IN THE SUPREME COURT
STATE OF FLORIDA

ST. VINCENT'S MEDICAL CENTER, INC.,

Appellant,

vs.

Case No. SC-06-1047
L.T. No. 1D05-1727

MEMORIAL HEALTHCARE GROUP, INC. d/b/a MEMORIAL HOSPITAL JACKSONVILLE and FAWCETT MEMORIAL HOSPITAL, INC.,

Appellees
_____/

ANSWER BRIEF OF APPELLEES, MEMORIAL HEALTHCARE GROUP, INC. d/b/a MEMORIAL HOSPITAL JACKSONVILLE AND FAWCETT MEMORIAL HOSPITAL, INC.

STEPHEN A. ECENIA, ESQUIRE
Florida Bar no. 316334
RICHARD M. ELLIS, ESQUIRE
Florida Bar no. 892777
Rutledge, Ecenia, Purnell & Hoffman, P.A.
Post Office Box 551
Tallahassee, Florida 32302-0551
(850) 681-6788

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PREFACE

In this Answer Brief, the following abbreviations are used:

The record on appeal is referred to as "R Vol. __, ___" in brackets, indicating the specific Volume of the record followed by the page number or numbers.

The trial transcript, which was not separately numbered for record purposes, is referred to as "Trial Transcript" followed by the page number or numbers. It is found in Volume 5 of the record.

Appellant, St. Vincent's Medical Center, Inc., is referred to as "St. Vincent's".

Appellees, Memorial Healthcare Group, Inc. d/b/a Memorial Hospital Jacksonville and Fawcett Memorial Hospital, Inc., are referred to individually as "Memorial" and "Fawcett", respectively, and collectively as "Appellees".

STATEMENT OF THE CASE AND FACTS

Appellees generally adopt St. Vincent's Statement of the Case. However, it should be noted that in denying St. Vincent's motion for summary judgment as to Counts I, II, and III of Appellees' Complaint, and scheduling an evidentiary hearing, the trial court clearly decided there were questions of fact concerning the Challenged Statute.

Appellees are unable to adopt the Statement of the Facts in St. Vincent's Initial Brief. As was the case below, St. Vincent's Statement of the Facts omits the most pertinent facts leading to the enactment of the law at issue herein. Moreover, St. Vincent's Statement of the Facts sets forth references to and excerpts of the testimony of its witnesses as "facts", when the trial court appropriately found such testimony unpersuasive. Therefore, Appellees submit the following Statement of the Facts.

In the fall of 2001, St. Vincent's and St. Luke's Hospital Association, Inc. ("St. Luke's) each filed Certificate of Need ("CON") applications with the Agency for Health Care Administration (AHCA). St. Luke's CON application sought approval to replace its existing hospital, located at 4201 Belfort Road, Jacksonville, with a 214-bed hospital located on the campus of Mayo Clinic Jacksonville. St. Luke's is a not-for-profit corporation owned and controlled by Mayo Foundation, and has an open-heart surgery program at its existing hospital. St. Vincent's CON application sought approval to establish a new, 135-bed hospital at the existing St. Luke's Hospital at 4201 Belfort Road, Jacksonville, with the new hospital to commence operation following the construction and licensure of St. Luke's replacement hospital. St. Vincent's acquisition of the existing St. Luke's Hospital was to serve as the funding source for St. Luke's proposed replacement hospital. The two CON applications were therefore interdependent: if

St. Luke's application was denied, there would be no facility to accommodate the "new" St. Vincent's; and if St. Vincent's application was denied, there would be no acquisition of the existing St. Luke's, and no funding for St. Luke's proposed replacement hospital. See, Memorial Healthcare Group, Inc. d/b/a Memorial Hospital Jacksonville vs. AHCA et al., 25 F.A.L.R. 2808, 2832 (AHCA 2003).

While there have been many CON applications for new hospitals filed with AHCA over the years, submitting two interdependent CON applications, as St. Vincent's and St. Luke's have done, where one provider proposes to establish a "new" hospital in the physical premises of an existing hospital, and the other provider seeks approval to establish a replacement hospital to be funded from the reciepts of the sale of the facility being replaced, is unprecedented. Memorial, supra, 25 F.A.L.R. at 2834.

