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TRANSCRIPTION OF RECORDING
ALBANY COUNTY LEGISLATORS - INFORMATION SESSION
JANUARY 24, 2013

P R O C E E D I N G S

1
2 MR. MARCELLE: We'll make an audio. We
3 actually tried to get a stenographer, but we
4 couldn't get one. Certainly, Mr. Mayo, any time
5 you feel like you want to contribute to the
6 lowering of the costs of the county, just bring
7 your machine and I'll try to speak slowly.

8 We had originally a request for these 36
9 questions and multiple subparts, which well
10 exceeded a hundred questions and answers, to
11 provide written answers which we deemed
12 impracticable and, of course, any time you put
13 something in writing, because there was not a
14 dialogue, it raises more questions.

15 Feeling that it wasn't a good use of
16 resources that the amount of time to provide
17 articulate, edited, precise answers that would
18 spurn more questions, the Executive's office and I
19 felt that the best way was to provide an oral
20 session of answers.

21 One member indicated it was very hard for her
22 to digest a Q and A type of response to questions
23 and so she requested that there be some type of
24 recording made and reduced to writing to assist

1 her in understanding the questions and answers.

2 So in accommodation for that member, we are
3 going to -- you know, the idea is to record it and
4 later on reduce it to minutes so it can be
5 digested properly and thoroughly.

6 So we left off at approximately the halfway
7 point last time on question 17. I say
8 approximately. We're not quite halfway through.
9 So does everyone have a copy of the questions? Do
10 we need more copies?

11 (No audible response.)

12 MR. MARCELLE: So 17 reads the statement
13 "The 400,000 --" or, I'm sorry "-- \$4 million
14 sponsorship payment, what is it for?"

15 LEGISLATOR MORSE: I'm sorry. Can you go
16 back to 16? I've heard all the other ones. Just
17 16, I didn't hear.

18 MR. MARCELLE: Sure. It says, "What are the
19 repayment terms for the \$12 million loan? The
20 lease says the repayment terms shall be per HUD
21 financing."

22 The lease doesn't say, by the way, repayment
23 shall be per typical HUD financing. There's no
24 reference to HUD financing in the lease. That

1 was, as we discussed, a point of negotiation to
2 determine the interest rate was to be based on
3 what the HUD interest rates are. And so the term
4 of the loan is a 15-year term for the 12 million
5 with an interest rate of 2.38 amortized over a
6 25-year period with a balloon payment at the end
7 of the term.

8 Now, as I expressed, the lease has two
9 mechanisms by which the County could provide a
10 loan. One is through the body directly or through
11 an LDC. Either way, the loan agreement in and of
12 itself will be subject to negotiations with the
13 precise terms if it's done through the County
14 being presented to the Legislature and voted on by
15 the Legislature. If done through an LDC, it will
16 be the LDC's responsibility for negotiating and
17 entering into an agreement for the loan.

18 I will say, and I will commend, and I would
19 just give my eternal appreciation to Mr. Ward who
20 came up with what I deem a stellar and brilliant
21 suggestion, if it works, but it certainly puts us
22 on a path. He suggested in his experience that
23 HUD may be able to finance this through the
24 County. He gave us a contact person.

1 Tomorrow morning, the very first call I will
2 make when I arrive -- well, I probably arrive too
3 early for the call, but the very first call I'll
4 make during business hours will be to contact Mr.
5 Ward's suggestion to see if we can, in fact, based
6 on this person's expertise and experience, in
7 essence, arrange a loan through HUD and then have
8 a third-party assignment of it.

9 It would be a tremendous boom for the bottom
10 line of the County and it is something I assured
11 Mr. Ward and I will assure the members here
12 tonight we will vigorously pursue, because it
13 presents an opportunity for a wonderful financial
14 savings to the County and so that suggestion will
15 be vigorously pursued.

16 So that was kind of a long answer to a short
17 question, Shawn. So I understand that precision
18 wasn't really kind of the touchstone of that
19 answer, but some of it is because the precision is
20 yet to be determined. But again, the agreement of
21 the loan itself would be subject to a separate
22 independent vote by this body no matter what the
23 arrangement, whether through HUD, whether
24 through -- well, not through the LDC or by this

1 body directly.

2 LEGISLATOR MORSE: Thank you.

3 MR. MARCELLE: You're welcome. So let's get
4 back to 17 and kind of slog through the rest of
5 these questions. "The \$4 million sponsorship
6 payment, it appears to be an outright gift. Where
7 did the number of \$4 million come from?"

8 Well, let me assure you that during the
9 course of negotiation that at no point did we
10 decide to bestow a gift upon our negotiating
11 partners. That wasn't the intent. As some of you
12 know who -- and most of you are aware and some of
13 you know, the original agreement called for higher
14 and much more significant CAPX contribution by the
15 County.

16 The County owns the building. The building
17 belongs to the people of Albany County and that
18 will always be belonging to the people of Albany
19 County. They are required to maintain the
20 building and make sure at the outset that that
21 building is in such a condition as to serve the
22 patients and provide an environment that is safe,
23 is comfortable, an environment which they can
24 receive the proper care and treatment in their

1 elderly years.

2 So in lieu of the County providing some --
3 at least additional \$2 million in CAPX, I can tell
4 you as a point of negotiation, part of that money
5 was transferred from us doing more repairs to the
6 building to the operator doing the repairs. As we
7 discussed, we need a roof, boilers, electrical.
8 There are a bunch of issues that are well in
9 excess of \$2 million. It may well be that even
10 the roof may be well in excess of \$2 million. It
11 was the thought, certainly, the County has certain
12 obligations under the Labor Law where project
13 labor agreements, apprentice programs and a host
14 of other things that are certainly a fine
15 obligation for the county to undertake that the
16 private sector does not undertake. They are not
17 bound by the same work requirements that we are.

18 So part of the negotiation strategy, as we
19 discussed, was to allow -- we thought we -- the
20 parties felt that there would be more bang for the
21 buck, if you will, if the money was transferred
22 from the County performing the CAPX to the private
23 sector performing the CAPX. So I will tell you
24 that's the lease part of it.

1 Second, I think, as just was explained, the
2 county nursing home runs at a deficit. The
3 operator will come in and take over an operation
4 that is not self-sufficient. They will be
5 operating without a stream of income which to make
6 ends meet. Therefore, pursuant to our discussion,
7 through discussion of the relative financial loss
8 statements of the nursing home, through
9 projections of when the nursing home would be
10 profitable, we certainly negotiated it very
11 vigorously and that number, by the way, we reached
12 it to be approximately \$2 million to sustain the
13 facility in the short term as well as to do the
14 necessary upgrade to the FF&E to be about \$2
15 million.

16 Without going through the negotiations, it
17 was a long point of contention that it was -- as
18 originally started, it was reduced by multiple
19 factors. So that's where that number came from.
20 It wasn't intended to be a present to say thank
21 you for doing business with the County. It wasn't
22 to line anyone's pockets and it wasn't an intent
23 to present someone with a present. It is not a
24 gift and I hope that we can make that clear.

1 Let's move on to 18. 18 provides "The
2 \$2 million CAPX is for repairs --"

3 LEGISLATOR COMMISSO: Just backing up.

4 MR. MARCELLE: Yes, sir.

5 LEGISLATOR COMMISSO: The \$2 million, will we
6 possibly be violating the union agreements with
7 the County's Taylor law, so on and so forth?
8 That's our dollars. That's taxpayer dollars.
9 Are we going to circumvent what may be out there?

10 MR. MARCELLE: Right. We looked at the
11 question. We used the leverage of the County to
12 talk to some people who do this law kind of off
13 the record. I came to the opinion based on those
14 conversations and conversations with other lawyers
15 who do this type of law that it would not violate
16 any of the Labor Law of the State of New York.

17 MR. FISCHER: Just for a point of
18 clarification, because I may have misunderstood
19 your question. You were asking if we gave them
20 money to make CAPX improvements?

21 LEGISLATOR COMMISSO: To our property.

22 MR. FISCHER: No, but we're not --

23 LEGISLATOR COMMISSO: -- coming out of their
24 pocket.

1 MR. FISCHER: But we're not speaking about
2 the CAPX funds, because that \$2 million dollars is
3 not going to be allocated to them.

4 LEGISLATOR COMMISSO: Forget if it's CAPX or
5 not. We have taken \$2 million in improvements
6 that we're aware of to our building. We are not
7 doing it. We are --

8 MR. MARCELLE: No, no, no. Just to clarify
9 this for --

10 LEGISLATOR COMMISSO: Let's bring it to a
11 different question. Is it going to cross the
12 State Comptroller's guidelines?

13 MR. MARCELLE: We believe, yes.

14 MR. FRIEDFEL: We're not specifying in the
15 \$4 million dollars that they use that for
16 improvements to the facility. They have to
17 maintain the facility. There are a number of
18 improvements that the State wanted made for their
19 operations. The \$4 million is because to a
20 certain extent because we're getting the accounts
21 receivable, there are accounts receivable and we
22 provided services, but whenever you're doing the
23 ongoing --

24 LEGISLATOR COMMISSO: The accounts receivable

1 are --

2 MR. FRIEDFEL: Correct. But any business
3 that's operating, you charge based on what you did
4 before and that's the money you use to pay the
5 people that are working today.

