'm sorry, 2.38, that the loan be amortized over 25 years, and that there be a balloon payment at end of the term of the loan.

So the budget director will provide -- if he hasn't already, will provide you with what a schedule of payment would look like under those arrangements. Now, how the loan is -- and the loan is guaranteed. But all the niceties of how the loan will be secured and made and all that will be broken out.

But I don't know if it -- you know, the budget director will provide you with a schedule of payments so you know exactly when the County will be authorizing the money and how the payback will look over time.

Does that help you, Mr. Crouse?

MR. CROUSE: It does. And if I can just expand upon that question, Mr. Marcelle?

MR. MARCELLE: Yes.

MR. CROUSE: Other counties that entered into agreements with USG, have they also had similar financial arrangements as far as

loaning USG funds to operate a nursing home?

MR. MARCELLE: Yes. I believe USG -- they were here earlier this week -- said that Onondaga County, which is on the parallel track -- in fact, they started slightly ahead of us -- is loaning them money as well.

MR. DAWSON: But that's a sale, not a lease; right?

MR. MARCELLE: I believe it's a sale.

MR. DAWSON: It's a sale of the assets.

MR. MARCELLE: It's a sale of the assets, but there's a loan agreement going back and forth between USG and Onondaga County in order to have finances for the sale.

A VOICE: And there's no interest rate attached to that?

MR. MARCELLE: Right.

MR. DAWSON: So what is our cost to loan this money to our LDC?

MR. FRIEDFEL: It's no real cost. It would be an appropriation; it would be like any other expenditure going directly there, so would be no -- the cost would be the amount of the --

MR. DAWSON: Opportunity --

MR. MARCELLE: Right, exactly.

MR. DAWSON: And that's funds, we have to make up somewhere else in our budget to pay for other obligations, including possibly raising tax levies.

MR. FRIEDFEL: The savings that I expounded on previously, that is after the cost of providing the loan, fully inclusive.

MR. DAWSON: But then this does not include loan repayment?

MR. FRIEDFEL: It does not include loan repayment and does not include rent.

MR. MARCELLE: So, in other words, the loan is basically made -- instead of operating a nursing home, the money, at least in those early years, what would normally fund to operate the nursing home is going to be funding the loan. And because there's a delta between what the nursing home would cost and what we're funding, we inured to the black, to the County.

MR. DAWSON: But the LDC still has to set up a loan.

MR. MARCELLE: The LDC -- right --

MR. DAWSON: There would be costs associated with that, so they won't really be getting $12 million; they'll be getting something less than that.

MR. MARCELLE: Right, there may be more.

Look, the LDC is going to need employees and counsel.

MR. DAWSON: I just don't want the LDC to turn around and come back and say, oh, well, they needed actually $12 million principal but now we've got costs, and blah blah blah, we need another appropriation. Okay? I don't want that surprise.

MR. MARCELLE: All right. I assume, you know -- that's a great question, Dr. Dawson. So we will -- I think certainly we have to figure out what that cost will be for the LDC to do it, so you have some ballpark --

MR. DAWSON: You could use the convention center authority, you know --

MR. MARCELLE: Ms. Patrice Lockhart from the Town of Colonie.

MS. LOCKHART: Would the way out of the

LDC and any other fees -- why wouldn't we just give the $12 million directly to USG?

MR. MARCELLE: What Dr. Dawson was referring to is the advantage of using the LDC is, although we feel confident that the loan is constitutional if the County would make it directly, certainly if a local development corporation were to do it instead of the County, we feel that fortifies our already strong position.

Look, as I mentioned last --

MS. LOCKHART: Like the football stadium --

MR. MARCELLE: Right. As I mentioned last night, the Governor saw fit it was okay to loan the Buffalo Bills tens of millions of dollars for their football stadium, and that's deemed a public purpose. Surely, a nursing home is also a public purpose.

So, you know, I know the Comptroller, in the public journals, has a habit of trying to jealously protect the literal interpretation of the Constitution, but I don't believe the courts have done so; nor has, certainly, the

Governor's interpretation been inhibited by a strictly construction.

Ms. Lockhart.

