IN THE CIRCUIT COURT
FOR FREDERICK COUNTY, MARYLAND

PETITION OF:	
LAWRENCE WATSON, et al.	
FOR JUDICIAL REVIEW OF THE DECISIONS OF THE BOARD OF COUNTY COMMISSIONERS FOR FREDERICK COUNTY MARYLAND	
IN THE MATTER OF:	
RESOLUTION NO. 13-15 Authorizing the Sale of Citizens Nursing Home and Montevue Assisted Living	Case No. 10-C-13-002413 AA
ORDINANCE NO. 13-13-641 Repeal and Re-enactment of Article II	
AND	
Motion for County Staff to enter into a Management Agreement with Aurora Health Management, LLC	
DATED: June 25, 2013	

MOTION TO DISMISS

Respondent, the County Commissioners of Frederick County, Maryland (the "County Commissioners" or "County"), pursuant to Maryland Rules 7-402(a) and 7-204(b), moves to dismiss the Petition for Judicial Review filed by Petitioners, Lawrence Watson, *et al.*

Petitioners seek judicial review, pursuant to the administrative mandamus procedures set forth in Maryland Rules 7-401 through 7-403, of the following actions by the County Commissioners:

(1) the adoption of Resolution No. 13-15 (attached as Exhibit 1) in which the County Commissioners approved the sale of the Citizens Care and Rehabilitation Center ("CCRC") and Montevue Assisted Living facility ("MAL") to Aurora Holdings VII, LLC ("Aurora") for $30 million and authorized the County staff to complete the transaction and disburse the proceeds pursuant to a Public Local Law enacted by the General Assembly in Chapter 678 of the Laws of 1912 which is now codified in § 2-2-22 of the Frederick County Code;

(2) the enactment of Ordinance No. 13-13-641 (attached as Exhibit 2) in which the County Commissioners amended §§ 1-11-21 through 1-11-26 of the Frederick County Code to abolish the Citizens Nursing Home Board; and

(3) the approval of a motion (attached as Exhibit 3) authorizing the County staff to enter into a management agreement with Aurora Health Management, LLC ("Aurora Health Management") under which Aurora Health Management would operate the CCRC/MAL facilities until completion of the sale approved by Resolution No. 13-15.

For the reasons stated below, the County respectfully submits that judicial review of these County enactments and action through the administrative mandamus procedures in §§ 7-401 through 7-403 is not authorized because the enactments and action were not quasi-judicial decisions, but rather, were legislative policy decisions made on the basis of legislative facts. *Talbot County v. Miles Point Property, LLC*, 415 Md. 372, 390-94 (2010).

FACTUAL BACKGROUND: THE COUNTY ENACTMENTS AND ACTION

1. Resolution No. 13-15

Resolution No. 13-15 stated that, in Chapter 48 of the Laws of 1825, the General Assembly authorized the County to expend not more than $12,000 to purchase land to develop and operate a farm to provide shelter, food, and employment for the poor. Following its receipt of this authority and direction from the General Assembly, the County purchased an approximately 88-acre farm from Elias Brunner for $5,313.75 pursuant to a Deed recorded among the Land Records of Frederick County on September 2, 1828. Resolution No. 13-15 further stated that at some point thereafter the County developed a hospital known as Montevue Hospital on a portion of the property. Additionally, Resolution No. 13-15 recited that, in Chapter 678 of the Laws of 1912 (now codified as § 2-2-22 of the County Code), the General Assembly authorized the County to sell Montevue Hospital, including both the land on which it is located and the buildings and improvements. In Chapter 678, the General Assembly directed the County to apply the proceeds from the sale in the following sequence: (1) to pay the bonded indebtedness of the Montevue Hospital; (2) to pay any indebtedness of the Board of Charities and Corrections for Frederick County arising from the support of any patients at Montevue; and (3) to utilize any remaining balance for the purchase of land or buildings suitable for the support of the poor.

