STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ANDREW M. CUOMO
ATTORNEY GENERAL

APPEALS AND OPINIONS BUREAU

Telephone (518) 473-4321

August 17, 2007

Hon. Stuart M. Cohen
Clerk of the Court
Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: St. Joseph Hospital of Cheektowaga, New York v. Novello
Fourth Dept. Docket No. CA 07-00587

Dear Mr. Cohen:

Respondents submit this letter in response to the Court's letter dated August 8, 2007, inquiring whether a substantial constitutional question is directly involved to support an appeal as of right. Plaintiffs-appellants St. Joseph Hospital of Cheektowaga, New York ("St. Joseph" or "the hospital"), and Catholic Health System, Inc. ("CHS"), filed a notice of appeal dated July 23, 2007, pursuant to C.P.L.R. 5601(b)(1), from an opinion and order of the Appellate Division, Fourth Department entered on July 18, 2007. See St. Joseph Hospital of Cheektowaga v. Novello, 2007 N.Y. App. Div. LEXIS 8546 (4th Dep't 2007). Because no substantial constitutional question is directly involved, the appeal should be dismissed.

In November 2006, plaintiffs commenced this action in Supreme Court, Erie County seeking a judgment declaring legislation ("the Enabling Act") unconstitutional and enjoining the State from revoking St. Joseph's operating certificate. The Enabling Act created the New York State Commission on Healthcare Facilities in the 21st Century ("Commission") and charged it with "examining the supply of general hospital and nursing home facilities, and recommending changes that will result in a more coherent, streamlined health care system in the state of New York." Enabling Act §§ 1, 2(a).

After holding public hearings and considering thousands of pages of documentary submissions from interested parties and the recommendations of its Regional Advisory Committees ("RACs"), the Commission issued a final report in November 2006. It recommended the closure of nine hospitals statewide – including St. Joseph – and the restructuring of forty-eight others. On November 30, 2006, the Governor approved the Commission's final report. Pursuant to section 9 of the Enabling Act, the Commission's recommendations became law when the Legislature did not disapprove the Commission's report by December 31, 2006.

In their amended complaint, plaintiffs alleged that the Enabling Act denied them procedural and substantive due process, violated the Presentment Clause of the New York Constitution as well as the separation of powers doctrine by authorizing the Legislature to veto the recommendations, denied them the free exercise of religion, and impaired their contracts with vendors and others. Supreme Court declared that the Enabling Act was

constitutional and dismissed the amended complaint. See St. Joseph Hospital of Cheektowaga v. Novello, 15 Misc. 3d 333 (Sup. Ct. Erie Co. 2007). The Appellate Division affirmed, with one Justice dissenting, but vacated the dismissal of the request for a declaratory judgment. See St. Joseph Hospital, 2007 N.Y. App. Div. LEXIS 8546 at **15-16.

Although the Appellate Division found that St. Joseph had a property interest in its operating certificate, it concluded the procedures afforded by Enabling Act satisfied procedural due process because they provided plaintiffs with adequate notice and a reasonable opportunity to be heard. In addition, the court held that plaintiffs were not deprived of substantive due process because the Commission's recommendation to close St. Joseph was neither without legal justification nor "outrageously arbitrary." The court rejected plaintiffs' challenge to the legislative veto provision without reaching the merits, concluding that the provision was severable. Thus, the court concluded that even if the legislative veto provision were unconstitutional, it would not nullify the remainder of the statute. Finally, the court held that the Enabling Act did not violate the Free Exercise or Contract Clauses.

A. The challenge to the legislative veto provision based on the Presentment Clause and separation of powers doctrine is not directly involved.

Plaintiffs' claim that the legislative veto provision violates the Presentment Clause and the separation of powers doctrine is not directly involved in this appeal. In order for

a constitutional question to be directly involved under C.P.L.R. 5601(b)(1), the Appellate Division must have taken a view of the case that necessarily required it to decide the constitutional issue. See Matter of Haydorn v. Carrol, 225 N.Y. 84, 87-88 (1914); Karger, The Powers of the New York Court of Appeals (revised Third ed.), § 7:8, at 229-230. Thus, the "directly involved" requirement is not met where an independent nonconstitutional basis for the Appellate Division's decision exists. See Board of Educ. of the Monroe-Woodbury Cent. School Dist. v. Wieder, 72 N.Y.2d 174, 182-183 (1989). Here, the Appellate Division did not reach the merits of plaintiffs' Presentment Clause/separation of powers claim because it concluded that the legislative veto provision was severable from the remainder of the Enabling Act. Severability presents a question of legislative intent and is not itself a constitutional question. See Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 683 n.5 (1987). Accordingly, the question whether the Enabling Act violates the Presentment Clause or the separation of powers doctrine is not necessarily and directly involved in this appeal.