AHCA preliminarily granted both CON applications, and Memorial challenged the decisions as an existing health care facility in the same health planning service district, pursuant to Section 408.039(5)(c), Florida Statutes. The formal administrative hearing commenced in May 2002, and concluded on October 9, 2002. The Administrative Law Judge entered an Order recommending approval of both applications on February 5, 2003, and AHCA entered a Final Order approving both applications on April 8, 2003. Memorial, supra, 25 F.A.L.R. at 2810, 2878. Memorial appealed, and the First District Court of Appeal affirmed the Final Order on June 16, 2004. Memorial Healthcare Group, Inc. d/b/a Memorial Hospital Jacksonville v. AHCA, et al., 875 So.2d 1244 (Fla. 1st DCA 2004).

In July, 2002, John Maher, CEO of St. Vincent's, met with State Representative Don Davis and State Senator Stephen Wise, each representing Jacksonville, to discuss the possibility of St. Vincent's providing open-heart surgery services at the existing St. Luke's facility. [R Vol. 3, pp. 406-410] In

February, Jeff Gregg, Chief of AHCA's CON Unit, met with Representative Davis, Senator Wise, and a group of community physicians on the staff of the existing St. Luke's Hospital to discuss the continuation of open-heart surgery services at St. Luke's. [R Vol. 3, pp. 528-533; p. 625] In the general session of the 2003 Legislature, Representative Davis and Senator Wise each introduced legislation designed to allow St. Vincent's to provide open-heart surgery at St. Luke's without having to submit an application and undertake the CON process. [HB 177 and SB 56]

The trial court below took judicial notice of the staff analysis of the Committee Substitute for Representative Davis' bill (CS/HB 177). The staff analysis states candidly as follows:

> According to AHCA, it appears that this bill affects the current situation between Mayo Clinic and St. Luke's Hospital in Jacksonville. Inpatient hospital services for the Mayo Clinic in Jacksonville--including adult open-heart surgery--are presently provided at St. Luke's Hospital. The Mayo Clinic has a CON approval to construct a replacement hospital at the site of its outpatient clinic, and then transfer open-heart surgery (and other services) from St. Luke's to the new hospital. It is expected that the new hospital will have a closed medical staff, meaning that all physicians on the medical staff are salaried employees of the hospital. A recommended order for the approval of the replacement hospital was issued by the Division of Administrative Hearings on February 5, 2003, supporting approval of the replacement hospital. The same order recommended approval of the St. Vincent's Hospital proposal to establish a new hospital in the St. Luke's Hospital building...
>
> These facilities have the option to apply for a shared services CON, which may be applied for under section 408.032(2)(b), F.S., but the application could not be processed until St. Vincent's was the owner and license holder of the facilities at that location. Under the current law, that cannot happen until the new Mayo Clinic is built and licensed. According to AHCA, it is also probable that, if such an

> application was submitted and approved, there would be an administrative challenge to that approval.
>
> This suggests the likelihood of a period from one to three years between St. Vincent's Hospital's acquisition of St. Luke's Hospital and their ability to begin operating the new shared open-heart program. **Because of these expected procedural delays, it would likely be necessary to authorize a specific exemption from CON review**, or to enable the shared program to be created without CON review, **to allow the uninterrupted delivery of open-heart surgery services at St. Luke's Hospital**. However, there are seven operational open heart programs in the district.

(Emphasis added)

AHCA's own analysis of the Senate bill references St. Vincent's and St. Luke's. Further, it expresses concern over the constitutionality of the legislation, stating in pertinent part as follows:

> III. EFFECT OF PROPOSED CHANGES:
>
> > This bill would create an exemption from certificate of need review, presumably to encourage St. Vincent's Hospital to establish an open-heart surgery program at the hospital facilities that will be vacated by St. Luke's Hospital. The exemption would avoid the necessity for a full review conducted under the requirements and constraints of the certificate of need program....
>
> VI. LEGAL ISSUES:
>
> ....
>
> > 3. Do the proposed legislation [sic] raise significant constitutional concerns under the U.S. or Florida Constitution (e.g., separation of powers? Access to the courts, equal protection, free speech, establishment clause, impairment of contracts)? **Possibly open to constitutional challenge as an invalid special law, if**

> **requirements of Article III, Section 10 have not been met.**

(Emphasis added) [R Vol. 4, pp. 631-637]

The Committee Substitute for the House bill (CS/HB 177) eventually passed out of the Senate (CS/SB 56). Even though the legislation was written specifically for the benefit of St. Vincent's, it was treated as a general law, and was never noticed to the public as a special or local law pursuant to Section 11.02, Florida Statutes. [Trial Transcript p. 5 (stipulation of the parties)]

On July 11, 2003, the Governor signed CS/SB 56 into law. CS/SB 56 was enacted as Chapter 2003-274, Laws of Florida, and codified as Section 408.036(3)(l), Florida Statutes, the statute at issue in this case (hereinafter referred to as the "Challenged Statute").

