August 16, 2007

VIA FEDERAL EXPRESS
Marjorie S. McCoy
Deputy Clerk of the Court
New York Court of Appeals
20 Eagle Street
Albany, NY 12207-1095

Re: St. Joseph Hospital of Cheektowaga, New York et ano. v. Novello, et al. (Fourth Department Docket No. CA 07-00587)

Dear Ms. McCoy:

We are counsel for Appellants St. Joseph Hospital of Cheektowaga, New York ("St. Joseph") and Catholic Health System, Inc. ("CHS"), and are writing in response to your letter of August 8, 2007 requesting that we address the question of whether this appeal directly involves a substantial constitutional question. For the reasons set forth below, we respectfully submit that it does.

We will first briefly discuss the background to this litigation, including the legislation whose constitutionality we have challenged below, and are challenging on this appeal. We will then describe the proceedings below. Finally, we will set forth the reasons why we believe this appeal poses several substantial constitutional questions.

A. The Enabling Legislation

Prior to 2005, the New York Commissioner of Health had the sole authority to limit or revoke the operating certificates of hospitals. N.Y. Public Health Law § 2806(a). Moreover, Section 2806(e) of the Public Health Law granted those hospitals the statutory right to both notice and a hearing before the Commissioner could revoke their operating certificates.

In April 2005, New York State Legislature passed, and the Governor approved Section 31 of Part E of Chapter 63 of the Laws of 2005 (the "Enabling Legislation") that created Respondent "Commission on Healthcare Facilities in the 21st

Century" (the "Commission"). The Enabling Legislation charged the Commission with reconfiguring the State's entire hospital and nursing home bed supply by targeting specific facilities for closure, consolidation, or downsizing. The Enabling Legislation also suspended - - until June 30, 2008 - - the statutory right of hospitals and other facilities to a hearing before their operating certificates could be revoked.

The Enabling Legislation also created six regional advisory committees ("RACs") which were directed to make recommendations to the full Commission concerning closure and downsizing for facilities in their respective regions. The Commission, in turn, was to make its recommendations to the Governor. If the Governor approved the Commission's recommendations, the Department of Health was required to carry them out unless both houses of the Legislature enacted a "concurrent resolution" rejecting the Commission's recommendations in their entirety.

B. The Commission's Proceedings

The Enabling Legislation commanded the six RACs to "conduct formal public hearings with requisite public notice to solicit input from local stakeholder interests, including . . . healthcare providers." The Western Region RAC solicited no information directly from CHS about any of its four hospitals (including St. Joseph) or its seven other facilities that were potential targets for closure. Rather, the Western Region RAC simply published certain data regarding CHS's facilities on its website, and allowed CHS to submit corrections to that data, which CHS did.

Thereafter, the Western Region RAC conducted only nine hours of "hearings" concerning all healthcare facilities in the eight counties covered by its mandate. Appellants were, again, provided no notice as to which of its many facilities might be likely candidates for closure, and they were only given 10 minutes to address the closure of their 11 facilities.

It was undisputed below that St. Joseph is a growing, vibrant, profitable hospital that treats more than 30,000 patients annually and employs 800 persons. It was also undisputed below that only two years earlier, the Commissioner of Health had expressly approved a $9,000,000 capital program to expand and improve the Emergency Department at St. Joseph such that it is now widely recognized as the finest in the region.

Notwithstanding this, on November 15, 2006, the Western Region RAC recommended that St. Joseph be decertified as an acute-care facility. Thirteen days

later, the Commission issued its Final Report which recommended that St. Joseph be closed entirely. (In so doing, the Commission did not conduct any formal public hearings at which healthcare providers were given the opportunity to testify.) The next day, the Governor announced his approval of the Commission's Final Report. The Legislature did not adopt a "concurrent resolution" rejecting the Commission's recommendations, and, pursuant to the Enabling Legislation, the Commissioner of Health must now carry them out.

C. Proceedings in the Trial Court

On November 28, 2006, Appellants filed an action in Supreme Court, Erie County, seeking a declaration that: (i) the Enabling Legislation violated their rights to Due Process under the United States and New York Constitutions; (ii) the "concurrent resolution" component of the Enabling Legislation violated the Presentment Clause and Separation of Powers Doctrine under the New York State Constitution; (iii) Respondents' actions violated Appellants' rights to the Free Exercise of their religion under the New York State Constitution; and (iv) Respondents' actions violated the Contracts Clause of the United States Constitution.

Both Appellants and Respondents moved for summary judgment. By its Decision dated February 2, 2007, the trial court awarded summary judgment to the Respondents, and declared that the Enabling Legislation did not violate Appellants' rights to Due Process, the Presentment Clause or Separation of Powers Doctrine, the Free Exercise Clause, or the Contracts Clause. St. Joseph Hospital of Cheektowaga, N.Y. v. Novello, 15 Misc. 3d 333 (Sup. Ct. Erie County 2007). By its Order and Judgment dated February 21, 2007, the trial court dismissed Appellants' complaint "in all respects."