MS. LOCKHART: As a follow-up to that, that's one of the concerns I had about the LDC, not so much the fees, but we hear about all these development corporations around the state; the Governor's talked about them. And we're kind of in the dark. Are we creating another boondoggle, possibly, that we don't really know much about, versus just being straightforward? Very sorry.

MR. MARCELLE: I just -- I mean, look, the LDC whether we create it or don't -- I shouldn't say we. That's a decision for the Legislature. Look, I really don't want to get into -- that's clearly a question of policy, a policy that's left better to the discretion of your body, to the body in its whole. Obviously there's pros and cons. Certainly one of the cons, as you indicated, it may be -- I'm putting air quotes for the stenographer -- a "boondoggle." Certainly other people may view it as an opportunity to

use that fund to consistently help -- as that loan is repaid, the funds there that be used for the LDC to make a continuous ability for the LDC to help the elderly and infirm of this county, if you were to ascribe virtue to such a corporation.

I am agnostic on the issue, and I don't intend to put my thumb on the scale. There will be enough certainly, I'm sure, lucid speeches from the floor to help the body make that decision.

Are there any other -- Mr. Mendick from Bethlehem.

MR. MENDICK: Thank you, Mr. Marcelle.

I perceive from the questions of my colleague, Mr. Crouse, and your response to that question, that we may be in somewhat of a catch-22 situation. By that I mean, Mr. Crouse indicated that it's difficult to take the contract and look at it in its entirety and come to a decision when a portion of that is this LDC issue, how we're going to fund the loan. And from your comments, that we need to look at and approve the contract

and then we will come back with a document that's, in fact, the loan document.

So I perceive we're in a catch-22 situation. And I wonder how we are going to get out of that and how we can, as a legislative body, vote on a complete contract without the loan portion of it being resolved.

MR. MARCELLE: I think the answer lies in the central term and what the loan will -- outside of incidental and opportunity costs. If the -- you know, let me back up.

Certainly if the County makes the loan, the costs alone can be accurately calculated, what the payback structure will be. So the budget director will tell you, based on the terms that we've agreed to -- because I think that will give you an accurate reflection of what our repayment schedule be.

Is that correct, sir?

MR. FRIEDFEL: Correct.

MR. MARCELLE: Now, on the other hand, if we do it through an LDC, outside of whatever incidental costs, so -- but it will be on the order of magnitude of certainly something less

than a hundred thousand dollars, or maybe on that order. We'll come up with an order of magnitude.

So what will happen with the LDC is you'll say, $12 million plus whatever you give it to to seed its initial staffing requirements. So it may be $12 million -- we'll have a figure for you of what that is, you can vote on.

So the LDC will then operate, and they want to receive $12 million. It won't loan $12 million from day one. There's a schedule over the time.

MR. FRIEDFEL: It will receive eight and four; eight million and four million.

MR. MARCELLE: Right, so they'll have certain interest-bearing capacities which will help generate the ability to fund its operation to make the transaction, in addition to whatever generous initial appropriation the body gives. But that can be a dollar certain. I'm certain we can give you a ceiling, a worst-case scenario -- I don't like the "worst-case scenario" phraseology, but

certainly a maximum number that would be expected under such a situation.

Mr. Mendick.

MR. MENDICK: I have two quick follow-up questions. The first one being that: Am I correct in saying that either we fund them directly, or we go to an LDC? That the source of funding in both cases is going to come from the tax levy?

MR. MARCELLE: Correct.

MR. MENDICK: The second question is: It seems to me that whether we go to an LDC or we go directly through the Legislature or through the County, revolves around the whole constitutional issue. If that is, in fact, correct, can we get a legal opinion that we can hang our hats on in order to just allow us to make that decision one way or another?

MR. MARCELLE: Are you looking for a formal opinion from the county attorney?

MR. MENDICK: Well, from whoever we need -- whoever is -- we would consider an authoritative source. And that's not saying that Mr. Marcelle is not an authoritative

source; however, it is a source all the legislators can buy into.

MR. MARCELLE: Sure. Here's what would be required, and I think I said this at the Elder Care Committee last night:

We've got a couple -- right. So let me try to articulate this. Let me regroup my thoughts here, as I'm stuttering on the record.