The County currently owns and operates the CCRC/MAL facilities on the property. CCRC is a 170-bed comprehensive care nursing home facility with a certificate of need from the Maryland Health Care Commission. MAL is a 75-unit assisted living

facility licensed by the Department of Health and Mental Hygiene. Resolution No. 13-15 further stated that (1) the County is authorized by Article 25, § 254 of the Maryland Annotated Code to establish, maintain, and operate a nursing home or convalescent home or homes and any other facilities or services for the proper care and treatment of the aged, convalescent, and chronically ill; and (2) Article 25, § 11A(b)(3-1) and § 2-2-21.1(b)(3)(iv) authorized the County to sell at a public or private sale any real property that it determines is no longer needed for a public use, provided the County gives public notice and holds a public hearing on the sale of the property.

Resolution No. 13-15 stated that during a public hearing held on October 25, 2012, the County Commissioners authorized County staff to the explore options available to eliminate subsidies to CCRC/MAL from the Fiscal Year 2014 budget, including the privatization and sale of CCRC/MAL. In exploring a potential sale of the facilities, the County solicited proposals from operators of skilled nursing and assisted living homes. The County received six proposals in response, and after review and analysis, the County staff recommended the approval of the proposal from Aurora.

Resolution No. 13-15 explained that, since Fiscal Year 2000, the Frederick County General Fund had been required to subsidize the operations of the CCRC/MAL facilities and these subsidies totaled $53,592,999. The County General Fund subsidies were necessary to cover a deficit between the revenue generated by CCRC/MAL and the expenditures incurred by the facilities during each fiscal year. Furthermore, the County incurred bonded indebtedness in excess of $37 million to finance the construction of the CCRC/MAL facilities.

Accordingly, in § 2 of Resolution No. 13-15 the County Commissioners determined:

(i) the property was no longer needed for any public use;

(ii) continued operation of the CCRC and MAL facilities by the County was no longer in the public interest due to the significant General Fund dollars expended by the County to subsidize the operation of these facilities;

(iii) the acceptance of the Aurora proposal and the sale to Aurora would promote the health, welfare and safety of the residents of Frederick County;

(iv) adequate notice and a hearing on the sale of the property had been provided.

In § 3 of Resolution 13-15, the County Commissioners approved the sale of the CCRC/MAL facilities to Aurora at a price of $30 million as adjusted pursuant to the Asset Purchase Agreement attached to the resolution as Exhibit A. In § 4, the County authorized the President or Vice President of the Board to execute the Asset Purchase Agreement in the name of the County. In § 5, the County authorized the President and Vice President of the Board, the County Manager, the County Attorney, the County Director of Finance, and such other officers, officials, and employees of the County as the President or Vice President shall designate to do any and all things, execute all instruments, documents, certificates, and otherwise take all actions necessary in connection with the Asset Purchase Agreement and sale of the CCRC/MAL facilities.

Finally, in § 6 of the resolution, the County required that all monies received from the sale of the property be applied consistently with the requirements of § 2-2-22 of the Frederick County Code (Chapter 678 of the Laws of Maryland of 1912).

2. Ordinance No. 13-13-641

By Ordinance No. 13-13-641, the County Commissioners repealed and re-enacted Article 2, §§ 1-11-21 through 1-11-26 of the County Code. This action abolished the Citizens Nursing Home Board, which had previously been established by the County Commissioners to operate and manage the facilities. The ordinance recited that the County Commissioners are authorized under Article 25, § 254(h) to establish, maintain, and operate a nursing home and assisted living facility, and the County had decided to abolish the Board so that they could operate, manage, and sell the facilities directly themselves.

3. Approval of Motion on June 25, 2013

On June 25, 2013, at a public hearing scheduled in connection with the disposition of the CCRC/MAL facilities, the County Commissioners approved a motion in which the County staff was authorized to enter into a management agreement with Aurora Health Management under which Aurora Health Management would have authority to operate the facilities prior to the County's sale of the facilities to Aurora Health Management pursuant to the Asset Purchase Agreement.