D. The Decision of the Fourth Department

Appellants appealed the trial court's Decision to the Fourth Department. On that appeal, Appellants briefed and argued the unconstitutionality of the Enabling Legislation as violative of: (i) their Due Process rights under the Fourteenth Amendment and Article I, section 6, of the New York Constitution; (ii) the Presentment Clause of Article IV, section 7 of the New York Constitution; (iii) the Separation of Powers Doctrine inherent in the New York Constitution; (iv) Appellants' rights to the free exercise of their religion as guaranteed by Article I, section 3, of the New York Constitution; and (v) the Contracts Clause of Article I, section 10, of the United States Constitution.

On July 18, 2007, the Fourth Department issued its Opinion and Order on that appeal. In brief, the majority of the Court held that the Enabling Legislation was not constitutionally infirm. In his dissent, Justice Eugene Fahey stated that he "agree[d] with [Appellants] that [Respondent] New York State Commission on Healthcare Facilities in the 21st Century (Commission) violated their right to procedural due process, and I further agree with [Appellants] that the [Enabling] Legislation violates the Presentment Clause of the New York Constitution and the separation of powers doctrine."

E. This Appeal

On July 23, 2007, Appellants filed their Notice of Appeal, and on August 1, 2007, Appellants filed their Preliminary Appeal Statement. As noted in that Statement, the issues raised on this appeal are those which were expressly raised, and decided, below, viz., whether the Enabling Legislation "is unconstitutional as a violation of:

> 1. procedural due process, as guaranteed by the Fourteenth Amendment to the United States Constitution, and by Article I, section 6, of the New York Constitution;
>
> 2. substantive due process, as guaranteed by the Fourteenth Amendment to the United States Constitution, and by Article I, section 6, of the New York Constitution;
>
> 3. the Presentment Clause of Article IV, section 7, of the New York Constitution, and the Separation of Powers doctrine inherent therein;
>
> 4. the Plaintiffs'-Appellants' right to free exercise of their religion, as guaranteed by Article I, section 3, of the New York Constitution; and/or
>
> 5. the Contracts Clause of Article I, section 10, of the United States Constitution."

We respectfully submit that this appeal raises substantial and direct constitutional questions. With respect to the former, the standard is clear: a question is not "substantial" when the appeal involves "a restatement of questions whose merit has been clearly resolved against appellant's position" by prior decisions of this Court. Kazim M. v. Abdiel C. (Matter of Adoption of David A.C.), 43 N.Y.2d 708, 708 (1977) (citations omitted). That plainly is not the case on this appeal. This is the first instance in which this Court will consider the constitutionality of the Enabling Legislation. As the dissent of Justice Fahey makes clear, the Enabling Legislation itself poses serious issues under both the United States and New York Constitutions, including whether it failed to provide Appellants with Due Process and whether its "concurrent resolution" provision violates the Presentment Clause and the Separation of Powers Doctrine. See also Community Hospital at Dobbs Ferry, et ano. v. Novello, et al. (Westchester Co. Index No. 24650/06) (finding the Commission failed to provide hospital with due process in ordering its closure) (a copy of which is enclosed).

It is also clear that this appeal "directly" involves constitutional claims. Although Appellants sought several forms of relief in their Amended Complaint, they requested invalidation of the Enabling Legislation only on constitutional grounds. In considering only those constitutional grounds, the Supreme Court and the Fourth Department did not provide any independent, non-constitutional basis for their holdings. Hence, the constitutional claims are "directly" raised. CPLR 5601(b)(1); Board of Education of Monroe-Woodbury Central School District v. Wieder, 72 N.Y.2d 174, 182 (1988); Matter of Westchester Rockland Newspapers, Inc. v. Leggett, 48 N.Y.2d 430, 437 n.2 (1979).

Lastly, we note that this appeal also involves a final judgment as required by CPLR 5601(b)(1). While the Fourth Department did vacate the trial court's dismissal of Appellant's causes of action seeking declaratory relief, it did so for narrow technical reasons, viz., a complaint seeking declaratory relief should not be dismissed, even where the declaration is issued, as here, entirely in the defendant's favor. Tumminello v. Tumminello, 204 A.D.2d 1067, 1067 (4th Dep't 1994), accord Boyd v. Allstate Life Insurance Co. of N.Y., 267 A.D.2d 1038, 1039 (4th Dep't 1999) (cited by the Opinion and Order). The Fourth Department otherwise affirmed the Supreme Court's Order and Judgment as modified, and did not remand the declaratory judgment action to the Supreme Court for any further proceedings. As such, the Fourth Department's Opinion and Order rendered a final judgment reviewable by this Court. See Kiker v. Nassau County, 85 N.Y.2d 879 (1995) (establishing that the Appellate Division's modification of a trial court's final order gives rise to a new final order reviewable by the Court of

Appeals); In re Bruce, 295 N.Y. 702 (1946) (deeming final the Appellate Division's vacatur of a trial court order, and substitution of other final relief).

F. Conclusion

We respectfully submit that this appeal involves substantial constitutional questions. As requested, we are also enclosing copies of the briefs filed by the parties in the Fourth Department and a copy of the Record on Appeal.

Respectfully,

Phillips Lytle LLP

By
Kenneth A. Manning

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Doc # 01-1681592.1
Encs.

cc: Victor G. Paladino, Esq. (via Federal Express) (w/o encs.)
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