6 LEGISLATOR COMMISSO: That's a little
7 different.

8 MR. MARCELLE: I understand your question,
9 Frank. And believe me, I know the concern and we
10 researched the concern, but here's the difference:
11 They are obligated under the lease to maintain the
12 facility through whatever number of years -- now,
13 there's even been some -- which I think they
14 indicated to you they were willing to go the
15 greater number of years. We would have done it if
16 it was lawful for us to do it.

17 They are responsible for maintenance of the
18 building, including the capital improvements of
19 that building, the parking lot and the curtilage.
20 As we negotiated that part of the lease, we made
21 some concessions that, hey, that's going to cost
22 money over time. Not all this has to say "Hey,
23 day one."

24 So given the fact that it's, you know, not

1 specifically targeted, I mean, there's one which
2 is, in essence, one major piece that has got to be
3 done that makes it, in our opinion, the building
4 close to being unable to be occupied or will be in
5 the near future. That's the roof. You've
6 seen the roof. I know, Frank, you know that
7 building probably as well or better than anyone in
8 the county. In all honesty, Frank, you're a very
9 conscientious leader. I know you're trying to be
10 modest, but in all honesty, you've put in a lot of
11 time on this nursing home and I know you've been
12 out there with Christine and you know what
13 condition it is.

14 And you know, we didn't want the
15 responsibility for maintaining the building over
16 the course of that 20-year lease. And in exchange
17 for them doing that, it cost us some money and
18 that was the trade-off we made and that's the best
19 I can explain it.

20 Now, I don't know if everyone would have made
21 the trade-off, but you know, as we sat there
22 negotiating and we looked at the numbers, we
23 thought it was a good trade-off for us to do, and
24 that's the best -- I don't know if that answers

1 the question.

2 LEGISLATOR COMMISSO: I'm not saying it's not
3 a good trade-off. You know, I'm concerned that
4 everyone else --

5 MR. MARCELLE: Yes.

6 MS. QUINN: Frank, just so I can understand,
7 to be clear, are you asking that if we go -- just,
8 for example, we give them the CAPX \$2 million,
9 right, they do the roof -- okay?

10 MR. MARCELLE: No, no, no. Wait just for a
11 second. We're not giving them the CAPX. We're
12 talking about the \$4 million grant.

13 LEGISLATOR COMMISSO: It's a simple question.
14 If we own the building and people do work on it
15 for minimum wage and all the other --

16 MS. QUINN: Well, I don't know if that was
17 your question.

18 MR. MARCELLE: They do not.

19 MS. QUINN: I thought you were talking about
20 the Taylor Law.

21 LEGISLATOR COMMISSO: No. I'm talking about
22 there are a mix of items that are going to come
23 into play and it could be viewed as we
24 circumvented the Wicks and everything else to get

1 to this point.

2 MS. QUINN: It wasn't a question. It's a
3 statement.

4 LEGISLATOR MORSE: Someone asked that
5 question a few months ago and you said you'd give
6 the question in writing. I'm not convinced that a
7 government can just lease our building and then
8 circumvent the prevailing wage and all those other
9 types of requirements for work being done on a
10 governmental building. And I thought there was an
11 argument made --

12 MR. MARCELLE: Right. I think under the
13 lease, we can lease a facility to an individual
14 and require them to maintain the property
15 without following Wicks and Taylor and all the
16 labor laws of the State.

17 LEGISLATOR MORSE: Does it violate Article 9
18 and service contracts?

19 MS. QUINN: That would be a service contract,
20 right? There are very specific -- there are
21 specific instances in which prevailing wage is
22 required.

23 LEGISLATOR MORSE: Can you provide us with
24 the written --

1 MR. MARCELLE: Certainly, I will do this, not
2 that I don't have enough on my plate right now,
3 Shawn --

4 LEGISLATOR MORSE: It was requested.

5 MR. MARCELLE: I guess I didn't recall that
6 and if you did, I certainly apologize, but what
7 we'll do certainly before the vote, Mr. Chairman,
8 we will provide you some sort of written opinion.

9 LEGISLATOR MORSE: I think it's in all of our
10 best interest to make sure that we're not doing
11 work and then --

12 MR. MARCELLE: It's a reasonable question.

13 LEGISLATOR MORSE: -- having 50,000 people
14 marching on us saying that we're not following the
15 rules.

16 MR. MARCELLE: Well, we may have people
17 marching on us but --

18 LEGISLATOR MORSE: I'm talking about those
19 people who do construction or other --

20 MR. MARCELLE: Sorry. I was laughing at
21 something Mr. Fischer said. He's well-known for
22 his witty remarks and he whispered one in my ear.

23 Yes, Mr. Ward.

24 LEGISLATOR WARD: I think it would be fair

1 for us to get a copy of any opinions you recite.
2 In my experience with the government, any time
3 they have a construction project, you know, you go
4 by Article 9 of the Labor Law and, of course,
5 service contract, I believe it's instructions
6 eight and nine, whatever. It's the prevailing
7 rate for both service and construction projects.
8 And I know, you know, one big bombshell to hit
9 this area that nobody ever thought about in the
10 Town of Colonie where everybody thought it was a
11 great project, including myself, was the youth
12 soccer club built a concession stand and the Town
13 got sandblasted for it, because they didn't use
14 prevailing rates when the club was built and it's
15 kind of the same premise here. I know there's
16 opinions out there. I think just cover --

17 MR. MARCELLE: Sure. I will say we've just
18 been through some of that with the Times Union
19 Center and the Department of Labor, DOL, conceded
20 a lot of it to us. There were some things that
21 they've -- it wasn't a universal yes or no, Shawn,
22 but look, I think it's --

23 LEGISLATOR MORSE: Hiring security? That's
24 probably a different argument.

1 MR. MARCELLE: There were other things in
2 there, too. There were a host of issues.

3 LEGISLATOR MORSE: I mean, they're different
4 than doing construction.

5 MR. MARCELLE: Look, Shawn, I promise you,
6 Mr. Chairman, we'll provide you an opinion as best
7 legal minds in the county will come to bear and
8 write you --

9 LEGISLATOR MORSE: I'd like to have an
10 independent --

11 MR. MARCELLE: Well, you know what? I see
12 Mr. Mackey almost willing to volunteer to write
13 the opinion on this and I would defer to his legal
14 brilliance on the subject.

15 Yes, Mr. Ward.

16 LEGISLATOR WARD: Another you know we're
17 talking about giving the \$4 million is for a
18 combination of, you know, services and
19 construction. I mean do we have to do a separate
20 or is there a party agreement what services are
21 provided, physical service agreement for specific
22 services? I mean you can't just give a gift of
23 one million dollars in order to I think something.

24 MR. MARCELLE: Right. Well, it's because the

1 lease details it, right. So the lease clearly
2 explains the justification both in Article, I
3 think it's 22 -- well, I'll start with -- let me
4 just start -- the most pertinent part is we deal
5 with this upfront.

6 So if you will pardon me, I'll just read
7 this, because I think, again, it's really
8 important to come back to this. "By this lease,
9 the parties understand and contemplate that while
10 the lessor is leasing demised premise and the
11 lease assets to lessee, a private organization,
12 lessee will continue to operate the skilled
13 nursing care facility at the demised premise
14 during the term in the public interest by keeping
15 all current patients who reside at the facility,
16 by adopting admission standards historically
17 employed by the facility, by accepting those
18 Albany County residents that because of their
19 unique disabilities are hard to place in private
20 sector nursing facilities and by obtaining
21 lessor's public property and assets at lessee's
22 expense. All is set forth in further detail
23 herein. The parties agree that lessee will
24 continue to operate the demised premise and

1 facility to benefit the indigent and severely
2 infirmed and to operate the facility to maintain a
3 safety net for the least able and sickest of
4 Albany County as set forth in more detail herein.

5 "In consideration of lessee's operating
6 facility without pure proper motives and in
7 recognition that but for the financial
8 assistance provided herein, lessee would not
9 operate the facility in the manner that the
10 facility is historically operated and would not
11 agree to maintain the improved public facility.

12 "The County deems that any and all such
13 financial assistance provided to the lessee as
14 part of this lease comports with the New York
15 State Constitution."

16 So what we tried to set forth is in the
17 recitals the essence of the justification. We're
18 saying, hey, look, what we want in Albany County
19 is not just another private nursing home. We want
20 you to promise to maintain the historic missions.
21 We want you to agree to take the hard-to-place
22 patients. We want you to do all these things and
23 we recognize that, hey, when you do this, it may
24 not be, you know, in essence, a pure private

1 sector operation.

2 And so you know, in a way, certainly, we've
3 expressed it this way -- by we, I mean the County
4 Executive -- in essence, there is a real component
5 of this to be a public/private partnership. This
6 isn't just a straight sale. A straight sale, we
7 couldn't require this. We would say, "Thank you
8 for your money. You operate the nursing home."

9 And the reason that I think that we didn't go
10 the sale route, at least in part, I certainly
11 don't want to speak in terms of absolute and just
12 universal reasons, but at least in part, it was
13 important for the County Executive to maintain
14 some kind of influence and control so when a
15 constituency of yours say, "Hey, I need admission
16 because I can't go to the Daughters of Sarah" or
17 whatever, there would be a requirement under the
18 lease that we deem to be enforceable that they
19 would have to live up to and so that's the reason.
20 And that, to us, provided the justification for
21 the grant and for the loan.