ARGUMENT

The Plaintiffs' Petition For Judicial Review Should Be Dismissed Because The Challenged Actions By The County Were Not Quasi-Judicial Actions That Can Be Reviewed By Administrative Mandamus

The rules and procedures in Chapter 400 of the Maryland Rules governing judicial review of agency decisions by administrative mandamus apply only to quasi-judicial decisions. Maryland Rule 7-401 states:

(a) **Applicability**. The rules in this Chapter govern actions for judicial review of a quasi-judicial order or action of an administrative agency where review is not expressly authorized by law.

1. The Distinction Between Quasi-judicial and Legislative Actions by an Agency

In *Talbot County v. Miles Point Property, LLC*, 415 Md. 372, 387-396 (2010), the Court of Appeals explained at length the principles governing whether an agency decision is quasi-judicial or legislative. There, two property owners, Miles Point Property, LLC and Shore Lands, LLC, filed applications to reclassify their properties for purposes of the Talbot County Comprehensive Water and Sewer Plan. Miles Point applied to reclassify its property from S-2 (service extension contemplated in three to five years) to S-1 (immediate priority to service). After experiencing two incidents of sewerage overflow at its treatment plant, the County Council denied the application, and Miles Point appealed to the County Board of Appeals. The Board of Appeals, however, dismissed the appeal on grounds that it did not have jurisdiction to review the Council's decision because § 502 of the County Charter only granted the Board of Appeals jurisdiction over executive, administrative, or adjudicatory orders, and the Council's decision was legislative. The Circuit Court reversed, ruling that the Council's decision was adjudicative and fell within the Board's jurisdiction under § 502 of the County Charter. Talbot County appealed, contending that the decision was legislative.

Shore Lands owned a 79-acre property in the Town of Easton classified as W-2/S-2 (service extension contemplated in three to five years) in the County Comprehensive Sewer and Water Plan and filed an application requesting the County

Council to redesignate the property as W-1/S-1 (immediate priority to service). The Town of Easton opposed the reclassification on grounds that the reclassification would allow for the development of the property in violation of the State's density requirements and would jeopardize State funding. As a result, the County Council denied the reclassification application. Shore Lands filed a Complaint for Writ of Administrative Mandamus in Circuit Court, seeking review of the Council's denial of its application. The Circuit Court dismissed the petition, holding that Shore Lands was required to exhaust administrative remedies by appealing the Council's decision to the Board of Appeals

The Court of Appeals issued a writ of certiorari to review both the *Miles Point* and *Shore Land* cases prior to a decision by the Court of Special Appeals, stating that it would address three issues: (1) whether the Council's decisions were subject to review by the Board of Appeals, (2) if not, whether the Circuit Court had original jurisdiction to review the decisions, and (3) if so, what is the proper mechanism and standard of review by the Circuit Court.

The Court of Appeals initially explained that § (V) of the Express Powers Act (MD. CODE ANN., Art. 25, § 5) authorizes a charter county to grant a board of appeals jurisdiction over any adjudicating order ...." Further, the Court explained that under Maryland Rule 7-401, administrative mandamus is only available to review quasi-judicial decisions of an agency for which there is no statutory right of review. Thus, the Court of Appeals explained, the question presented in both the *Miles Point* and *Shore Lands* cases

was whether the Council's classification decisions were quasi-judicial (that is, adjudicative) or legislative in nature.

The Court then stated the principles that govern whether a decision is quasi-judicial or legislative in nature. First, the distinction as to whether an administrative decision is quasi-judicial or legislative in nature does **not** depend on whether the decision affects an individual piece of property. Rather, the distinction turns on whether the decision is based on adjudicative facts or legislative facts. The Court explained (415 Md. at 387-88):