Initially you could go to someplace like the Attorney General's Office. The Attorney General, because we are not their client, (A) will only issue an informal opinion. As well, they will not peruse through the lease. We cannot hand them the lease and say, is this lease legal, would you look at all the aspects. They will only answer questions posed in abstract: Can a county loan money for the funding of a nursing home. And I think it's more nuanced than just any simplistic question because the lease is quite detailed in that respect.

Another way to do it is through the Comptroller's Office; again, we run into the

same problems. But I will say we've been working with the Comptroller's office.

MR. MENDICK: State Comptroller?

MR. MARCELLE: Yes.

The third way would be to engage outside counsel, someone who allegedly wouldn't have an ox to gore, who would then render us an opinion that's neutral. And we certainly will -- if, I guess, upon request -- that we will engage a third-party law firm.

My guess, Mr. Mendick, is if I were running that opinion as a third-party lawyer, you would get an opinion that hedges quite a bit.

MR. MENDICK: That brings me to the last follow-up question. And that is: Let us say that we decide to fund it through the legislative process and not through the LDC. What is the downside risk if that were to be deemed at some point in time as unconstitutional?

MR. MARCELLE: (A) It's my opinion that it's unlikely. (B) Should that happen -- look, there's some issues I'm rather

ambivalent on. But, as I've said before, I've had enough cases that I thought were sure winners that were not. I've had enough cases that I thought were sure losers that were not. Because jurists who wear black robes tend to be persnickety in how they interpret the law sometimes.

I will say the venue of any such suit would be brought in Albany County, and Albany County Supreme Court justices would hear the case, which gives me -- knowing the stellar makeup of our bench in Albany County, I believe that we would have jurists who would understand legal arguments of constitutionality. Having said that, again, it's less than certain.

So a fair question is raised, I believe: What happens if it's declared unconstitutional. Well, if it were declared unconstitutional, I suspect the very next day we would create an LDC and fund it through an LDC.

MR. MENDICK: That's the answer I'm looking for. Thank you.

MR. MARCELLE: I'm sorry it took so long to get there. As I said before, I'm used to getting paid by the hour.

MR. MENDICK: So we have an out if we have the worst-case scenario, and that is to go to the LDC.

MR. MARCELLE: An LDC, right.

MR. MENDICK: Thank you.

MR. MARCELLE: Or Governor Cuomo could do it, since he did for it a football team.

Mr. Crouse from Colonie.

MR. CROUSE: Mr. Marcelle, if I can digress for just a moment?

MR. MARCELLE: Well, I often have, so feel free to digress.

MR. CROUSE: Well, this is more of a procedure question. And since you've got great experience working in the Legislature, as well as your current position, my understanding is that the Elder Care Committee met last night, was presented with a document, and that that document was tabled at that meeting?

MR. MARCELLE: Correct.

MR. CROUSE: My understanding also is that the Audit & Finance Committee, that meets tomorrow night, will be presented with the identical document.

My question procedurally is: In this county legislature can one committee, who apparently has the authority to act upon this issue, choose not to and another committee can choose to act upon it and move it forward? And how does that square with the committee process?

As you know, at the state level it has to go steps, one committee to the next committee to the next committee. It appears to me in this situation, that may not be the case, but it may be. So perhaps you could elucidate.

MR. MARCELLE: To begin with, it's universally been my experience -- although this may be an exception -- that the initial committee, if the initial committee -- well, let me say this: Usually the committees act in concert. If there is a conflict, my recollection of how we've resolved conflicts when they occurred, is at a joint committee

meeting.

So I believe at least -- I'm going back now a number of years -- there was one conflict between Law and Audit & Finance on an act. And the way we resolved it was to have a joint meeting between the two committees.

Given what the majority leader said last night at the Elder Care Committee, what I suspect will happen is that at some point there will be a joint committee meeting where members of entire legislature will be invited.

Certainly, it's -- let me express this on the record and to you. This process, should the legislature agree to it, is not instantaneous. It's going to take some time. Additionally, obviously, the earlier we get this done, the better. It's been a priority for the administration, and one I think that is reasonable, given the amount of time we've tried to vet and explain the lease, to try to move the Legislature for the February session on the 11th to vote upon the document.