The Challenged Statute purports to create an exemption from the requirement of obtaining a CON for the establishment of an adult open-heart surgery program, in the unique circumstances described as follows:

> 1. For an adult open-heart-surgery program to be located in a new hospital provided the new hospital is being established in the location of an existing hospital with an adult open-heart-surgery program, the existing hospital and the existing adult open-heart-surgery program are being relocated to a replacement hospital, and the replacement hospital will utilize a closed-staff model. A hospital is exempt from the certificate-of-need review for the establishment of an open-heart-surgery program if the application for exemption submitted under this paragraph complies with the following criteria:
>
> a. The applicant must certify that it will meet and continuously maintain the minimum Florida Administrative Code and any future licensure requirements governing adult open-heart programs adopted by the agency, including the most current guidelines of the American College of Cardiology and American Heart Association Guidelines for Adult Open Heart Programs.

b. The applicant must certify that it will maintain sufficient appropriate equipment and health personnel to ensure quality and safety.

c. The applicant must certify that it will maintain appropriate times of operation and protocols to ensure availability and appropriate referrals in the event of emergencies.

d. The applicant is a newly licensed hospital in a physical location previously owned and licensed to a hospital performing more than 300 open-heart procedures each year, including heart transplants.

e. The applicant must certify that it can perform more than 300 diagnostic cardiac catheterization procedures per year, combined inpatient and outpatient, by the end of the third year of its operation.

f. The applicant's payor mix at a minimum reflects the community average for Medicaid, charity care, and self-pay patients or the applicant must certify that it will provide a minimum of 5 percent of Medicaid, charity care, and self-pay to open-heart-surgery patients.

g. If the applicant fails to meet the established criteria for open-heart programs or fails to reach 300 surgeries per year by the end of its third year of operation, it must show cause why its exemption should not be revoked.

h. In order to ensure continuity of available services, the applicant of the newly licensed hospital may apply for this certificate of need before taking possession of the physical facilities. The effective date of the certificate of need will be concurrent with the effective date of the newly issued hospital license.

2. By December 31, 2004, and annually thereafter, the agency shall submit a report to the Legislature providing information concerning the number of requests for exemption received under this paragraph and the number of exemptions granted or denied.

3. This paragraph is repealed effective January 1, 2008.

In the language of the Challenged Statute, the "existing hospital and the existing adult open-heart-surgery program" which are to be relocated to a "replacement hospital" refers to St. Luke's. The "new hospital" which is to be established in the location of the "existing hospital" refers to St. Vincent's.

In the trial proceedings below, Appellees proved that no hospital other than St. Vincent's can qualify for the exemption in the Challenged Statute by January 1, 2008, when the Challenged Statute expires. Appellees presented the testimony of Patti Greenberg, an expert in health planning with extensive experience in the Florida CON process and in AHCA's process of licensing hospitals and health care facilities, and Dr. Todd Sagin, a licensed physician and attorney who is an expert in hospital medical staff issues. Elizabeth Dudek of AHCA, who is referred to in St. Vincent's Statement of the Facts as a witness "called" by Appellees, was a witness for St. Vincent's. She was called as an adverse witness in Appellees' direct case. St. Vincent's other witnesses were Eric Springer, an expert in hospital medical staff issues who largely agreed with Dr. Sagin's testimony, and Ron Luke, Ph.D., an expert in health planning.

The testimony of St. Vincent's witnesses, which is referred to and excerpted as "facts" in its Initial Brief, was by turns confusing, irrelevant and unpersuasive.

In finding the Challenged Statute unconstitutional, the trial court rejected much of the testimony of Appellant's witnesses and accepted the testimony of Appellees' witnesses over the conflicting testimony of St. Vincent's witnesses. This is clear from the terms of the Final Declaratory Judgment, and from the decision of the First District Court of Appeal which St. Vincent's has appealed. St. Vincent's Medical Center, Inc. v. Memorial Healthcare Group, Inc. and Fawcett Memorial Hospital, Inc., 928 So.2d 430, 434-435 (Fla. 1st DCA 2006).

