August 21, 2007

VIA HAND DELIVERY
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, et ano. v. Novello, et al.
Fourth Department Docket No. CA 07-00587

Dear Mr. Cohen:

We are counsel for Appellants on this appeal, and are writing to address three points raised by Respondents in their August 17, 2007 letter to the Court addressed to the issue of whether this appeal directly involves a substantial constitutional question.

First (and as noted in our August 16, 2007 letter to the Court addressed to this issue), the Enabling Legislation suspended, for 18 months, the right of a hospital to a hearing before its operating certificate can be revoked. N.Y. Pub. Health Law § 2806(6). For their part, Respondents contend that the hearing required by Section 2806(6) is not constitutionally mandated. (Resp. Ltr. p. 8). This is simply wrong. Indeed, the legislative history of Section 2806(6) expressly stated that the evidentiary hearing prescribed by that provision is designed to protect "the due process and property rights" of the operators of hospitals. 1978 N.Y. Sess. Laws 1460 (McKinney). Moreover, the Public Health Law mandates that such a hearing be a full evidentiary proceeding. N.Y. Pub. Health Law § 12-a(6). Thus, the Legislature itself has clearly recognized that hospital owners have "property rights" in their operating certificates, and they are entitled to "due process" - - viz., an evidentiary hearing - - whenever those rights are threatened. The Enabling Legislation, while perhaps suspending a hospital owner's statutory right to an evidentiary hearing, cannot suspend an owner's constitutional right to such a hearing.

Second, Respondents argue that the question of Appellants' due process and other constitutional claims "involve[ ] only the routine application of settled principles of law to a particular statutory scheme." (Resp. Ltr. p. 4) (emphasis added). This, however, overlooks Justice Fahey's vigorous dissent on these issues, as well as the fact that Respondents required more than 100 pages to address these "settled principles" in their briefs filed in the trial court and the Fourth Department. We submit that the issues posed on this appeal concerning the constitutionality of the Enabling Legislation are, in fact, those of first impression, including whether: (i) its attempted suspension of Appellants' due process rights is impermissible; and (ii) its legislative veto provision violates the Presentment Clause and the Separation of Powers Doctrine.

Third, Respondents argue that the legislative veto provision is not "directly involved" on this appeal because the Fourth Department determined that that provision was severable from the remainder of the Enabling Legislation. This, however, overlooks that "[a]ll relevant questions of law may be argued" on an appeal, as of right, "upon a constitutional question." Adirondack League Club v. Board of the Black River Regulating Dist., 300 N.Y. 624, 624 (1950); Bogart v. County of Westchester, 295 N.Y. 934, 934 (1946).

Respectfully,

Phillips Lytle LLP

By
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Csdm
Doc # 01-1682556.1

cc: Victor G. Paladino, Esq. (by facsimile)
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