22 Yes.

23 LEGISLATOR MORSE: Tom, if that was the case,
24 why wouldn't we have them specifically identify

1 those services that they do not provide, have that
2 in the lease? So that after the lease is signed,
3 they don't just unilaterally decide, "Well, we're
4 no longer going to provide this, because it's hard
5 to handle" or "We're not going to have the staff
6 at this facility."

7 I heard them say that maybe throughout their
8 facilities, they have the ability to take certain
9 people that maybe Albany County's not taking,
10 which is kind of concerning to me in certain ways,
11 but that doesn't necessarily mean it's the Albany
12 County Nursing Home. They could be putting them
13 in Judy Blair or they could be putting them
14 somewhere else.

15 So if we're concerned about having our
16 mission met, shouldn't we say that, okay, we
17 recognize that you're not going to take people
18 that have this, this and this, but we'll take the
19 people that historically have any other disease,
20 illness, that we currently take now in our
21 facility? Because they can change their opinion.
22 It's quite simple. The mission of all nursing
23 homes is to take some of the poor, they accept
24 Medicaid which is 85 percent of their revenue

1 anyway, right, which is the poor and indigent
2 person. So why couldn't we have them identify
3 they don't take ventilator beds, they don't take
4 this, they don't take that and that would exclude
5 them from changing their opinion a month down the
6 road that they're not going to take somebody who
7 may have an alcohol problem because they're hard
8 to handle in Albany County but we may be able to
9 send them to New York in one of our facilities
10 that currently has a staff to handle those
11 patients.

12 MR. MARCELLE: Sure. That's a great
13 question, Shawn, and we had actually contemplated
14 that and just let me explain why we didn't go that
15 route.

16 The problem, I thought, from our perspective
17 is once we get to a laundry list yes and no,
18 inevitably, the list will be we didn't think of
19 this or something falls between the cracks. And
20 so the object was, from my perspective, to tie it
21 to the historical mission standard.

22 So let's take, for example, just one of the
23 examples you gave, someone who was an alcoholic or
24 someone like that. Once I can tie it to we've

1 historically taken that type of patient and they
2 tell me no, at that point, I can come under the
3 lease and enforce it. As long as I can show
4 through my historical records we've taken that
5 patient, they're obligated under the lease to take
6 them.

7 I mean, you know, we could have researched
8 and created a laundry list. I just liked it
9 better that I had them tied to historical mission.
10 So if we take them in the past, we're going to
11 take them in the future.

12 LEGISLATOR MORSE: Here's what I'm concerned
13 about. Because the historical mission of the
14 nursing home in the last six or seven years does
15 not represent the historical nature of what we've
16 done before Mr. Breslin decided he wanted to get
17 out of the business.

18 So when you say you're looking at the
19 historical nature of the facility, what is
20 historical? Is it, you know, last year, two years
21 ago? Because I'm concerned just to hear that Gene
22 didn't take somebody just recently because they
23 may have some other issues --

24 LEGISLATOR BUSCH: It happens a lot, every

1 day.

2 LEGISLATOR MORSE: I'm addressing the
3 attorney. I understand it happens a lot.

4 Do you see what I'm saying? My concern is
5 that historically, we've taken a lot of patients
6 that over the last five years, we haven't taken.
7 We've turned a lot of people away. We've sent
8 people out of state. These are people that have
9 issues that once, historically, we did provide
10 care to. But from the time that they wanted to
11 move out of the nursing home business, we
12 stopped taking those type of patients.

13 MR. MARCELLE: So just let me understand, if
14 I could rephrase it and then answer the question.
15 So what you're saying, Shawn, is hey, we tied it
16 to historically and you're worrying that some
17 court or we may get in disagreement over what time
18 horizon historically means.

19 If it means over the last five or six years,
20 that's going to have one implication. If it means
21 since 1971, that has another implication. Maybe
22 we can clean that up, and I will consider that. I
23 will consider it since the inception of '71 or
24 something like that. But that's why we

1 included -- and we fought. This wasn't an easy --
2 the phraseology here wasn't easy to agree upon,
3 but that's why I tried to tie it to not only
4 historical but the next paragraph says the
5 parties agree that we'll continue breaking away
6 from historical and trying to define it to benefit
7 the indigent and severely infirmed to operate the
8 facility to maintain a safety net for the least
9 and the sickest and also ones that would not find
10 a home in the private sector.

11 So I think the intent -- I think if I went to
12 court and they said, "Well, Your Honor, look, what
13 historic means is five years," I would say, "No,
14 Judge, look, our history in the county exceeds
15 five years. You know, it goes at least to the
16 establishment of the nursing home in --" was it
17 '71?

18 MR. FRIEDFEL: It opened in '72.

19 MR. MARCELLE: '72. That's the correct time
20 horizon. And by the way, read the breadth of the
21 language that we included. Now, I certainly will
22 make sure that we peg it to '71, you know, to have
23 a broader time horizon. I don't know if that
24 would answer your concern.

1 I just would have a concern, Mr. Chairman,
2 that if I pegged it to a laundry list, inevitably,
3 you know, there will be a dual diagnosis, "Hey, we
4 said yes to this type but no to this type," and
5 they have a dual -- you know, I just worry that
6 that may lead to more scraps.

7 LEGISLATOR MORSE: I understand. I
8 understand there's no catchall. I just don't want
9 to get -- you know, this is a very big issue for
10 me and many people and I'm trying to sway myself
11 on which way I'm going here. I have a great
12 concern if we just use the historical, because I
13 don't know what that means anymore, because again,
14 historical used to mean a lot of things that we
15 don't historically do today.

16 And I don't want to get it where they can
17 turn people away because this Legislature and the
18 County Executive in the last six years as to the
19 nature of the relationship --

20 MR. MARCELLE: Sure. Right. I mean, look,
21 that's the nub of the problem here, right. I
22 mean, I've talked to enough legislators to
23 understand this; that there is a sincere and
24 genuine notion that is the function of the

1 government to provide this safety net and that
2 there was this -- you know, as you know, Mr.
3 Chairman, I sat as counsel to part of this body
4 while this was going on and, certainly, that
5 was -- you know, the former Executive had a goal,
6 in essence, to terminate that function. I
7 think -- and you know the County Executive as well
8 as anyone in the body. You know, you have a very
9 unique relationship with him and you know his
10 concern to take care of this population. And
11 certainly, as we were instructed to negotiate this
12 lease as best as I could, I tried to make sure
13 those protections were in. And I understand that
14 this represents a bold venture that gets away from
15 the comfort of control; that in a very real sense,
16 and I think most of these questions are directed
17 at trusting the folks who just presented here to
18 do the right things by our residents. That's
19 really the nub of the problem. Can we trust our
20 partners?

21 We know we can trust ourselves, although I do
22 say even though we can trust ourselves, as you
23 point out, we had an Executive previously who
24 certainly was hostile towards the continuation of

1 the mission that, I think, so many members feel
2 that's important.

3 So I know that's kind of a long-winded
4 answer, but I don't -- and look, I was talking to
5 some members even before tonight, I don't -- and
6 I've said this before, I don't envy your position.
7 I think it's a difficult issue to deal with and,
8 you know, you're going to have, I assume, a very
9 vigorous debate in the body among this and, you
10 know, my function is just to try to explain to you
11 kind of what this lease hopes to accomplish.

12 Ultimately, it's up to you to determine if it
13 does that. It's up to you to determine even if it
14 does that that's something you want. And I just
15 want to make sure you're informed of what the
16 lease says and the intent behind it and to reach a
17 comfort level with that.

18 Having said that, let's move on to Question
19 18. Question 18 talks about the \$2 million CAPX
20 that's required by the County. What they ask is
21 two questions: Does the County have the right to
22 any say in how those funds are expended? The
23 quick answer is yes. And does ARC have to follow
24 competitive bidding procedures for -- let me

1 answer B first.

2 So B is easy. B is to the extent that we're
3 going to do the CAPX, even though we're going to
4 reach an agreement with the operator, we have to
5 abide by all the labor laws as we previously
6 mentioned. We don't have an option.

7 What we spend on this \$2 million must be
8 Wicks and the PLAs, not just what the Labor Law
9 is. There's a bunch of resolutions from this
10 Legislature that require the bidders to provide
11 certain requirements. I can't remember off the
12 top of my head, but I know there's some unique
13 provisions that the Legislature has proposed. It
14 will be done through a bidding process with all
15 the requirements of the body.

16 Now, with respect to what is accomplished is,
17 I believe, 19.1 of the lease talks about the
18 repairs of which -- we are the deciding folks of
19 which will happen subject to the approval of the
20 lessor which shall not be unreasonably -- sorry.
21 I've got that backwards.

22 Look, here's in essence what it is. We're
23 going to sit down with the operator and agree what
24 we should do and that we're going to negotiate in

1 good faith. That's the long and short of it.

2 LEGISLATOR MORSE: Who's going to do that?

3 MR. MARCELLE: The Executive and probably I
4 guess it's going to fall upon me at some point to
5 do that.

6 LEGISLATOR MORSE: So once the contract's
7 signed, the legislators --

8 MR. MARCELLE: Well, no, I don't think -- I
9 think to the extent that any members want to be
10 involved in that part of that decision speaking,
11 A, I'm sure the Executive would welcome it and I
12 tell you without a doubt that if the task devolves
13 upon me, I would welcome that.