> In determining whether the Council's action was adjudicatory or legislative in nature, we are informed by our analysis of zoning decisions in *Bucktail, LLC v. County Council of Talbot County*, 352 Md. 530, 723 A.2d 440 (1999). In *Bucktail*, we held:
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> > The determination of whether a local zoning authority is acting in an adjudicative or legislative manner is dependent upon the nature of the particular act in which it is engaged. This determination is not based on whether the zoning decision adversely affects an individual piece of property but whether the decision itself is made on individual or general grounds.
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> *Id.* at 545, 723 A.2d at 447 (quotation marks and citation omitted). It is thus not a hearing's "mere focus on one parcel that is dispositive of [the hearing's] quasi-judicial nature, but rather that the matter taken up at the hearing is disposed of based on the unique characteristics" of the property at issue. *Md. Overpak Corp. v. Mayor & City Council of Balt.*, 395 Md. 16, 39, 909 A.2d 235, 248-49 (2006). In other words, the greater a decisionmaker's reliance on general, "legislative facts," the more likely it is that an action is legislative in nature. Likewise, the greater a decision-maker's reliance on property-specific, "adjudicative facts," the more reasonable it is to term the action adjudicatory in nature.

Second, the Court of Appeals explained that adjudicative facts involve the tribunal applying an existing statutory or common-law framework to an application and determining "who did what, when, how, [and] why ...." *Id.*, 415 Md. 386, quoting *Montgomery County v. Woodward & Lothrop Inc.*, 280 Md. 686, 711-12 (1977) (quoting 1 Davis, *Administrative Law Treatise*, § 7.02 (1958)). On the other hand, legislative facts are "general facts which help the tribunal decide questions of law and policy and discretion." The Court stated (415 Md. at 387-88):

> Although we have recognized that "[t]he difference between adjudicative and legislative facts is not easily drawn[,]" *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 711-12, 376 A.2d 483, 497 (1977), the proper classification of the Council's hearings in these cases is quite straightforward. Generally, adjudicative facts concern questions of "who did what, where, when, how, why, [and] with what motive or intent," while legislative facts "do not usually concern the immediate parties but are general facts which help the tribunal decides questions of law and policy and discretion." *Id.* (quoting 1 Kenneth C. Davis, *Administrative Law Treatise* § 7:02 (1958)).

The Court then ruled that the County Council's decisions in response to the applications of Miles Point and Shore Land to reclassify their properties under the Comprehensive Water and Sewerage Plan were based on legislative, not adjudicative or quasi-judicial facts. As to the Miles Point application, the Court of Appeals explained (415 Md. at 388-89):

> While the Council's review of the Plan was spurred by Miles Point's request for reclassification, few of the facts discussed by the Council address unique characteristics of the Miles Point property itself.

> As stated above, the Council does iterate the particulars of Miles Point's application, and identify the property in question, but only at the outset of its findings. The balance of the Council's findings address broad-based facts relating to Talbot County infrastructure, the capacity and history of the Region II Wastewater Treatment Plant, and policy issues. Specifically, the Council discussed a number of problems with existing sewage treatment procedures. The Council found that the Plant had experienced a steady increase in wastewater inflow between 2002 and 2005, and a corresponding decrease in available capacity for additional treatment. The Council also noted that peak flows into the Plant could reach 2,000,000 GPD-twice the Plant's design capacity and approximately four times its total functional capacity. The findings of fact addressed the sewage overflow issues that the Plant had experienced, and the litany of problems that had been revealed by an inspection of the Plant's function. The Council also discussed Talbot County's agreement with the Martingham Utilities Cooperative, a private sewage treatment facility located north of the Town of St. Michaels. The County had previously agreed that the Plant would accept an additional 19,000 GPD of effluent from the Martingham facility to assist that facility in meeting its MDE permit requirements.
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> In addition to these findings, the Council addressed policy matters. The Council discussed the County's plan to expand Plant capacity, and noted that in spite of the County's intentions, the expansion had not yet been authorized by the MDE, "[n]o bid [had] been approved[,] ... and no construction contract [had] been executed." The Council addressed the history of sewer allocation policy in Talbot County, including the County's larger water and sewer planning scheme in relation to the Plant's historical capacity, and found that granting Miles Point's application would be incompatible with the overall scheme as organized by the County as early as 1987.