ISSUE

There are two related issues to be determined in this appeal. The first is whether, given the trial court's resolution of conflicting evidence and findings of fact below, the Challenged Statute is a special law in the guise of a general law in violation of Article III, Section 10 of the Florida Constitution, on the ground that the classification made in the Challenged Statute can only apply to St. Vincent's. The second issue is whether the Challenged Statute is a special law in the guise of a general law in violation of Article III, Section 10 of the Florida Constitution, because the classification lacks any rational relationship to a legitimate state interest.

STANDARD OF REVIEW

St. Vincent's Initial Brief sets forth the standard of review as de novo, citing Schrader v. Florida Keys Aqueduct Authority, 840 So.2d 1050, 1055 (Fla. 2003). However, review of the opinion in Schrader indicates that the facts in that case were not in dispute. Thus, Appellees submit that Schrader does not stand for the standard of review applicable in this appeal.

This Court has held that when a trial court rules on the constitutionality of a statute following a trial wherein the parties introduce conflicting evidence, as in the instant case, the trial court's legal conclusion must be subjected to de novo review, but the trial court's factual findings must be sustained if supported by legally sufficient evidence; i.e., competent substantial evidence. North Florida Women's Health and Counseling Services, Inc. v. State, 866 So.2d 612, 626 (Fla. 2003). The standard of review of a trial judge's factual findings as articulated in North Florida is found in numerous other Florida cases. See, e.g., Miller v. Miller, 842 So.2d 168 (Fla. 1st DCA 2003); State, Florida Highway Patrol v. Forfeiture of Twenty Nine Thousand Nine Hundred and Eight (29,980) in U.S. Currency, 802 So.2d 1171 (Fla. 3d DCA 2001); Milian v. State, 764 So.2d 860 (Fla. 4th DCA 2000);

Smith v. Sears, Roebuck & Co., 681 So.2d 871 (Fla. 1st DCA 1996); Clegg v. Chipola Aviation, Inc., 458 So.2d 1186, 1187 (Fla. 1st DCA 1984); Concreform Systems, Inc. v. R.M. Hicks Construction Co., 433 So.2d 50 (Fla. 3d DCA 1983).

SUMMARY OF THE ARGUMENT

The Challenged Statute is a special law passed in the guise of a general law, and therefore the Final Declaratory Judgment should be affirmed. There was competent, substantial evidence in the proceedings below to support the trial court's finding that St. Vincent's is the only hospital in Florida that can qualify for the CON exemption before the Challenged Statute is repealed effective January 1, 2008. Thus, the First District Court of Appeal's decision in State of Florida, Dept. of Business and Prof. Reg., Div. of Pari-Mutuel Wagering v. Gulfstream Park Racing Ass'n, Inc., 912 So.2d 616 (Fla. 1st DCA 2005), is not implicated in this appeal. Further, the CON Act itself, its historic interpretation, and the testimony of all experts in health planning at the trial below demonstrate that the Challenged Statute bears no rational relationship to a legitimate state interest. The absence of rational basis for the Challenged Statute is itself an independent basis for invalidating the Challenged Statute as a special law passed in the guise of a general law.

The 2008 "sunset" provision also supports the conclusion that the Challenged Statute is a special law. St. Vincent's argument to the contrary, and the cases from other jurisdictions cited in support thereof, would lead to absurd results if adopted in Florida. Further, case law in at least one other jurisdiction demonstrates that "limited duration" of a law is indeed a factor in whether the law is a special or general law.

ARGUMENT

I. Appellees Demonstrated By Competent, Substantial Evidence Below That The Challenged Statute Is A Special Law Passed In The Guise Of A General Law In Violation Of Article III, Section 10 Of The Florida Constitution. The District Court Of Appeal's Decision And The Final Declaratory Judgment Should Be Upheld Under The Applicable Standard Of Review.

In considering St. Vincent's arguments in this appeal, the appropriate standard of review must be applied. The standard of review articulated by the District Court of Appeal in the case below should also apply in this appeal. The opinion which St. Vincent's appeals is instructive in this regard:

