reasonableness" (*Association of Surrogates & Supreme Ct. Reporters Within City of N.Y., 79 NY2d at 46*).

Here, the purpose of the Legislation was for the Commission to examine the current supply of hospital and nursing home facilities and to reconfigure the supply to align with the demand or need. The Legislature determined that minimizing excess capacity was necessary to promote stability and efficiency in the health care system. That is a legitimate public purpose, and the task of the Commission in recommending facilities to close, downsize, or consolidate was both necessary and reasonable to accomplish that purpose.

VIII

Accordingly, although the court properly declared that the Legislation is constitutional, we conclude that the order and judgment should **[***16]** be modified by vacating the provision dismissing those causes of action seeking a declaratory judgment.

DISSENT BY: Fahey

DISSENT

FAHEY, J. (dissenting). I respectfully dissent because I cannot agree with the majority that the Enabling Legislation at issue, i.e., section 31 of part E of chapter 63 of the Laws of 2005 (hereafter, Legislation) is constitutional. The manner in which the Legislation has been implemented and the procedural history of this case have been set out by the majority and I shall not repeat them here. I disagree with the majority on two grounds and thus conclude that the statute should be declared unconstitutional on those **[**271]** grounds. I agree with plaintiffs that defendant New York State Commission on Healthcare Facilities in the 21st Century (Commission) violated their right to procedural due process, and I further agree with plaintiffs that the Legislation violates the *Presentment Clause of the New York Constitution* and the separation of powers doctrine.

I

The Legislation provides for six regional advisory committees (RACs) to hold public hearings and then to make recommendations **[***17]** to the Commission. The Commission would then determine which hospitals were to lose their Certificates of Operation **[*149]** (operating certificates). The Commission recommended changes with respect to the operation of 57 hospitals, approximately one quarter of the state's total number of hospitals. It is uncontested that "[e]ach interested party, including plaintiff Catholic Health System, Inc. (CHS), was limited to a ten (10) minute address" at a public hearing conducted by the western RAC, and plaintiffs also submitted numerous documents to the RAC. The actual decision-making body, the Commission, did not hear testimony from any of the affected health care providers or conduct any public hearings. Thus, none of the parties potentially affected by the recommendations of the RACs was afforded an opportunity to make a presentation to the final decision-making body.

At stake is the continued operation of plaintiff St. Joseph Hospital of Cheektowaga (St. Joseph) that is in fact a solvent health care provider. For the first three quarters of 2006, St. Joseph operated at a surplus of approximately $ 2 million. It serves approximately 30,000 patients per year and employs 800 people.

Pursuant to the **[***18]** Legislation, plaintiffs were provided with the opportunity to express their opinions at a public hearing and through unlimited document submissions to the western RAC, which then presented its recommendations to the Commission. Significantly, none of the hospitals in the region covered by the western RAC was told which were to be closed prior to the public hearing held by the western RAC. St. Joseph did not receive notice of its potential closing prior to the announcement of all hospital closings recommended by the Commission. Further, St. Joseph was given no opportunity to be heard by the Commission before it made its decision.

II

In determining whether there was a violation of the right to procedural due process under the United States Constitution, a court must make a two-part inquiry. First, the court must consider whether there is in fact a constitutionally protected property interest and, if so, the court must then determine whether constitutionally sufficient due process has been provided with respect to the protected property interest (*see Logan v Zimmerman Brush Co., 455 US 422, 428, 102 S Ct 1148, 71 L Ed 2d 265 [1982]*). "Many controversies have raged about the cryptic and abstract words of the *Due Process Clause*, **[***19]** but there can be no doubt that at a minimum they require that deprivation of life, liberty **[*150]** or property by adjudication be preceded by notice and

Exh A

opportunity for hearing appropriate to the nature of the case" (*Mullane v Central Hanover Bank & Trust Co., 339 US 306, 313, 70 S Ct 652, 94 L Ed 865 [1950]*). The majority correctly states the minimum standard for ensuring procedural due process in New York, as set forth in *Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes (94 NY2d 686, 691-692, 731 NE2d 137, 709 NYS2d 481)*.

[272]** Neither the parties nor Supreme Court contested the fact that St. Joseph had a constitutionally protected property interest in its operating certificate. Likewise, the majority concludes that plaintiffs have a protected property interest in St. Joseph's operating certificate, but further concludes that the procedures provided by the Legislation are constitutionally sufficient under the United States Constitution and the New York Constitution.

The majority's conclusion is that a government's interest in restructuring the health care system can override the minimal requirements of notice and a hearing. I do not agree that this additional safeguard would create an overwhelming burden for the government. **[***20]** The history of the procedure governing such closings supports this conclusion.