14 I think the money set aside is part of the
15 capital improvements and so, as such, the process
16 would be subject -- well, certainly, Mr. mores, at
17 least the bidding requirements, we would put it
18 out to bid and the bids would come back. And so
19 before we could do anything, before we could spend
20 dime one, it would require the approval of the
21 body.

22 And so the object isn't try to be in an
23 adversarial relationship with the body. It's
24 certainly to bring leadership along to make sure

1 we're all on the same page if this is the way
2 we're going to go. So, again, it's not a way of
3 trying to shove things down peoples' throat.

4 LEGISLATOR MORSE: No. I just want you to
5 answer the question.

6 MR. MARCELLE: Yeah. I mean, ultimately,
7 look, the money doesn't come out of the budget
8 unless you say aye.

9 Nineteen talks about the cell tower. This
10 goes back to some of the discussion we had last
11 night. The cell tower and, more importantly, the
12 revenue stream involved in the cell tower, like
13 all the counties, property interests are the
14 county's unless specifically given to the
15 operator. We are not giving away our lease for
16 the cell money. That is ours. We will continue
17 to receive the benefit of the lease we struck with
18 the cell companies and for the cell tower.

19 Question 20 asks about how we're going to
20 assure compliance with HIPAA. I have the good
21 fortune and certain happily now to rely upon the
22 Deputy County Executive who has spent many years
23 dealing with these issues who has indicated her
24 willingness to enlighten the body of how we're

1 going to provide HIPAA, but I will preview this by
2 saying this is something that has not escaped our
3 attention.

4 I think we began to represent, as you will
5 see in some of the transfer and the continuity of
6 operations provision, but I now defer to the
7 Deputy County Executive who is well versed in
8 this.

9 MS. QUINN: Thank you, Tom, for that
10 wonderful introduction. Fortunate or unfortunate,
11 I've had a great deal of involvement with HIPAA,
12 so I'm very much aware of the many exceptions that
13 fall within the HIPAA regulations.

14 So just very quickly, I think many of you
15 know that have went through the entire HIPAA
16 process we're considered a hybrid entity, meaning
17 some departments are healthcare providers and many
18 are not. A nursing home being a healthcare
19 provider is permitted to transfer protected health
20 information -- in this case, the patient file is
21 that -- to individuals for reasons of payment,
22 healthcare operation and for healthcare.

23 So, for example, you have two doctors that
24 need to share information for purposes of caring

1 for you, then that is something that would be
2 permitted.

3 So in this particular case, among numerous
4 other exceptions that fall within the HIPAA
5 regulations, a permissible transfer or disclosure
6 of protected health information would be for
7 treatment. And in this case, we are going to have
8 a new -- proposed to have a new operator of the
9 facility who would be the new healthcare entity,
10 would fall clearly within the HIPAA regulatory
11 framework and would be permitted to care for that
12 patient.

13 Now, I will also say that, obviously, the
14 patient would have an option to leave. So it's
15 ultimately going to be the patient's decision. So
16 if they stay, then they are agreeing to receiving
17 treatment from the new healthcare provider and if
18 they decide not to stay which, of course, would be
19 their option -- it is their option now, it will
20 always be their option -- then no, I would say
21 that file, that patient record, would not be
22 something that would be permitted to be
23 transferred by us to anyone unless it falls under
24 an exception.

1 So I think as a part of this process, this is
2 something that if the County chooses -- if the
3 Legislature chooses to move forward with, there
4 would certainly be as similar to Legislator Busch
5 your question about sitting down and talking to
6 employees, you know, there would be communication
7 to residents and their families. Obviously, this
8 is a new operator. This would be a choice for
9 them. This isn't something you can force anyone
10 to do as it exists now or in any way in the
11 future.

12 So there is not, barring some sort of a
13 malicious disclosure of health information, a
14 concern in my opinion of violating the HIPAA
15 regulations.

16 LEGISLATOR MORSE: If they do consent, you
17 can transfer the records? If they do consent.

18 MS. QUINN: Yes. If they're going to stay in
19 that facility and they're going to remain there,
20 their patient record transfers and there are
21 additional exceptions that also apply to change of
22 ownership and all of those things.

23 The simplest way to, I think, explain it is
24 that this is a disclosure of health information

1 for the purposes of treatment. If the person
2 doesn't wish to be treated by this new operator,
3 then that's a completely different story, but we
4 would certainly know that in advance.

5 MR. MARCELLE: Okay. Let's move on to 21.
6 How is the County making sure there are no labor
7 issues with respect to the transfer of employee
8 records?

9 Again, we have the Deputy County Executive
10 who, without the quite elaborate introduction,
11 we'll just defer.

12 MS. QUINN: Thank you. I think this is to
13 some extent a similar understanding as the
14 previous and I would also add that there's going
15 to be much, if not -- you know, a lot of the
16 things that are in the personnel records are not
17 going to be applicable to the new owner, health
18 insurance, you know, master file updates and all
19 of those things.

20 I think things -- and I would actually -- I'm
21 not certain that they would need to go ahead and
22 do this again themselves, but I-9s (phonetic) and
23 things like that, I'm not so certain that they
24 would be able to take our files as it relates to

1 that anyway. But I think the important piece is
2 if the employee is going to be an employee,
3 there's certain information that the new operator
4 is going to both need and want.

5 Specifically, and I think of note, is the
6 requirement that individuals working in a nursing
7 home need to be run through the Department of
8 Health for a criminal history background check.

9 There are certain crimes if there's a
10 conviction that prohibits an individual from
11 working in a nursing home if that person has a
12 direct care relationship. So, again, I'm not
13 certain whether they can -- and that's something
14 that I would defer to them on if they can accept
15 our checks as their own, but that's something that
16 if they can, they certainly for purposes of a
17 transition, if you will, that you know, is going
18 to be necessary.

19 So if the employee is going to be an employee
20 of the new facility, then I do not see a concern.
21 Again, what you're referring to as being in the
22 personnel record, if you have a specific question
23 about a specific document, I'd be happy to address
24 that. It may or may not be in the personnel file.

1 And if you're speaking of a specific provision in
2 the Labor Law, then I'd certainly be happy to
3 address that.

4 Yes.

5 LEGISLATOR WARD: Do you know if there's any
6 differences between the public and the private
7 sector? I mean, I know there is -- I can't
8 specify anything, but I know there is a regulation
9 that states that public employees be required to
10 do this or that. I don't know what any difference
11 is.

12 MS. QUINN: I think the answer is yes, there
13 is a difference. And in the public sector,
14 background checks typically are going to be
15 permissible. Background checks being a criminal
16 history record check, I think is what we're
17 talking about, are only permissible in certain
18 circumstances and the way you use that background
19 check is further constrained by whether there's a
20 nexus to the individual's job duties.

21 So in any of our departments, I think the
22 only -- I won't speak for the sheriff, but the
23 only department where criminal history record
24 checks are performed is in the Department of

1 Health. I think the Department of Mental Health
2 is under a similar regulation through the
3 State Department of Health.

4 So similarly, you know, we're required by law
5 to do drug testing with the CDLs. You know, it's
6 usually driven or negotiated, because that's
7 definitely a mandatory subject to -- (inaudible).

8 So if there's any specific provisions of
9 Labor Law that you want to sort of point to, I
10 would be happy to address it. I know there's a
11 perception about (inaudible) but only a separate
12 file, not the personnel file, not health
13 information, doctor's notes. That's not personnel
14 file stuff.

15 MR. MARCELLE: Okay. Let's move on to
16 Question 22. Let me summarize this. This goes
17 back to the question of property tax. I think
18 there's some assumptions in here that, certainly,
19 we should talk about before we get to the
20 substance of the question about notifying the
21 Colonie assessor of this and our kind of an
22 invitation to the assessor to try to tax our
23 property.

24 So I will start with the answer: We have not

1 talked to the assessor. We have no intention of
2 talking to the assessor of Colonie. We're not
3 going to make any invitation, extend any offer or
4 make even a suggestion that such property that
5 belongs to the County that's operated as a public
6 safety net is subject to property tax. I want to
7 make that clear now and forever, and I think we
8 talked about it last time. We will fight any
9 attempt by the town assessor of Colonie to tax
10 government property.

11 If we should not prevail -- and I've
12 indicated before that I don't think there's a
13 bright line that indicates that this is a safe
14 harbor question. If we should not prevail, the
15 responsibility to pay the taxes rests entirely and
16 exclusively upon the operator. We are not liable
17 for property taxes should that come to fruition.
18 And let me be clear about this, too. Please do
19 not hear me to say that I am promising,
20 guaranteeing or telling you that the law is clear
21 on this point. Quite to the contrary. It is not
22 clear.

23 I believe we have the superior position. I
24 believe that it's likely, although far from

1 certain, we'd prevail in court. I know there's a
2 bunch of sophisticated members in here who
3 understand the process of litigation and even
4 cases that appear to be slam dunks depending upon
5 who the jurists in the black robe is tends not to
6 be a slam dunk. So I am not making that promise.