> We first consider the appropriate standard of review. In many instances, an evidentiary hearing is an implicit requisite for determining whether a statute may potentially apply to other parties. Compare Fla. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering v. Gulfstream Park Racing Ass'n, 912 So.2d 616, 620 (Fla. 1st DCA 2005) (finding the question of whether statute could apply to others is, in part, an issue of fact), review pending, No. SC05-2130, with Dep't of Bus. Reg. v. Classic Mile, Inc., 541 So.2d 1155, 1157 (Fla.1989) (determining factual findings unnecessary as all parties agreed it was facially impossible for statute to apply to others) and Ocala Breeders' Sales Co. v. Fla. Gaming Ctrs., Inc., 731 So.2d 21, 25-26 (Fla. 1st DCA 1999) (finding tiebreaker provision of statute made it facially impossible for others to obtain the single license available). Here, the trial court properly conducted an evidentiary hearing. Accordingly, the final declaratory judgment has both factual findings and legal conclusions. Under the familiar maxim, we review findings of fact under the competent substantial evidence standard, while legal conclusions are reviewed de novo. See Gulfstream Park, 912 So.2d at 620 ("We accept the trial court's findings of fact and apply the de novo standard of review only to the legal conclusion drawn from the facts."). Arguing for de novo review, St. Vincent's urges this court to determine independently whether Appellees failed

> to prove their case beyond a reasonable doubt. See Lakeland Reg'l Med. Ctr., Inc. v. Fla. Agency for Health Care Admin., 917 So.2d 1024, 1030 (Fla. 1st DCA 2006) (stating that a statute will not be found unconstitutional unless proven invalid beyond a reasonable doubt). Nevertheless, we review the circuit court's factual findings for legal sufficiency, not evidentiary weight, just as we would in a criminal case. See, e.g., Tibbs v. State, 397 So.2d 1120, 1123 (Fla.1981) ("Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.").

St. Vincent's Medical Center, Inc. v. Memorial Healthcare Group, Inc. and Fawcett Memorial Hospital, Inc., 928 So.2d 430, 433-34 (Fla. 1st DCA 2006).

This Court and Florida's District Courts of Appeal have historically deferred to trial judges in determining the credibility of witnesses, weighing conflicting evidence, and making factual findings, including cases where the constitutionality of a statute is at issue. As was stated in North Florida Women's Health and Counseling Services, Inc. v. State, 866 So.2d 612, 626 (Fla. 2003):

> A trial court's ruling concerning the constitutionality of a statute following a trial wherein the parties introduce conflicting evidence is generally a mixed question of law and fact. We conclude that the proper standard of review in such cases is as follows: the trial court's ultimate ruling must be subjected to de novo review, but the court's factual findings must be sustained if supported by legally sufficient evidence. Legally sufficient evidence is tantamount to competent substantial evidence.

The standard of review of a trial judge's factual findings as articulated in North Florida has been applied in many other Florida cases. Miller v. Miller, 842 So.2d 168 (Fla. 1st DCA 2003); State, Florida Highway Patrol v. Forfeiture of Twenty Nine Thousand Nine Hundred and Eight (29,980) in U.S. Currency, 802

So.2d 1171 (Fla. 3d DCA 2001); Milian v. State, 764 So.2d 860 (Fla. 4th DCA 2000); Smith v. Sears, Roebuck & Co., 681 So.2d 871 (Fla. 1st DCA 1996); Clegg v. Chipola Aviation, Inc., 458 So.2d 1186, 1187 (Fla. 1st DCA 1984) (holding that "[t]he resolution of factual conflicts by a trial judge in a nonjury case will not be set aside on review unless totally unsupported by competent substantial evidence"); Concreform Systems, Inc. v. R.M. Hicks Construction Co., 433 So.2d 50 (Fla. 3d DCA 1983).

The trial court was uniquely situated to completely understand the operation of the Challenged Statute, including its various terms of art, as addressed by the conflicting testimony offered below. The Challenged Statute creates a CON exemption for an "adult open-heart-surgery program to be located in a new hospital provided the new hospital is being established in the location of an existing hospital with an adult open-heart-surgery program, the existing hospital and the existing adult open-heart-surgery program are being relocated to a replacement hospital, and the replacement hospital will utilize a closed-staff model." This language is followed by the Challenged Statute's enumerated criteria, among which is the requirement that "[t]he [exemption] applicant is a newly licensed hospital in a physical location previously owned and licensed to a hospital performing more than 300 open-heart procedures each year, including transplants."