B. Plaintiffs' other constitutional claims are insubstantial.

Although the Appellate Division reached the merits of plaintiffs' other constitutional claims, none of them is substantial. Resolution of these constitutional questions involves only the routine application of settled principles of law to a particular statutory scheme.

1. Procedural due process

Plaintiffs' procedural due process claim does not raise a substantial constitutional question. The basic requirements of procedural due process are notice and an opportunity to be heard. Mitchell v. W.T. Grant Co., 416 U.S. 600, 634 (1974). Plaintiffs, by their own admissions, had both. The gravamen of plaintiffs' challenge in the courts below was that they should have been given an adversarial, evidentiary hearing before the Commission issued its recommendations. However, none of the factors identified in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), supports their argument that the Constitution required that procedure instead of the notice and opportunity to be heard that the Commission provided.

a. The notice provided was adequate.

There is no substantial question that plaintiffs received constitutionally adequate notice that the Commission might recommend that St. Joseph's operating certificate be revoked based on a lack of ongoing public need. This Court has held that constitutional notice requirements are satisfied where a statute notifies a party that there will be a proceeding, what issues will be reviewed at such a proceeding, and the possible outcomes. See Tompkins County Support Collection Unit v. Chamberlin, 99 N.Y.2d 328, 338 (2003); see also Dusenbery v. United States, 534 U.S. 161, 170 (2002); Harner v. County of Tioga, 5 N.Y.3d 136, 140 (2005).

Any contention by plaintiffs that the State failed to put them on notice of the pendency of the Commission's proceedings or the possible consequences to themselves is insubstantial. Long before the Enabling Act was enacted, New York law put all hospitals on notice that their continued operation was conditioned on an ongoing public need for their beds and services. See P.H.L. § 2806(6)(a). The enactment of the Enabling Act put every hospital and nursing home, including plaintiffs, on notice that the State would review its operations in order to eliminate excess bed capacity and duplicative services through hospital closures, consolidations and mergers. See Enabling Act §§ 1, 8, and 9. The statute also informed plaintiffs of the process that would be used to review public need. Plaintiffs fully participated in the statutory process. They attended the public hearings and made no fewer than five written submissions to the Commission arguing that none of the CHS facilities should be closed or downsized.

Moreover, plaintiffs' argument that the Commission was constitutionally required to inform them before making its determination of the likelihood that St. Joseph would be slated for closure, though adopted by the dissent below, is contrary to well-settled law. In fact, plaintiffs submitted to the Commission a detailed analysis of the cost of closing St. Joseph (R. 555-58), demonstrating that they were aware that St. Joseph was a candidate for closure. Plaintiffs did not suggest that their extensive written submissions to the Commission would have been different had they been notified that St. Joseph was considered a high priority for closure.

b. The opportunity to be heard was adequate.

There is also no substantial question that plaintiffs received a reasonable opportunity to be heard. The Commission first afforded plaintiffs the opportunity to comment on the analytic framework that the Commission adopted to identify those hospitals that would receive greater scrutiny, and to review and comment on the objective data that would form the basis for the Commission's recommendations. Plaintiffs and other hospitals submitted corrected data to the Commission, thereby minimizing the risk of error (R. 138, 141-42, 785).

Thereafter, as required by the Enabling Act, the Commission held public hearings and otherwise solicited input from interested parties and the public (R. 139, 143-145). With respect to the western region, the RAC conducted nine hours of public hearings on three separate days, receiving testimony from 43 different stakeholders (R. 488). Plaintiffs participated in two of these hearings, presenting testimony and comments on its facilities and the Commission's efforts to reconfigure the hospital industry (R. 139, 488-490). Several of plaintiffs' representatives also met informally with RAC members (R. 139, 488-491). Plaintiffs supplemented these appearances with five written submissions to the Commission and the RAC on a variety of issues, including the impact of possible right-sizing for their facilities (R. 489, 532-566). The Commission received all these submissions and considered them when rendering its recommendations (R. 487-489).

Plaintiffs thus had -- and took advantage of -- many opportunities to oppose any down-sizing or closure of their facilities. The Constitution required nothing more.

Plaintiffs' assertion that due process required the Commission, after making recommendations that affected fifty-seven hospitals around the State, to afford each of the hospitals an individualized, evidentiary hearing, does not raise a substantial constitutional question. First, any procedures under prior law, see Public Health Law § 2806(2), did not prescribe a constitutional mandate. In addition, under the Enabling Act, the Commission was required to evaluate public need and available supply on a regional basis and to make region-wide recommendations. The Enabling Act did not permit the Commission to consider individual hospitals in isolation. The process set forth in the Enabling Act did not provide for "charges" against specific hospitals such that an adjudicative hearing would have been useful in clarifying the relevant facts.