7 What we've promised to do, because it's in
8 this county's interest to do so, is to prevent any
9 local assessor from taxing our property. One of
10 the assumptions, though, that needs to be
11 corrected is that the value of the leased property
12 is north of \$31 million. We've given out the
13 description although, again, a visual description
14 lacking the legal formal meets and bounds, but I
15 think if people look at that, they would
16 understand what we're leasing, that one portion of
17 the property is not worth the entire value of
18 \$31 million.

19 I don't know what it is. I don't have an
20 opinion what it is and, quite frankly, I don't
21 care what it is, because ultimately, if we are
22 liable -- I shouldn't say if we are liable. If
23 the property is deemed taxable, we are not liable.
24 That will be a question -- while we are obligated

1 to fight the question of whether something is
2 taxable, we are not required to fight the fight of
3 the value of the assessment. Two distinct and
4 different questions.

5 And so while certainly -- and by the way, nor
6 would it be in our interest to fight what the
7 value is. At some point, presumably, the property
8 will become ours. If we go and make public
9 statements that our property is only worth, let's
10 say, \$2 million when it's really worth 4 that the
11 assessor says, we'd be hard-pressed in any
12 subsequent negotiation to say, "Oh, yeah, we
13 weren't quite honest with the town assessor.
14 Trust us now." So we will not take a position in
15 that, because again, we're not responsible for
16 that.

17 I don't know if there are -- I know this
18 question or a form of it has appeared several
19 times. So, obviously, this was a concern of the
20 membership. And so I know I've -- I hope I
21 haven't gone on too long.

22 LEGISLATOR MORSE: Why would we have to pay?
23 What's the argument?

24 MR. MARCELLE: I think the argument is this:

1 If the government leases public property to
2 private concerns, in theory, the assessing unit
3 could say, hey, you know, it's not really -- that
4 is a private commercial operation on that property
5 and, therefore, is --

6 LEGISLATOR MORSE: They don't do it here.

7 MR. MARCELLE: Well, and by the way --

8 LEGISLATOR MORSE: (Inaudible).

9 MR. MARCELLE: Right, which is why, Shawn, as
10 we negotiate this, I'm not going to rely on those
11 guys -- if push should come to shove, I'm not
12 going to rely on the operator to defend this. I
13 want to make sure, although there was a point --
14 it was actually a very good point for us, because
15 it was one of those points that they wanted from
16 us that we resisted knowing all the time that we
17 really want it. So we got some concessions for
18 defending it, meanwhile, knowing that, quite
19 frankly, it was in our interest to defend it
20 because it concerns interests more than just the
21 property that the nursing home is on.

22 LEGISLATOR MORSE: Let's put a governmental
23 entity upstairs.

24 MR. MARCELLE: Well, like I said, we will, as

1 best as I can muster the resources of this
2 county's Department of Law, defend that
3 vigorously.

4 Yes, Mr. Leader.

5 LEGISLATOR COMMISSO: What about leasehold
6 improvements after-the-fact?

7 MR. MARCELLE: Like a garage or like a new
8 building?

9 LEGISLATOR COMMISSO: Well, not necessarily a
10 new building. Just updating the building.

11 MR. MARCELLE: Updating, okay. Again,
12 whether that changes the taxable status, is that
13 the question or just -- I'm not sure.

14 LEGISLATOR COMMISSO: Yeah. Does that
15 portion become taxable from what's there now?

16 MR. MARCELLE: Again, this isn't an area of
17 the law that's well illuminated. So what I'm
18 about to speak to you now, I'm talking in
19 probabilities and not certitudes. It's my opinion
20 after doing research on this area of the law that
21 the building belongs to the public, which is a
22 very important factor; and, two, the benefit of
23 any improvements upon the building go back to the
24 public; and, three, according to the lease, the

1 operation of the building is done for a public
2 purpose, although by a private entity.

3 And it is that essence that I think is
4 critical for distinction that we would -- I feel
5 comfortable making to a court. I feel that is the
6 better position to have in court, but I just want
7 to be clear on this --

8 LEGISLATOR COMMISSO: There's case law.

9 MR. MARCELLE: There is some case law on
10 this.

11 LEGISLATOR COMMISSO: And there's opinions by
12 the attorneys in this building.

13 MR. MARCELLE: Yes. However, again,
14 certainly, the lawyers in this body know sometimes
15 you run into a particular jurist who sits on a
16 bench who has a certain view that -- I can't
17 guarantee an outcome. You know, I feel less than
18 comfortable that this is a clear-cut thing. And I
19 think the members know I tend to be more confident
20 sometimes than I should, but this is not one of
21 those times.

22 Ms. Lockart.

23 LEGISLATOR LOCKART: In the end, if it
24 wasn't, they pay the taxes.

1 MR. MARCELLE: They pay the taxes, because
2 you know -- but the fight is worth -- in other
3 words, the fight is worth having.

4 Okay. Twenty-three talks about insurance. I
5 think some of the questions are kind of not quite
6 a reflection of what the lease says, although I
7 will say we're in the midst of making it more
8 detailed with an insurance rider. So there will
9 be an insurance rider presented, but a couple
10 things I just want to make clear.

11 The 3 million/1 million dollar that's
12 represented in Article 6, 6.3-A, is about bodily
13 injury or property damage occurring on the
14 premise. The 3/1 or the 1/3, we felt, was
15 consistent after talking a little bit with some of
16 the insurance and risk people within the county
17 that for that type of insurance that that was a
18 reasonable amount.

19 There are multiple types of insurance that's
20 required under Article 6. At the outset, we're
21 required to have certificates of insurance and the
22 lease clearly, in my opinion, without a doubt,
23 absolutely requires them to maintain their
24 insurance and we can require -- since we are the

1 beneficiaries of the insurance, we can require
2 certificates as they are currently in force and
3 effect any time we wish.

4 LEGISLATOR COMMISSO: We would be named an
5 additional insured?

6 MR. MARCELLE: Yes, yes. And, again, some of
7 the more finer details are being spelled out. And
8 I will say one other thing. There is -- one of
9 the members who has some expertise in insurance
10 law demonstrated one point that I think is
11 legitimately ambiguous that we'll clear up in the
12 insurance rider about the indemnification.

13 Yes, Mr. Ward.

14 LEGISLATOR WARD: I don't know how much you
15 should go with a governmental building, but you
16 know, in a lot of cases, I seen additional
17 umbrella policies cheaper more than three million.
18 You know, I've seen ten million dollar umbrella
19 policies which are reasonably priced. Like I say,
20 I don't know how much you should go with a nursing
21 home.

22 MR. MARCELLE: Sure. And let me say this: I
23 think as we hammer out the insurance rider that
24 that's certainly something we should -- I mean, we

1 should negotiate, and I think there's other terms
2 in here that may at least arguably require more,
3 at certain points, definitely requires more than
4 1/3. We'll specify in more detail. But
5 certainly, I like that idea. I hadn't considered
6 it, quite frankly. And as always, Mr. Ward, you
7 tend to make whatever you're involved with better.
8 I appreciate it.

9 Okay. Question Number 24: Lessee defaults.
10 "The County can terminate the lease, but where
11 does that leave the County and nursing home
12 patients?"

13 Throughout the course of this process from
14 its inception going forward, Mr. Fischer has been
15 leveraging his contacts with the Department of
16 Health. He has done yeoman work and has been
17 certainly quite proficient and quite zealous in
18 trying to understand all the Department of Health
19 regulations and requirements. And so it certainly
20 is beyond my kin to answer this and because Mr.
21 Fischer certainly came in with some expertise and
22 certainly has developed more, I will defer to him.

23 MR. FISCHER: The County really has two
24 primary end points if the lease terminates. The

1 first is that it would be incumbent on the
2 operator to file a closure plan. That closure
3 plan would have to account for what would occur to
4 every current resident, where they would be
5 placed, what accommodations would be made. That
6 closure plan would be submitted to the Department
7 of Health and then it would have to be reviewed
8 and accepted.

9 This is typically a period of months and if a
10 closure plan is not initially accepted, then it is
11 revised and re-submitted. This means that at any
12 point in time, were there to be a breach and,
13 thus, we look to terminate the lease, the nursing
14 home would still -- patients would still be taken
15 care of until such time that a closure plan was
16 accepted by the Department of Health.

17 The other option for the County would be to
18 seek out a receiver to, in the interim, step into
19 the shoes of Upstate Service Group. At that
20 point, once they had been petitioned by the County
21 and then accepted by the Department of Health as a
22 receiver -- and for those who are familiar with
23 Bankruptcy Law, while the title is similar,
24 there's receivers in bankruptcy, there's no

1 overlap between the two. It's just a terminology
2 that's been used by the Department of Health.

3 They would then -- the receiver then
4 petitions the Department of Health and PHHPC for
5 their own CON to operate and the County would
6 obviously then enter into a lease with whomever
7 would seek to fill the shoes of USG.

8 So either we could on our own accord and
9 efforts look to bring in a new provider or have a
10 closure plan that the operator, USG in this
11 instance, would have to file to make
12 accommodations for all patients.

13 Yes, sir.

14 LEGISLATOR WARD: I know USG is pledging
15 whole credit for the lease agreement, but are they
16 also pledging a CON? The reason I ask that is
17 because if the subsidiary that's operating the
18 facility runs out of money itself and they provide
19 a closure plan and it's rejected, where do we
20 stand there? Is USG going to, I guess, back up
21 and start the whole phase? In our agreement, they
22 are, but are they recognized by the Health
23 Department in doing so?