As to the Shore Lands' application, the Court of Appeals ruled (415 Md. at 396-96):

> An examination of the Council's findings of fact regarding the Shore Lands property shows that the Council based its decision largely on legislative facts. The Council discusses

> the Shore Lands property at the beginning of its findings, including the history of Shore Land's application and the classification history of the parcel itself. After this initial assessment, however, the Council leaves behind its property-specific discussion, and segues into a larger discussion of the Talbot County Plan.
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> Unlike its analysis of the Miles Point property and the development proposal for that property, the Council did not focus on the County's sewage processing infrastructure in considering Shore Land's application, Indeed, the Council found that "adequate capacity apparently exists to serve the [Shore Lands] property with sewer and water and necessary infrastructure is located adjacent to the property ...." Rather, the Council found that reclassification of the Shore Lands property as currently zoned "would be inconsistent with the State Smart Growth Law ... and potentially problematic in terms of the Town of Easton's [funding agreements] with the State of Maryland." The Council also found that the Plan "specifically discourages development of properties in growth areas at 'low "septic system" densities[,]'" and that reclassification would run afoul of this strategic goal.
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> * * *
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> At no point during the findings of fact leading to this conclusion did the Council indicate a focus on the unique characteristics of the Shore Lands property. Rather, the Council directed its attention to matters of law and policy, including the long-range development strategy of Talbot County.

Accordingly, the Court ruled that the Council's decisions were legislative in nature, not adjudicative or quasi-judicial. The Court explained, however, that legislative decisions are subject to judicial review in a declaratory judgment action under the "legal boundaries" standard of review (415 Md. at 393):

> Legislative action by a local government or agency is still subject to review by the courts, though the standard of review is extremely narrow. Judicial scrutiny of legislative action

> under a court's ordinary jurisdiction "is limited to assessing whether [a government body] was acting within its legal boundaries." *County Council of Prince George's County v. Offen*, 334 Md. 499, 507, 639 A.2d 1070, 1074 (1994) (quotation marks and citations omitted). This is an even more limited standard than the already narrow review for arbitrary and capricious action, or for action unsupported by substantial evidence. *Cf. Judy v. Schaefer*, 331 Md. 239, 264-66, 627 A.2d 1039, 1052-53 (1993) (discussing judicial review of administrative decisions).
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> Under this "legal boundaries" standard, government legislative action will be permitted to stand as long as it was "consistent with relevant law." *Id.* If the legislative action exceeds the acting agency's legal authority, however, the courts have the power to correct the extralegal conduct pursuant to their original jurisdiction.

The Court of Appeals' decision in *Maryland Overpak Corp. v. Mayor and City Council of Balt.*, 395 Md. 16, 53 (2006) provides a good example of an agency decision found to be quasi-judicial in nature. The case involved an application for an approval under an established standard and a decision made after an evidentiary hearing. There, Maryland Overpak and other adjoining landowners, pursuant to then MD. CODE ANN., Art. 66B, § 2.09(a)(1)(ii), sought judicial review of Baltimore City Ordinance 04-873 which amended an industrial planned unit development ("PUD") plan for a 67-acre parcel to increase the number of residential dwelling units permitted and to modify the number of uses and buildings permitted and their locations and sizes. Art. 66B, § 2.09(a)(1)(ii) authorized judicial review of a "zoning action" made by the City. Citing a long line of authority, the Court of Appeals explained that a "zoning action" subject to judicial review under § 2.09(a)(1)(ii) must, among other things, be a quasi-judicial action and not a

legislative action. The Court explained the distinction between a quasi-judicial action and a legislative action as follows (395 Md. at 53):

> To summarize, the pertinent criteria for determining whether a particular action by the Mayor and City Council is a "zoning action" are: first, there must be a determination that the process observed by the governmental body in affecting an alleged zoning action was quasi-judicial in nature, rather than legislative. A quasi-judicial proceeding in the zoning context is found where, at a minimum, there is a fact-finding process that entails the holding of a hearing, the receipt of factual and opinion testimony and/or forms of documentary evidence, and a particularized conclusion, based upon delineated statutory standards, for the unique development proposal for the specific parcel or assemblage of land in question.