In analyzing the Challenged Statute and all that is needed to qualify for the exemption, it should first be recognized that two willing parties are required: the entity which will be the "new hospital"; and the "existing hospital with an adult open-heart-surgery program", which must relocate to a "replacement hospital" to make room for the "newly licensed hospital in a physical location previously owned and licensed to a hospital performing more than 300 open-heart procedures each year, including transplants." The "existing hospital with an adult open-heart-

surgery" program cannot lie dormant and unlicensed for a period of time before becoming occupied by the "newly licensed hospital"; if that were the case, it would not be an "existing hospital". For there to be the seamless transition in the licensed operation of the "existing hospital", it must be acquired by the entity which is to be the "new hospital" at that location, and that entity must immediately succeed to licensure of the "existing hospital" once the "existing hospital" is licensed as a "replacement hospital". In this regard, it should be noted that the terms of St. Vincent's acquisition of St. Luke's were substantially agreed to by the time the two hospitals filed their CON applications in the fall of 2001; indeed, it would not have made sense for the applications to be filed absent that agreement. No other hospital in Florida enjoys this "head start" conferred upon St. Vincent's in meeting the criteria for the exemption in the Challenged Statute.

If there are two willing parties, and the details of the acquisition of the hospital with an adult open-heart surgery program can be worked out, one must then consider the inordinate length of time it takes to become a "newly licensed hospital in a physical location previously owned and licensed to a hospital performing more than 300 open-heart procedures each year, including transplants."

St. Vincent's unique facts and circumstances demonstrate this. As mentioned, the CON applications of St. Vincent's and St. Luke's were filed in the fall of 2001. Approximately 30 months passed from the time the applications were filed to the conclusion of judicial review in 2004. As Appellees demonstrated below, that duration is not at all uncommon in CON litigation. It would not be prudent for any approved CON applicant to go forward with a project prior to conclusion of judicial review, and, accordingly, St. Luke's did not proceed with construction of its replacement hospital while the appeal of AHCA's final order was pending. With judicial review concluded, St. Luke's can prudently undertake construction of its replacement hospital. Robert Walters, St. Luke's administrator,

testified in his deposition in this case that construction of the replacement hospital will take approximately three years to complete [R Vol. 3, p. 464], during which St. Vincent's can do nothing but wait before becoming a "newly licensed hospital in a physical location previously owned and licensed to a hospital performing more than 300 open-heart procedures each year, including transplants."

The requirement of a "physical location previously owned and licensed to a hospital performing more than 300 open-heart procedures each year," coupled with the requirement that "the existing hospital and the existing adult open-heart-surgery program are being relocated to a replacement hospital, and the replacement hospital will utilize a closed-staff model," is a detailed description of St. Luke's Hospital. As the trial court found, St. Luke's is the only hospital in the state performing more than 300 open-heart procedures that is being relocated to a replacement hospital that will utilize a closed-staff model. [R Vol. 5, p. 883]

A "closed-staff model" medical staff is one in which the physicians are salaried employees of the hospital, rather than being self-employed or members of a group practice with clinical privileges granted under the hospital's medical staff bylaws. See, Naples Community Hospital, Inc. vs. Agency for Health Care Administration and Collier HMA, Inc., 26 F.A.L.R. 87, 95 (AHCA 2003). As the trial court found below, closed medical staffs exist in Florida in only in a handful of academic hospitals and highly-specialized hospitals. Some of these hospitals may even have on their medical staffs non-employee community physicians with clinical privileges to admit patients to the hospital. In virtually all Florida hospitals, including those with adult open-heart surgery programs, the medical staff is open to all physicians who apply for membership and can meet the criteria for staff membership stated in the medical staff bylaws.

At trial, Appellees demonstrated there are numerous practical and legal difficulties in closing a medical staff. St. Luke's itself is an example of how

difficult it is to close a medical staff. Paragraphs 38-41 of the Administrative Law Judge's order in the CON litigation indicate the following:

> 38. Prior to its affiliation with Mayo, St. Luke's was a local community provider. More than two-thirds of its patients originated from Jacksonville and Duval County. Few patients originated from beyond northeast Florida. Its only tertiary service was adult open-heart surgery.
>
> 39. In recognition of its importance as a community provider, the seller of St. Luke's conditioned its acquisition on the requirement that an open staff be maintained for five years after purchase. St. Luke's acquiesced. St. Luke's Hospital, therefore, promised to be "open-staffed" at least until 1992.
>
> 40. With the end in 1992 of the open-staff requirement imposed at sale, concern over community access continued. To address the concern, Mayo committed to continue to keep the staff open at St. Luke's as long as it remained operationally feasible to do so.
>
> 41. In keeping with that commitment, today St. Luke's has approximately 700 non-Mayo physicians or community physicians on staff in addition to 300 or so Mayo physicians.