Prior to the enactment of the Legislation, *section 2806 (6) (a) of the Public Health Law* set forth the procedure to be followed by respondent New York State Health Commissioner (Health Commissioner) in revoking a hospital's operating certificate. That section afforded the Health Commissioner the right to

> "revoke a hospital['s] operating certificate, after taking into consideration the total number of beds necessary to meet the public need . . . and after finding that . . . revoking the operating certificate of such facility would be within the public interest in order to conserve health resources by restricting the number of beds and/or the level of services to those which are actually needed."

The remainder of *section 2806 (6)* sets forth a detailed procedure to be followed by the Health Commissioner, including providing notice and a hearing, before revoking any operating certificate.

Public Health Law § 2806 (2) provides a hospital with a statutory right to notice of a hearing before its operating certificate may be revoked. In providing the protections afforded by that statute, the Legislature **[***21]** wrote: "It is the intention of the legislature to provide a mechanism to protect the rights of patients to proper health care while taking due consideration of **[*151]** the due process and property rights of the operators of such facilities" (L 1978, ch 713, § 1). The Legislature itself clearly recognized that hospital operators have property rights in their operating certificates and that they are entitled to due process when those rights are threatened.

Of course, this is the case with all manner of licenses that are issued by the State of New York (*see generally O'Brien v O'Brien, 66 NY2d 576, 583-584, 489 NE2d 712, 498 NYS2d 743 [1985]* [medical license]; *Matter of Moore v Macduff, 309 NY 35, 38-39, 127 NE2d 741 [1955]* [driver's license]; *Matter of Bender v Board of Regents of Univ. of State of N.Y., 262 App Div 627, 631, 30 NYS2d 779 [1941]* [dental license]). Thus, the relevant case law and the Public Health Law clearly indicate that CHS has a significant property interest in St. Joseph's operating certificate.

The Legislation at issue herein, specifically sections 9 and 11, suspends the rights to notice and the hearing guaranteed by *Public Health Law § 2806 (2)* for a temporary period of time. The suspension of those rights is to remain in effect until June 2008, **[***22]** at which time St. Joseph is to be closed. In essence, the Legislature is suspending a party's right to procedural due process in order to implement a policy decision on a one-time basis.

Notice, to be meaningful, must be actual notice. To close a health care facility without at least allowing the facility to explore the basis for the government's decision is a violation of constitutionally protected due process rights. St. Joseph should have been given a pretermination notice and an opportunity for a hearing. That is not to **[**273]** say that the Commission is required to conduct adversarial proceedings. Rather, it must publicly state its recommendations and allow those affected to explore the basis for its decisions through a hearing process. I recognize that an additional round of hearings by the Commission thus would have been required but, given the serious nature of the Commission's decision, this is the minimum necessary to

satisfy plaintiffs' constitutional procedural due process rights. I am compelled to conclude that the Legislation is unconstitutional inasmuch as the Legislature suspended the requirements for revocation of a hospital's operating certificate set forth in *Public Health Law § 2806* **[***23]** without providing even minimal procedural due process protections.

III

Further, the implementation of the Commission's recommendations violates the *Presentment Clause of the New York Constitution* as well as the separation of powers doctrine. The **[*152]** Legislation requires the Health Commissioner to carry out the Commission's recommendations unless the Governor does not approve them, which did not occur here, or the Legislature adopts a "concurrent resolution" rejecting them (Legislation § 9 [b] [ii]). The Legislature's concurrent resolution is a veto of the Commission's recommendations and must be a veto of the entirety of the Commission's recommendations.

It is apparent that the Legislation inverts the usual procedure utilized for the passage of a bill. According to the usual procedure, a bill is presented to the Governor for his or her signature or veto after passage by the Senate and the Assembly. Should the Governor sign the bill, it becomes law; should the bill be vetoed, the veto may be overridden by a two-thirds vote of the Legislature. Here, the Legislation creates a process that allows the recommendations of the Commission to become law without ever being presented to the Governor after the action of the Legislature. **[***24]** Further, the Governor must transmit his or her message of approval of the Commission's recommendations *before* action by the Legislature instead of *after* action by the Legislature. The Legislation then allows for a veto of the Governor's proposal by a majority vote of the Legislature rather than by a two-thirds vote, and the Governor has no right to veto such legislative action. Stated differently, the Legislature has in effect assumed the veto powers of the Governor.