I would hope that the Legislature would heed the majority's call for a special joint

session where the entire membership would be provided.

I think we're going to have transcripts; there's a stenographer here tonight transcribing this. I don't know how many hours we've now spent discussing this. At some point the margin of utility really diminishes on further discussion. And at some point, whether it be pleasant or unpleasant, necessary or unnecessary, it's incumbent upon the full Legislature to address the issue here.

I don't -- as I said earlier, I don't envy that. It's a question that's going to be fraught with emotion, a question fraught with consequences, both large and small, to the fiscal health of this county. And at some point, kind of a picayune, well, why don't we have a 15-day notice before insurance is renewed, is going to have to fade into the background.

Look, any document is going to be subject to a few "gotcha" moments or, couldn't we improve this if we dotted the I with a smiley

face as opposed to a circle. But that's not the issue. And certainly some of these questions are legitimate; I don't mean to imply that there's any illegitimacy. But at some point, this decade-long problem now has festered into a decision in light of the property tax cap.

I'm taking the temperature from the legislature at the outside; although, as you noted, Mr. Crouse has spent a good portion of time on the inside of the legislature. I don't know how much will there is to annually exceed the property tax cap. It certainly stressed the body this year. And it's not going to become easier as reelection time draws nearer and nearer and nearer. And the reality is, you can't have it both ways. You can't have a nursing home without the proper increase of property taxes.

We've gone through a large extent of our reserve. It's not there anymore. You know, I don't see any economic forecast where our sales taxes are going to be looming so large as to mask the problem that's been building

over a decade. So as the I-dotting and T-crossing does fade into the background, it's incumbent upon you guys to make a decision. Putting it off -- look, I have three teenagers. I tell them continually, when you have a problem, the problem can be part of your future or part of your past. And certainly my advice as counsel to the County and counsel to you all, is one way or another, make the problem of the nursing home part of your past, not part of your future.

Mr. Mendick.

MR. MENDICK: Thank you, Mr. Marcelle. We all appreciate the need for expediency, and I commend both you and your entire staff on the number of meetings, your every attempt to provide as much information as possible. But here we sit the day before the Audit & Finance Committee meeting, we are still talking about, for lack of a better term, tweaking the contract. It's still in transition. You appreciate that, from our standpoint, we need to make a decision on a document that is at least as final as we can make it. And I don't

think that we're there yet.

At some point -- and I think you've pointed that out -- we have some picayune kind of things going on. But at some point we need to say, this is it. Unless there is a major change and if there's a major change that can be put in as an amendment on the floor. But we need to have a document that we can look at and we can vote on. And until we have that document, it is very difficult for us to push this process along. So I implore you and your colleagues to get to that point as soon as possible so that we can expedite this process.

MR. MARCELLE: Fair point. And I suspect, given our conversation today with USG, we're at a quick turnaround of having whatever we're going to have to vote on certainly, hopefully by the end of day tomorrow, if not sooner, by the end of this week. And then we would hope that there be a petition for a joint session.

Now, I will say normally what's done, this is -- look, maybe not pretend that this ought to be or is the normal process. When

there is a contract, the Legislature approves the concept of the contract and leaves it to the county attorney to negotiate. I appreciate for all the right reasons why that can't be done here, but we will have, on a very, very short-term basis, our last best contract to you with the hope that some minor provision on notification of insurance renewals isn't the reason why or why not someone can't support the leasing of the nursing home.

I believe, unless there are further questions, we are adjourned. Thank you very much.

And if the record didn't already note, can I just please note the presence of the Deputy County Executive Christine Quinn for the session. She may not have spoken on the record, but her presence was felt in many ways.

MS. QUINN: Thank you.

(Proceedings concluded at 5:27 p.m.)

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C E R T I F I C A T I O N

I, ELLEN J. FRANKOVITCH, Shorthand Reporter and Notary Public in and for the State of New York, do hereby CERTIFY that the foregoing record taken by me at the date and place noted in the heading hereof is a true and accurate transcript of same, to the best of my ability and belief.

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ELLEN J. FRANKOVITCH

Dated: February 6, 2013