Because of the policy-oriented nature of the Commission's determination, the post-determination evidentiary hearings called for by plaintiffs and the dissenting justice below would have imposed on the State a massive administrative burden without reducing the risk of an erroneous determination. Determining how best to reconfigure hospital bed supply in a given region was essentially a matter of evaluating the undisputed, historical facts in light of the statutory factors and making what were essentially discretionary policy choices. Indeed, plaintiffs have not identified any way in which the post-

determination hearing they claim was constitutionally required could have changed the outcome in any way.

Finally, the objection of the dissenting justice below that, although the RACs held took testimony from stakeholders and interested parties, the "actual decision-making body, the Commission, did not hear testimony from any of the affected health care providers or conduct any public hearings," is insubstantial. The fact that the Commission, as specifically authorized by the Enabling Act, relied in part upon materials gathered by the RACs, has no constitutional significance. An administrative decision-maker may, consistent with due process, rely upon the factual findings and analysis prepared by subordinates. See Keeler v. Joy, 641 F.2d 1044, 1054 (2d Cir.), cert. denied, 454 U.S. 893 (1981); Yaretsky v. Blum, 629 F.2d 817, 822-825 (2d Cir. 1980), rev'd on other grounds, sub. nom. Blum v. Yaretsky, 457 U.S. 991 (1982); Fields v. Blum, 629 F.2d 825 (2d Cir. 1980).

2. Substantive due process

Plaintiffs' substantive due process claim is not substantial, because the Commission's actions are "wholly without legal justification." Bower Assoc. v. Town of Pleasant Valley, 2 N.Y.3d 617, 627 (2004). To be constitutionally arbitrary, the government's actions must shock the conscience or be outrageously oppressive, "not merely incorrect or ill-advised." Ferran v. Town of Nassau, 471 F.3d 363, 370 (2d Cir. 2006) (internal quote omitted). Here, plaintiffs cannot meet that standard because, as the

Appellate Division observed, the Enabling Act contemplated that some facilities should be closed and others resized, consolidated, converted, or restructured, and the Commission's recommendation to close St. Joseph was in keeping with the purpose of the creation of the Commission.

3. The Free Exercise claim

Nor is there any merit to plaintiffs' Free Exercise claim. When the State imposes an incidental burden on the right to the exercise of religion, New York courts examine the interest advanced by the legislation imposing the burden, and balance the respective interests to determine if the burden is justified. Catholic Charities of the Diocese of Albany v. Serio, 7 N.Y.3d 510, 525 (2006). "Substantial deference" must be given to the Legislature's judgments, and "the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom." Id. The interests advanced by the Enabling Act, a generally applicable and neutral law, are weighty and justify the incidental burden on plaintiffs' right to exercise their faith. The Legislature determined that New York's health care system, especially in the western region, is in a deepening state of crisis, caused in substantial part by excess capacity, duplication of services and the lack of a coordinated system. These inefficiencies not only cause the State to expend an ever-increasing portion of its budget on health care, but result in hospitals and nursing homes closing at an alarming rate, endangering the public health. The Legislature's judgment

that hospital closures, mergers and consolidations are necessary to alleviate that crisis is entitled to substantial deference. See Enabling Act § 1.

4. Contract Clause claim

Finally, plaintiffs' Contract Clause claim is insubstantial. Even if the Enabling Act substantially impairs plaintiffs' contracts with vendors and others, the Enabling Act is justified as reasonable and necessary to serve an important public purpose. The statute here serves an important public purpose, as it was designed to ameliorate the State's health care crisis resulting from excess capacity and duplication of services. The statute is also "reasonable and necessary" to meet its stated purposes. The Legislature found that the best way to address the health care crisis was through a comprehensive review of bed capacity in all six regions of the state by an independent, expert commission charged with the task of developing recommendations for the reconfiguration of bed supply to align it with regional needs. Enabling Act §§ 1, 2(a), 8(a). That judgment is reasonable and entitled to deference.

In view of the foregoing, the appeal should be dismissed, sua sponte, on the ground that no substantial constitutional question is directly involved.

Respectfully yours,

ANDREW M. CUOMO
Attorney General

BARBARA D. UNDERWOOD
Solicitor General

ANDREW D. BING
Deputy Solicitor General

Victor Paladino

VICTOR PALADINO
SASHA SAMBERG-CHAMPION
KATHLEEN M. TREASURE
Assistant Solicitors General

cc:

Kenneth A. Manning, Esq.
Phillips Lytle LLP
Suite 3400
One HSBC Center
Buffalo, New York 14203-2887