24 MR. FISCHER: I'm going to ask for a little

1 more point of clarification. I just want to make
2 sure that I hear your question correctly.

3 In the lease between us and USG or between us
4 and ACRNC, USG is acting as a guarantor.

5 LEGISLATOR WARD: Yes.

6 MR. FISCHER: You're asking in ACRNC's
7 application to PHHPC for a CON, is USG acting as a
8 guarantor of any secondary liabilities?

9 LEGISLATOR WARD: Yes.

10 MR. FISCHER: Given the talks that we've had
11 with them and the relationship that USG has had, I
12 can't speak with any specificity as to
13 prospectively what they will do, but we certainly
14 can -- I mean, PHHPC will approve whatever CON and
15 obviously, they'll approve it feeling -- if they
16 do approve it, feeling sure and confident in
17 ACRNC's ability. Whom the guarantor will be, let
18 me circle back with Ephram (phonetic) and then I
19 will convey that information to you as soon as I
20 get it.

21 LEGISLATOR WARD: I just don't know the
22 mechanics. I know they're pledging their faith
23 and credit to the County, but if they exercise
24 their option to terminate the lease and they

1 provide a closure plan to DOH and they reject it,
2 is USG backing that?

3 MR. FISCHER: If --

4 LEGISLATOR WARD: If they run out of money --

5 MR. FISCHER: Understood.

6 LEGISLATOR WARD: -- and DOH is the reason
7 they aren't allowing the closure, are they still
8 going to back the --

9 MR. FISCHER: Well, no, no. If ACRNC has to
10 file a closure plan because they've been in breach
11 in terms of our lease, they have to share any
12 defects with the closure plan until it is found to
13 be acceptable by the Department of Health. The
14 backing of -- or the guarantee by USG doesn't
15 factor into that.

16 The criteria for an effective closure plan is
17 such that all of the current residents of the
18 facility are placed in facilities that meet their
19 needs, are able to adequately serve them in a
20 mission consistent with DOH and nursing homes
21 across the state.

22 The guarantee wouldn't really factor into
23 that. The guarantee is more if ACRNC becomes an
24 insoluble but still functioning entity, but it's

1 not able to meet some of our payment schedules,
2 that USG would then be able to step in and fulfill
3 its financial responsibilities.

4 In regards to criteria of care and how that
5 impacts an acceptable closure plan, that's a
6 relationship between ACRNC and DOH.

7 Did that get you any closer to --

8 LEGISLATOR WARD: I guess if they run out of
9 money to operate the facility and they're still
10 meeting their obligations with us and they want to
11 close and DOH doesn't allow them to, that's what
12 I'm concerned about. I want to make sure there's
13 no loopholes. Is USG going to step in and back
14 this until DOH tells them they can close?

15 MR. FISCHER: Well, if for --

16 LEGISLATOR WARD: I don't want to see that
17 happen. It sounds to me like --

18 MR. FISCHER: It's not -- and, again, I'm
19 sorry if I'm misinterpreting what you're saying.
20 But you're saying if ACRNC were to become
21 insolvent. I mean, at that point, USG steps in
22 with regards to their relationship to us --

23 LEGISLATOR WARD: Yes.

24 MR. FISCHER: -- and fulfills their financial

1 obligations to us. I feel like I'm losing you
2 after that.

3 LEGISLATOR WARD: Which is repaying the loan
4 and the lease agreement. What about the care
5 that --

6 MS. QUINN: I think this is important,
7 because I keep -- the nursing home industry is
8 unbelievably regulated and the Department of
9 Health does announced survey visits, they do
10 unannounced visits. There is a pretty invasive
11 presence by the Department of Health in nursing
12 homes and in most all healthcare facilities. And
13 if there is similar to a concern, you know, for
14 resident care or insolvency and, you know, there's
15 going to be an end point that looks to be --
16 that's going to compromise resident care, the
17 Department of Health would also have the ability
18 and is mandated to step in.

19 So similar to what happened with Julie Blair,
20 now Hudson Park, they, for reasons of a whole host
21 of different reasons, step in and in that case
22 were assigned a receiver who, as we all know, is
23 USG, but there is continuous and constant
24 monitoring and oversight by the Department of

1 Health. You know, it's not as if we -- and we are
2 monitored constantly. We just had a survey. We
3 just got survey results and we correct different
4 deficiencies, low grades, you know, luckily, not
5 in immediate jeopardy, which many of you are
6 familiar with at the nursing home that we've had
7 in previous years and there's a lot of oversight,
8 a great deal of oversight.

9 LEGISLATOR WARD: So the Department of Health
10 assures the care of --

11 MR. FISCHER: Yes.

12 MS. QUINN: Absolutely. They provide
13 oversight over -- they respond to complaints.
14 They investigate.

15 LEGISLATOR MORSE: There's a huge disparity
16 and study after study after study prove that the
17 public sector far exceeds the quality of care for
18 payors and non-for-profit nursing homes are a
19 little better than for-profit. There's tons of
20 studies. There's no standard that I know of that
21 says there's a minimum staffing level you have to
22 have, this, that and the other thing.

23 The public sector has always said we want to
24 provide better care so we may have more employees

1 that guarantee we have more hours per patient,
2 blah, blah, blah. And the public sector has
3 always provided more than the for-profit. The
4 for-profit is in the business of making money. So
5 any time you compare the two, you're going to see
6 the staffing levels are quite different and you
7 get better quality of care in the public sector.

8 We also know that the Department of Health
9 does respond to all nursing homes, but they don't
10 come in and close down a nursing home that's two
11 star rated compared to a nursing home that's five
12 star rated. We also know that the star rating is
13 not necessarily highest in all aspects. You can
14 have a five star category that have really no
15 direct relationship to the actual patient care and
16 then have a bunch of lower stars on the patient
17 care side and still be a four star rated facility
18 compared to one that's a three rated who has five
19 stars on patient care and has lower stars maybe on
20 some other issues.

21 So I just don't want to like mislead anybody
22 by saying that the Department of Health is the
23 authority that comes in and says, "We make you a
24 better nursing home than the next one."

1 I've been in the industry a very long time
2 and I do not see that that is the case. There's
3 the 800-number and somebody says, "We have
4 issues," the Health Department comes in and
5 reviews them. If they find something, they cite
6 you. If they don't find nothing, they don't cite
7 you.

8 You know, I can hand you 5,000 boring studies
9 that certainly show that the private sector spends
10 more money on employees to provide better patient
11 care than a for-profit. We heard the government
12 indirectly say, "We never have as much staff as
13 you have." Whether that's right or wrong or
14 indifferent doesn't matter. It's just a
15 comparison of saying that the State does not
16 necessarily step in and make you a better nursing
17 home.

18 MR. MARCELLE: Mr. Chairman, let me say this:
19 First of all, this is one of the wonderful aspects
20 of having a 39-member Legislature, because the
21 diversity of the backgrounds, the individualized
22 areas of expertise and knowledge always bring
23 light to a subject. And I know you have
24 tremendous knowledge with respect to nursing

1 homes. I know you've invested a lot of your time
2 and energy in that area and I just want to tell
3 you we appreciate the comments.

4 Does that answer your question, Mr. Ward?

5 LEGISLATOR COMMISSO: Can you repeat what you
6 just said? Can you say that again?

7 MR. MARCELLE: Which part of it did you want
8 me to say?

9 LEGISLATOR COMMISSO: The 39-member
10 Legislature.

11 MR. MARCELLE: Well, Mr. Commisso, I would
12 hate to taint the work of the Charter Review
13 Commission. I have my own opinions on the virtues
14 of large bodies of representation which may
15 coincide with some members and it may not.

16 Yes, Mr. Leader.

17 LEGISLATOR COMMISSO: On another note, what
18 is the time frame on the default? Let's say they
19 don't pay their rent for three months. Does that
20 constitute a default in accordance with your
21 lease?

22 MR. MARCELLE: On the lease, there's default
23 and cure provisions. I'm going to tell you what;
24 the next two questions have relatively simple

1 answers, then Dave is going to provide the
2 financial analysis. And while the financial
3 analysis is being discussed, I'll refer to the
4 lease and then jump back to that question, if
5 that's okay.

6 LEGISLATOR COMMISSO: No problem.

7 MR. MARCELLE: I'm just going to make a note
8 to make sure I don't forget to come back.

9 And also, I just want to mention one thing
10 that I think is worth a note here, too, only
11 because I've been sitting in their chairs before
12 and I know as the evening -- certainly, the last
13 couple of evenings have drawn late, I would really
14 be remiss if I didn't extend my thanks to the
15 staff for both the majority and minority.

16 You know, there are some dedicated members
17 who can sit here and listen to me prattle on.
18 Most members probably don't have that tolerance
19 for prattling. So I certainly appreciate the
20 attendance of majority council. I know last
21 night, minority counsel was here. I see the
22 policy analysts for both the majority and minority
23 here to, I'm sure, take my prattling and reduce it
24 to something that's coherent to the members who

1 were unable to attend. So I do certainly on
2 behalf of myself and the Executive's office just
3 extend our deep thanks and appreciation for your
4 attendance here, your faithfulness in taking notes
5 and trying to be a conduit of information.