Memorial, supra, 25 F.A.L.R. at 2821. The Mayo Foundation acquired ownership of St. Luke's in 1987. As the ALJ found in the CON case, the medical staff was still not closed fifteen years later.

Florida law recognizes that the medical staff bylaws constitute a binding and enforceable contract between the hospital and members of its medical staff. Fernandez v. Coral Gables Hospital, Inc., 720 So.2d 1161 (Fla. 3d DCA 1998); Greenberg v. Mount Sinai Medical Center of Greater Miami, Inc., 629 So.2d 252 (Fla. 3d DCA 1994); Lawler v. Eugene Wuesthoff Memorial Hospital, 497 So.2d 1261 (Fla. 5th DCA 1986). It is the medical staff bylaws which provide for

admission to the medical staff, and for the granting of clinical privileges to physicians to admit patients to the hospital and to treat them there. Since the medical staff bylaws constitute a contract between the hospital and members of its medical staff, the hospital administration is not at liberty to unilaterally close the medical staff where the terms of the bylaws provide for an open staff. A hospital that would undertake to close the staff contrary to the terms of the bylaws is likely to be sued by existing members of the medical staff who would be excluded from the closed staff. Further, if the hospital unilaterally amends the medical staff bylaws, such an action would be in violation of the accreditation standards of the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), the body which accredits Florida hospitals. [Trial Transcript, pp. 48-51] (The vast majority of Florida hospitals are JCAHO-accredited.) Amending the bylaws to allow for a closed staff is simply unrealistic, as amendments generally require approval by a super-majority (e.g., two-thirds) of the active medical staff. Thus, the law in Florida, and JCAHO's standards, weigh heavily in favor of keeping open medical staffs open.

Appellees proved below that any of the steps necessary to obtain an exemption under the Challenged Statute--acquisition of existing hospital performing more than 300 adult open-heart procedures each year; final approval of the two CON applications required; construction of the replacement hospital; closure of the medical staff--can take years to achieve. When all of the steps necessary to qualify for the exemption are combined, it is clear that no hospital in Florida other than St. Vincent's has even a possibility of qualifying for the exemption before the Challenged Statute is repealed effective January 1, 2008. St. Vincent's itself may not even qualify by that date.

At trial, Appellees' presented testimony from Patti Greenberg, a recognized expert in health planning in Florida. [Trial Transcript, pp. 97-101] Her expertise

was not challenged by St. Vincent's. She discussed each step in the complicated process of qualifying for the CON exemption under the Challenged Statute. Ms. Greenberg established that the convoluted requirements of the statute were unlike any prior health care arrangement in Florida other than the unique circumstances related to St. Vincent's. She also demonstrated that the requirements were such that no other facility could reasonably be expected to qualify before the repeal date of January 1, 2008. [Id., pp. 103-125]

As Ms. Greenberg noted, the application for the "new" hospital and any application for a "replacement" hospital could not be filed simply at the convenience of the applicant, but could only be filed in bi-annual comparative review (or "batching") cycles, consistent with the CON law. [Trial Transcript p. 104] Once filed, the applications could potentially be denied by AHCA, or, if approved, challenged in an administrative proceeding by an existing health care facility with an established program in the same service district. Section 408.039(5)(c), Florida Statutes (2004).

Ms. Greenberg established that since 1996, the time for a replacement hospital to become licensed and operational, as measured from the submission date for the CON application, has averaged 44 months. That time is for straightforward replacement hospital projects, i.e., applications not tied to any other CON application as in the case of St. Vincent's and St. Luke's. [Trial Transcript p. 120; Plaintiffs' Exhibit 7] She noted that the replacement of Cleveland Clinic, the only replacement hospital with a closed medical staff and an adult open-heart surgery program, took over six years from submission of its CON application to its eventual licensure. [Id.] The exemption criteria compound the difficulty of qualifying for the exemption by adding the requirement that a "new hospital" be established in the location of an "existing hospital with an adult open-heart-surgery program". This requirement can add years to the process due to the transacting

that occur in order to create the perfect storm which results in a "new hospital" being established in the location of an "existing hospital with an adult open-heart-surgery program".

As Ms. Greenberg testified, construction of a replacement hospital cannot begin until construction plans are prepared and approved by AHCA, a process which takes months to complete. [Trial Transcript, pp. 105-107] Once the commencement of construction is approved by AHCA, the process of constructing the hospital itself takes years. St. Luke's replacement hospital is projected to take three years to complete, from the beginning to the end of construction.