IV

Although, as I have concluded, section 9 of the Legislation violates both the *Presentment Clause* and the separation of powers doctrine, I further note that section 10 contains a severability clause providing that,

> "[i]f any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been **[***25]** enacted even if such invalid provisions had not been included therein."

A severability clause creates the presumption that the Legislature intended the act to be divisible (*see Alaska Airlines* **[*153]** *, Inc.v Brock, 480 US 678, 686, 107 S Ct 1476, 94 L Ed 2d 661 [1987]*; *National Adv. Co. v Town of Niagara, 942 F2d 145, 148 [1991]*). New York courts, however, have declared an entire act unconstitutional even though it contained a severability clause (*see e.g.* **[**274]** *Matter of New York State Superfund Coalition v New York State Dept. of Envtl. Conservation, 75 NY2d 88, 94, 550 NE2d 155, 550 NYS2d 879 [1989]*). In determining whether to give effect to the severability clause, courts must look to the intent of the Legislature in including the clause in the Act. This Court has before it the affidavit of the former Majority Leader of the New York State Assembly who oversaw the debate and voting on this issue. He stated therein that he believed that neither he nor his colleagues would have voted for this legislation had it not contained the veto provision. I can only conclude therefrom that the inclusion of the veto provision permeated all the decisions made by the Legislature in enacting the Legislation. Thus, the severability clause should not be given effect because the Legislature **[***26]** would not have enacted the Legislation without the veto (*see Alaska Airlines, 480 US at 685*; *CWM Chem. Servs., L.L.C. v Roth, 6 NY3d 410, 423, 846 NE2d 448, 813 NYS2d 18 [2006]*).

In refusing to credit the affidavit of the former Majority Leader, the court relied on *Civil Serv. Empls. Assn. v County of Oneida (78 AD2d 1004, 1005, 433 NYS2d 907 [1980]*, *lv denied 53 NY2d 603, 421 NE2d 854, 439 NYS2d 1027 [1981]*), in which this Court wrote that "postenactment statements or testimony by an individual legislator, even a sponsor, [are] irrelevant and

[were] properly excluded." In failing to rely on the affidavit of the former Majority Leader, the majority implicitly concludes that postenactment statements cannot be considered. Such a conclusion, however, ignores the fact that "[t]his postenactment rule does not apply . . . when such testimony might be appropriate in extraordinary circumstances, such as when the constitutionality of a particular measure is challenged and the existence of a discriminatory purpose, or motivation, becomes relevant" (*id.*, citing *Arlington Heights v Metropolitan Housing Development Corp., 429 US 252, 97 S Ct 555, 50 L Ed 2d 450 [1977]*). Although this case does not involve the existence of any discriminatory purpose, the circumstances are clearly "extraordinary" (*id.*). The magnitude **[***27]** of the deprivation and the minimal nature of the protection offered by the Legislation to the property interest of St. Joseph demand that this Court apply the exception to the postenactment rule and consider the affidavit of the former Majority Leader.

Given that the veto provision is not severable from the remainder of the Legislation, I conclude that the entire Legislation **[*154]** is unconstitutional for the further reasons that it violates the *Presentment Clause* and the separation of powers doctrine. Further, even assuming, arguendo, that the legislative veto provision was severable, I conclude that the Legislation may nevertheless constitute an improper delegation of legislative authority to the Commission (*see generally Boreali v Axelrod, 71 NY2d 1, 9-11, 517 NE2d 1350, 523 NYS2d 464 [1987]*; *Matter of Levine v Whalen, 39 NY2d 510, 515-516, 349 NE2d 820, 384 NYS2d 721 [1976]*).

V

The decision whether to close a hospital can never be easy, and the Legislature and the Governor were faced with difficult choices. The procedures for approval of the Commission's recommendations set forth in the Legislation do not, however, provide the minimal procedural due process rights to which plaintiffs are entitled, and the Legislation violates the *Presentment Clause of the New York Constitution* and the **[***28]** separation of powers doctrine. Accordingly, I would reverse the order and judgment, deny defendants' cross motion for summary judgment, reinstate the amended complaint, grant plaintiffs' motion for summary judgment in part, grant **[**275]** judgment in favor of plaintiffs declaring that the Legislation is unconstitutional and grant the injunctive relief sought.

SCUDDER, P.J., LUNN and PERADOTTO, JJ., concur with CENTRA, J.; FAHEY, J., dissents and votes to reverse in accordance with a separate opinion.

It is hereby ordered that the order and judgment so appealed from be and the same hereby is modified on the law by vacating the provision dismissing those causes of action seeking a declaratory judgment and as modified the order and judgment is affirmed without costs.