6 So with that aside, let's journey forward.
7 On Question 25, it talks about the condition
8 precedent to the commencement of the lease, that
9 there be no litigation. Now, as an aside, the
10 July 15th, 2013 date was kind of a placeholder.
11 Should the lease be passed, I would anticipate we
12 would have a different date there more reflective
13 of the time to get DOH licensing.

14 But the nub of the question is: Is
15 litigation anticipated? I do not believe
16 litigation is anticipated. I have no knowledge of
17 the same. I've heard no rumblings of the same.
18 So the answer to that, that can be a simple
19 answer, no.

20 Question 26, fortunately, also has the virtue
21 of having a simple and straightforward answer.
22 The question is: "What about persons legal in the
23 United States who aren't citizens? Are there any
24 at the nursing home?"

1 We spoke with Mr. Larraby on this very issue.
2 I can report with 100 percent certainty to this
3 body there are no aliens in the nursing home,
4 either legal or illegal.

5 Twenty-seven talks about "The proposed
6 nursing home lease agreement is silent on matters
7 of maintaining the building. Should we not insist
8 that the language be included that would cover
9 maintenance of the premises indicated below?"
10 And there is a laundry list of A to L.

11 Now, Article 7 talks about in some detail of
12 what's required of maintenance in the most
13 broadest strokes that we could come up with,
14 interior, exterior, it goes on. Now, this goes
15 back to a question earlier, I believe, was posed
16 by Mr. Morse or Chairman Morse, I should say.

17 There are always two schools of thought,
18 right? It's, look, you can enumerate and sit down
19 and tick off a universe of items, this, this,
20 this, this and this. And then, of course, by just
21 typical statutory construction, or contract
22 construction in this case, you'd be bound by that
23 universe which you ticked off.

24 It was our position that universal language

1 was better encompassing and protecting of the
2 county than a laundry list. Now, I'm not sure one
3 is better than the other. I just find it for
4 myself in going through this process to try to
5 construct in Article 7 a universal set of
6 conditions rather than trying to particularize a
7 universe that may approach as large of numbers as
8 we could possibly think of and then here's my
9 fear: My fear is somehow through, I would hope,
10 no negligence or lack of due diligence either on
11 my part or upon the part of people competent with
12 this, I would exclude something that would be on
13 that list and then what would happen invariably,
14 according to Murphy's law, is the exact item which
15 I did not include would be destroyed or not
16 maintained and I would have Mr. Mackey coming to
17 see me asking me why I was such an incompetent
18 attorney in not to have included that item.

19 And again, I don't think there is -- that's
20 my preferred style. And, you know, rightly or
21 wrongly, that's just the way I went about it in
22 part because in this lease also, there were a
23 large number of negotiable items and, you know,
24 when we got down to that granular level of

1 negotiation, I could see us -- at points, the
2 negotiations were very contentious and one way
3 sometimes to avoid contention is not get down to
4 the nitty-gritty of the color paint that must be
5 used through the halls of the nursing home.

6 But I understand completely the concerns
7 raised in paragraph or Question 27 and I hope that
8 Article -- it may not satisfy it, but that's the
9 best I think I could do under the circumstances to
10 protect the County's interests.

11 Now, 28 and 29 are kind of companion
12 questions. And while, so far, you've heard three
13 lawyers expound invariably long on certain finer
14 points of law and of knowledge, this now comes to
15 not just bluster and different vexations, it
16 requires some type of concrete thinking and
17 analysis. And fortunately, there is no better
18 person in the County of Albany and, perhaps, we
19 were fortunate to get him from the State
20 Legislature much to their loss and to our gain
21 than our current budget director. And so in
22 recognition of that, I'm going to ask him to
23 provide answers to 28 and 29 in ways that I would
24 be wholly incompetent. And please do not take

1 this as a sign that I'm abandoning ship, but at
2 this juncture, the coffee which I have consumed
3 requires my momentary absence from the room, but I
4 shall return.

5 MR. FRIEDFEL: Thank you for that
6 introduction and that bit of detail. I had
7 provided two spreadsheets earlier in the week
8 Tuesday. I think everyone has them. If anyone
9 needs a copy, let me know. I'll be happy to
10 provide them to you.

11 Starting off with the sheet that begins "NH
12 budget status quo --" it says "status quo" at the
13 top. Going down the left side of the sheet, it
14 lists out personnel service individual,
15 non-individual, contractual -- sorry -- equipment,
16 contractual, fringe, the IGT recoupment, which
17 we've discussed ad nauseam, as well as the
18 building investment. Those are the items that
19 are -- I'm sorry -- outside of the building
20 investment, those are the items that are included
21 in the nursing home's budget that are nursing home
22 costs.

23 The building investment, the capital plan
24 contain \$2.2 million towards the nursing home.

1 Below that is worker's compensation, which is not
2 included in the nursing home's budget. It's
3 included overall for the County under risk
4 retention. And retiree healthcare is also not
5 separated out by the prior employer.

6 Going through those, the 2011 is actual.
7 Parts of 2012 where it's folded are actuals.
8 There are a few items that aren't actual. Fringe
9 is not finalized yet, won't be until the books are
10 closed at the end of February, beginning of March.
11 Worker's compensation is final. The same thing
12 with retiree healthcare is not finalized yet.

13 Going forward, on the right side of the page,
14 under my notes, I've explained my growth factors.
15 For 2013, it was generally what was actually just
16 included in the budget. Going forward, the right
17 side explains the growth factors. I attempted to
18 be conservative, although fair, in the growth
19 rates used.

20 Going to the lower half of the page, the
21 revenues, Medicaid is also not finalized yet for
22 2012. For 2013, it's what was included in the
23 full year version of the budget. We actually just
24 received notice yesterday that our Medicaid rate

1 decreased from about \$189 a day to \$185. That
2 will cost us an additional \$300,000 in 2013.

3 I lumped together the other sources of
4 revenues, because they're relatively small just to
5 keep the document a little more understandable. I
6 listed the IGT. I wanted to point out that the
7 2012 IGT came out about \$5 million less than what
8 had previously been budgeted. So we budgeted
9 about \$8 million and only received three and a
10 half million.

11 This year's is the actual that we will be
12 receiving as well in a few months. And the
13 aggregate, the revenues -- I'm sorry. The local
14 IGT share within the nursing home's budget, it
15 just has the revenue side. There's a local match
16 that's included under DSS's budget. I included it
17 here so we can get a full picture of the actual
18 costs of the nursing home.

19 Under that is the revenues and then the net
20 county share for the status quo of operating the
21 nursing home for a full year. On the second page
22 where it says "Proposed lease to USG" at the top,
23 again, the actuals are bolded for 2012 and then
24 there's the partial year estimates which are

1 included in the budget and enacted by the
2 Legislature in addition to the contingency.

3 Here, we have the same items up to the IGT
4 recoupment. We do have the addition of the
5 sponsorship to USG so we capture the full cost of
6 the proposal, the operation as well as the
7 payments to Upstate Services Group. The capital
8 is the same, \$2 million as included in the capital
9 plan.

10 Below that, there's an additional set aside
11 for other contingencies of \$277,000. It's not the
12 full amount for contingencies. There's also an
13 additional \$850,000 from unfilled positions as
14 well as one and a half million dollar contingency
15 remaining that the Legislature enacted.

16 In order to not overstate the savings, the
17 worker's compensation claims are exactly the same
18 as they are for a full year. They will actually
19 be less, but I didn't want to overstate the
20 savings. The same thing for retiree healthcare.
21 Retiree healthcare will be the same regardless.
22 They're retirees. They're not any less retired
23 because we've transferred ownership.

24 Moving forward to the revenues, the original

1 version of this sheet only counted six months of
2 revenues pursuant to the agreement with USG at
3 that time. Since then, it's been amended to
4 include the accounts receivable transferring over
5 to us. Therefore, for Medicaid claims, there's
6 eight months of reimbursement because of lags.
7 Medicaid takes two months to get fully reimbursed
8 for kind of general claims. Beyond that, there's
9 an additional lag where there will likely be
10 additional revenues for the County coming in.
11 For most sources under "other", it's eight months.
12 Again, my notes on the right describe my
13 assumptions.

14 The inter-governmental transfer receiving in
15 a few weeks, it's actually exactly the same on
16 both sides. It's reflective of 2011-'12 service.
17 Again, it includes the local share that's included
18 in the DSS budget so as to accurately reflect the
19 true costs of the nursing home.

20 That brings us in 2013 to a net county share
21 of \$15.8 million assuming transfer on July 1st
22 with a net savings of approximately two and a half
23 million dollars.

24 Going forward into future years, it also

1 includes the full commitment to USG of \$9 million
2 in 2014, which includes the \$8 million loan in
3 addition to the \$1 million in additional subsidy.
4 The worker's compensation claims are kept the same
5 in 2014 and '15 decreasing by 25 percent in 2016.
6 That's an overstatement of costs. Those plans
7 will definitely decrease, but just so again to not
8 overstate the savings. The same thing with
9 retiree healthcare. I have it being stable here
10 as no one else will be able to -- or the number of
11 people that are retirees will decrease. At the
12 same time as retirees age into Medicare, the
13 County's costs actually will decrease
14 considerably.