Applying this distinction, the Court ruled that the amendment of the PUD plan for the 67-acre parcel was a quasi-judicial action by the City Council (395 Md. at 53-54):

> In the case at hand, Ordinance 04-873 was enacted as the result of a quasi-judicial process. It approved the "increase [of] the number of residential dwelling units permitted and [modified] the uses and buildings permitted and their locations and size." (citation omitted). The prevailing purpose of the Ordinance, then, was to define the permissible uses, if not also to modify to some degree the zoning classification, of the specific parcel. The amendment sought by the property owner proposed "to increase the number of residential dwelling units from 100 to 504; to decrease the amount of office space from 1.7 million to 1.5 million square feet; to decrease the amount of retail space from 450,000 to 150,000 square feet; and to increase the amount of restaurant space from 50,000 to 120,000 square feet." (citation omitted) The City Council's deliberative consideration, after receiving evidence at a required hearing, and approval of these specific uses for this specific parcel after making required statutory findings falls within the realm of a "zoning action." We, therefore, hold that Maryland Overpak was entitled to seek judicial review of the adoption of Ordinance 04-873 as a "zoning action" under § 2.09(a)(1)(ii).

Likewise, in *Bucktail, LLC v. County Council of Talbot County*, 352 Md. 530, 545-46 (1999), Bucktail, LLC, a real estate developer, Bucktail, sought to develop a 93.59-acre tract in Talbot County of which 20.83 acres were located outside of the Critical Area and zoned Town Residential and 72.76 acres were located in the Critical Area with a Critical Area plan designation of Rural Conservation Area (or RCA), which limited development to one unit per 20 acres. Further, the portion of the parcel in the Critical Area was zoned in a classification called RCA, which limited development to one unit per 20 acres. Bucktail filed an application under the Critical Area Law for a growth allocation which would authorize a change to its designation from RCA to LDA. Further, Bucktail sought a piecemeal rezoning of its property from RCA to Rural Residential (or RR). If these two applications were granted, Bucktail would be permitted to construct 14 residential units in the Critical Area portion of its property, rather than three.

The County Council denied the applications, and Bucktail sought judicial review in Circuit Court, which affirmed the Council on grounds that substantial evidence supported its decisions. The Court of Appeals granted a petition for writ of certiorari to review the Council's actions. The County moved to dismiss the appeal on grounds that no provision of the County Charter or Code authorized an appeal. The Court of Appeals rejected this argument on grounds that Maryland common-law had long authorized judicial review of quasi-judicial administrative decisions by writ of administrative mandamus. *Id.*, 352 Md. at 542-43, *citing Criminal Injuries Compensation Board v. Gould*, 273 Md. 486, 500-01 (1975). (The case was decided before the adoption of the

administrative mandamus procedure in Maryland Rules 7-401 through 7-403.) The Court then explained the distinction between a quasi-judicial or adjudicated action and a legislative action (352 Md. at 545-46, quoting *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 711-12 (1977)):

> The determination of whether a local zoning authority is acting in an adjudicative or legislative manner "is dependent upon the nature of the particular act in which it is engaged." *Mayor of Rockville v. Woodmont Country Club*, 348 Md. 572, 505, 705 A.2d 301, 307 (1998). This determination is not based on whether the zoning decision adversely affects an individual piece of property but whether the decision itself is made on individual or general grounds.
>
> "The difference between adjudicative and legislative facts is not easily drawn; ... adjudicative facts are facts about the parties and their activities, businesses and properties. They usually answer the questions 'of who did what, where, when, how, why, with what motive or intent' while legislative facts 'do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.' The difference, broadly speaking, involves whether the decision is to be made on individual or general grounds. Simply because an individual has a protected interest does not entitle him to a trial-type hearing where the matter to be determined involves issues of legislative fact. That the effect of a zoning authority's decision may dramatically affect an individual is not determinative of the difference between adjudicative and legislative facts; rather, it is the nature of the decision's fact-finding process, not the ultimate effect of the decision, that determines the party's right to an adjudicatory hearing."

Based on this standard, the Court ruled that the Council's application of the specific standard for a piecemeal rezoning and growth allocation amendment to the facts of Bucktail's applications was adjudicative, not legislative. 352 Md. at 548.

2. The Enactments and Actions Challenged by the Petitioners are Legislative in Nature

In the present case, Petitioners challenge three interrelated decisions of the County Commissioners: (1) the adoption of Resolution No. 13-15 (attached as Exhibit 1) in which the County Commissioners approved the sale of the CCRC/MAL facilities to Aurora Holdings VII, LLC ("Aurora") for $30 million and authorized the County staff to complete the transaction and disburse the proceeds pursuant to a Public Local Law enacted by the General Assembly in Chapter 648 of the Laws of 1912 which is now codified in Frederick County Code § 2-2-22; (2) the enactment of Ordinance No. 13-13-641 (attached as Exhibit 2) in which the County Commissioners amended §§ 1-11-21 through 1-11-26 of the Frederick County Code to abolish the Citizens Nursing Home Board; and (3) the approval of a motion (attached as Exhibit 3) authorizing the County staff to enter into a management agreement with Aurora Health Management under which Aurora Health Management would operate the CCRC/MAL facilities until completion of the sale approved by Resolution No. 13-15.

The enactments and action challenged by the Petitioners implemented the underlying policy decision of the County Commissioners to sell its nursing home and assisted living facilities. This decision by the County Commissioners involved a balancing of general policy considerations, including the past financial performance of the facilities and their projected financial performance in the future, the fiscal ability of the County to continue to operate the facilities, whether such facilities are more effectively and efficiently operated by entities specializing in health care, how the County

should provide assistance for lower income residents, and the most effective manner for delivery of that assistance. The ultimate decision whether to sell the facilities thus involved a careful balancing of policy considerations that was discretionary and legislative in nature, not quasi-judicial. The decision was not made in the context of an application for an approval under a statutory standard and after an evidentiary hearing.

Additionally, in *Appleton Regional Community Alliance v. Board of County Commissioners of Cecil County*, 420 Md. 172, 182-84 (2011), the Court of Appeals ruled that a decision by the County Commissioners of Cecil County to sell a County sewer and water utility to a private company for purposes of its operation by the private company was reviewable by the courts only in a declaratory judgment action to determine whether the County Commissioners had authority to take this action – that is, the decision was reviewable under the "legal boundaries" standard of review applicable to legislative decisions. In that case, Cecil County was authorized under MD. CODE ANN., Article 25, § 8(a) to sell property that was no longer needed for "public use." The Court of Appeals ruled that the County had authority under this provision to sell the facilities to a private utility company, even though the company would continue to use the facilities to provide service to the public.

Finally, it should be noted that the Court of Appeals ruled in Talbot County v. Miles Point Property, LLC, 415 Md. at 395, that the appropriate procedural mechanism for obtaining review of a legislative decision by an agency such as the County Commissioners is by declaratory judgment action invoking the original jurisdiction of this Court. The Petitioners in this case have also filed a declaratory judgment action in

this Court challenging the County Commissioners' legal authority to sell the nursing home and assisted living facility. The County respectfully submits that judicial review of the legislative decisions challenged in the present Petition for Judicial Review should be conducted in this declaratory judgment action under the narrow standard of "legal boundaries" applicable to legislative actions. *Id.*

CONCLUSION

For the reasons stated, the County requests that the Petition for Judicial Review be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of August, 2013, a copy of the foregoing Motion to Dismiss was mailed, first class, postage prepaid, to:

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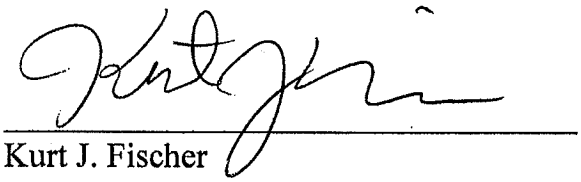

Kurt J. Fischer