15 And in 2014, an estimated savings of
16 \$3.3 million. It would have been higher obviously
17 except for the amount given to USG. \$9.9 million
18 in 2015. And then in 2016, as our commitment to
19 USG would be exhausted, the net savings to the
20 County would be approximately \$15.6 million
21 annually.

22 I believe that kind of sums up how the County
23 will save money. I don't know if there are any
24 questions as far as the sheet relates. It's

1 probably more detail than most people would be
2 interested in.

3 LEGISLATOR MACKEY: Just a question on the
4 IGT.

5 MR. FRIEDFEL: Sure.

6 LEGISLATOR MACKEY: There's an assumption
7 that that's going to end in 2014. Do we know
8 that's actually the case or is that based on --

9 MR. FRIEDFEL: That's based on what we've
10 heard thus far. There's a chance it could be
11 extended. It's gone down.

12 LEGISLATOR MACKEY: Who makes the decision?

13 MR. FRIEDFEL: The federal government. The
14 Center for Medicaid Studies makes that decision.

15 LEGISLATOR MACKEY: Do we have a drop dead --

16 MR. FRIEDFEL: We don't, no. And as fewer
17 and fewer counties continue to operate nursing
18 homes, to me, it seems more and more likely that
19 that end date will actually occur as it gets
20 focused more and more on individual entities.

21 LEGISLATOR MACKEY: How does the local share
22 of the IGT actually work? I'm assuming we get a
23 check from the federal government.

24 MR. FRIEDFEL: It would be nice if we got the

1 check first or if we just got a smaller check.
2 Instead, we actually have to transfer the money
3 ahead of time. It's usually between two weeks and
4 a month. I think it varies depending on the
5 years.

6 So in this case, we'll be sending a little
7 more than \$2 million to the State and then about a
8 month later, we'll get back the \$4.3 million.

9 LEGISLATOR MACKEY: So that local share, we
10 actually send it to the State and then they send
11 us money back that includes that plus --

12 MR. FRIEDFEL: Well, the total amount that
13 they send us back will be the 4.3 and we have to
14 send them 2 first. So the net is only 2. --

15 LEGISLATOR MACKEY: So 4.3, so the net is --

16 MR. FRIEDFEL: Correct. The net is only
17 2.3., which is one of the reasons it was included
18 here partially just because of the way our budget
19 is set up. DSS sends all of our Medicaid payments
20 to the State, our weekly share as well as any
21 other payments. It just comes out of their
22 account. It's all set up. It's the way it's
23 functioned for years.

24 LEGISLATOR MACKEY: But you can segregate

1 that out.

2 MR. FRIEDFEL: Yes. It's nursing home funds.
3 They send us a bill that says, "You owe us X for
4 the nursing home IGT" and it can be very easily
5 segregated.

6 If there are no more questions -- well, Tom's
7 not back yet.

8 MR. FISCHER: Mr. Commisso, you had asked a
9 question prior about in the event of default, like
10 missing rent, what triggers default. Article 13
11 of the lease covers events of default and with
12 regards to rent and what that triggers. 13.1-A
13 says, "The failure of lessee to pay when due any
14 base rent payment or any part thereof," et cetera,
15 shall -- you know, it's 20 days of notice to
16 lessor under the provisions of the lease when such
17 failure shall continue for a period of 20 calendar
18 days after written notice.

19 So we would give them notice if they didn't
20 cure it within 20 days. We anticipate that this
21 could probably be a month, but if this body --

22 LEGISLATOR COMMISSO: I guess that's what I'm
23 getting at. We're at 60 days, 90 days. I just
24 think anybody can have --

1 MR. FISCHER: Well, again, we can custom
2 tailor and modify this to comport with the will of
3 the body. I mean, if we want to have hard
4 language that states definitively --

5 LEGISLATOR LOCKART: The next section, does
6 that extend it out?

7 MR. FISCHER: Oh, yeah, with the curing. I
8 mean --

9 LEGISLATOR LOCKART: I don't know if that's
10 what it means.

11 MR. MARCELLE: Okay.

12 MR. FISCHER: We're just going over the
13 default.

14 MR. MARCELLE: The default, okay. Sorry. I
15 didn't have a chance to review it during the
16 budget director's -- just let me say one thing.
17 The Deputy County Executive had to leave and she
18 wants to let everyone know that she will be
19 providing counsel for the majority and for the
20 minority the chart she promised to have with
21 respect to the number of employees or whatever the
22 years plus service and who may be edging towards
23 eligible for their retirement.

24 MR. FISCHER: And just shifting quickly back

1 to Article 13, with 13.1-A, Ms. Lockart, that goes
2 to rent which has a shorter duration, because we
3 think it's much easier to cure. They cut us a
4 check to transfer and make payment available to
5 us.

6 13.1-B goes to specific covenants and
7 warranties, things within -- so there's a longer
8 duration of time, because there may be a
9 necessity -- something may not be able to be done
10 as quickly as cutting a check or something like
11 that, but here's what we consider and what our
12 counterparty considers a commercially viable and
13 appropriate amount of time to be able to remedy
14 any defaults.

15 But I didn't go to Cornell Law School. So in
16 totality, I always defer to the County Attorney.

17 MR. MARCELLE: Frank, refresh my recollection
18 on the exact question you were having and whether
19 Brad answered it.

20 LEGISLATOR COMMISSO: Well, I think he
21 answered it, but I think 20 days is --

22 MR. MARCELLE: Okay.

23 LEGISLATOR COMMISSO: Anybody could have
24 financial difficulty that may last 90 days before

1 they could go out and get closure or whatever and
2 60 or 90 days --

3 MR. FISCHER: Again, if it's the will of the
4 body, we can certainly alter that. I don't think
5 our counterparty would have any qualms if we
6 extend --

7 MR. MARCELLE: I'll share this with you,
8 Frank. I tended to narrow the frame knowing that,
9 hey, we can always then negotiate and extend it.
10 And when I negotiate to extend it, I may be able
11 to get a little something else. You know, once
12 something's on the table, you know, everything's
13 on the table, right? So that's why I think I
14 tried to make it -- I tried to narrow the window.
15 That was all. And I understand your point. We
16 can make it longer. But it also allows us to --

17 LEGISLATOR COMMISSO: You have a good point.
18 It gives you a chance to get in there --

19 MR. MARCELLE: Who knows what?

20 LEGISLATOR COMMISSO: -- and find out what's
21 really happening.

22 MR. MARCELLE: Right. So we're through 28
23 and 29. Number 30: "Why didn't the negotiation
24 team insist that the tenant procure, tenant

1 expense, all risk and replacement cost insurance?"
2 Now, I think as with some of the questions, it may
3 assume facts which aren't entirely accurate or
4 entirely understood. I think 6.6-B -- oh, no,
5 that doesn't do it. I had this answer notated
6 down.

7 6.6-B and A include the rent loss. I think
8 what I would say as you read subtopic 6 we are
9 including the replacement, which is 6.1 provision,
10 6.2 which is fire and casualty provision, 6.3,
11 which is property or bodily injury provision,
12 6.3-B, which is certain explosion provisions, 6.4
13 which covers naming us as additional insured and
14 some other provisions. And, again, this will be
15 all subject to the additional insurance rider
16 which we are currently negotiating.

17 So I hope everything is covered. Again, we
18 are at this moment negotiating the insurance rider
19 to make sure everything is covered.

20 Now, that takes care of 30. I'm switching
21 over to my secondary e-mail, updated e-mail, which
22 included eight additional questions. Now, I will
23 say this: We're about just slightly under two
24 hours into it and I will confess that today,

1 Department heads and the Executives had me like a
2 ping-pong ball bouncing around. I personally
3 outside of breakfast have not had anything -- I
4 didn't have any lunch today. It is getting
5 towards -- what is it? 8:00 o'clock? Brad points
6 out my European heritage dictates I eat dinner
7 late, which is true.

8 I will say we do have one more Q and A
9 session. While the herd has thinned, the
10 Darwinian strong still remain and I am, I will
11 confess, more than happy to continue on or I can
12 defer these supplemental questions to a later
13 time. Is there a sense -- hearing Mr. Mackey and
14 a second by Mr. Cotrofeld, I will -- and, again, I
15 thank the Legislature for its patience and I will
16 be more than happy to continue.

17 Yes, Ms. Lockart.

18 LEGISLATOR LOCKART: Can you confirm the next
19 date of session?

20 MR. MARCELLE: Mr. Fischer.

21 MR. FISCHER: This upcoming Tuesday at 4:00
22 o'clock.

23 LEGISLATOR LOCKART: 4:00 o'clock?

24 MR. FISCHER: Yes, 4:00 o'clock. Given that

1 there's committee meetings, we don't want to
2 compete with those, so 4:00 o'clock here. What
3 we're contemplating doing, and if you guys are
4 amenable to it, is we would be here at 4:00 but
5 then stay. So as certain committee meetings get
6 out, members can filter down and be able to bear
7 witness to questions being answered or pose any
8 final questions.

9 MR. MARCELLE: Yes, we'll stay as late as the
10 latest committee meeting. So whatever the last
11 committee meeting is, when that adjourns, we will
12 still be here to answer questions from members or
13 counsel.

14 (End of tape.)

15 * * * * *

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

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

THERESA L. KLOS

Dated: February 5, 2013.

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