Dr. Todd Sagin, an expert in hospital medical staff issues, testified to the overwhelming practical and legal difficulties involved in "closing" a hospital's medical staff. [Trial Transcript, pp. 34-70] Dr. Sagin demonstrated that "closing" an open medical staff is virtually impossible without the consent of a super-majority (typically two-thirds) of the medical staff.

The trial court below found that only St. Vincent's could qualify for the CON exemption in the Challenged Statute before the statute expires on January 1, 2008. The District Court of Appeal affirmed that finding. 928 So.2d at 434-435. Notably, St. Vincent's Initial Brief does not argue that the record lacks competent, substantial evidence for the trial court to make that factual finding. Instead, St. Vincent's offers (in its Statement of the Facts) references to and excerpts of the testimony of its witnesses, apparently as "proof" to this Court that one or more hospitals other than St. Vincent's can qualify for the CON exemption. This evidentiary argument should be rejected out of hand. North Florida, supra.

For the sake of argument, if St. Vincent's evidence is considered, it demonstrates the wisdom of the trial court in finding it unpersuasive. For example, St. Vincent's excerpts the testimony of Ms. Dudek as follows (Initial Brief, Statement of the Facts, pp. 14-15):

Q. How did Cleveland Clinic first enter the state?

A. They came into the state and purchased a hospital that was on the coast of Florida.

Q. Was that hospital subsequently replaced?

A. Yes, it was.

Q. Is there anything that would prohibit Cleveland Clinic from acquiring another hospital in Florida that already has an existing adult open-heart surgery program?

A. No, nothing at all.

Q. How did Mayo Clinic first enter the state?

A. They also came into the state and purchased an existing hospital.

Q. Is there anything that would prohibit the Mayo Clinic from acquiring another hospital in Florida that has an adult open-heart surgery program?

A. No.

The foregoing demonstrates a complete misunderstanding of the operation of the Challenged Statute. The significance of the Cleveland Clinic and Mayo Clinic (actually St. Luke's Hospital in Jacksonville, which is owned by Mayo) is that they are the only two closed-staff hospitals in Florida that have adult open-heart surgery programs (as was noted in the Final Declaratory Judgment). The Challenged Statute requires the entity seeking the exemption to establish a licensed hospital at the premises of an existing hospital with an adult open-heart surgery program performing more than 300 procedures each year, with the existing hospital relocating its operations to a "replacement" hospital that will utilize a closed staff. Thus, an entity seeking an exemption under the Challenged Statute would want to purchase either the Cleveland Clinic or the Mayo Clinic, rather than the Cleveland

Clinic or Mayo Clinic "acquiring another other hospital that has an adult open-heart surgery program." As the trial court found, the Cleveland Clinic does not perform more than 300 open-heart procedures each year, making the acquisition of Mayo (i.e., St. Luke's) the only option for an entity (i.e., St. Vincent's) seeking the exemption. Further, Cleveland Clinic replaced its hospital in Broward County following a litigious process which lasted (as Ms. Greenberg testified) for more than six years. It is absurd to believe that Cleveland Clinic would replace and relocate its facility a second time.

Ms. Dudek's testimony was also notable for her proposition that the Challenged Statute does not require the exemption applicant to establish a licensed hospital at the premises of an existing hospital with an adult open-heart surgery program (despite the requirement that the applicant be a "newly-licensed hospital"), and that the Challenged Statute only requires the replacement hospital to utilize a closed open-heart surgery staff, rather than a closed medical staff for the entire hospital (despite the requirement that "the replacement hospital will utilize a closed-staff model"). [Trial Transcript, pp. 189-192; 193-194] This testimony was rightly rejected by the trial court.

Similarly, the trial court did not accept the testimony of Ron Luke, St. Vincent's primary health planning expert witness. Dr. Luke's testimony was based largely on the experience of hospitals in Texas, a state which has not had CON regulation since 1985. [Trial Transcript, pp. 360-364] In his testimony, Dr. Luke sidestepped the Challenged Statute's reference to a "replacement hospital", suggesting instead that a single entity owning the "existing" hospital could continue its ownership and operation of that hospital and simply build a new, additional hospital elsewhere, rather than relocating its existing operations to a replacement hospital. [Trial Transcript, pp. 356-360] It is this sort of testimony that the trial court correctly rejected in Appellees' favor. The term "replacement

hospital" is a term of art in Florida CON law, meaning an "existing" hospital licensee either rebuilds its facility on-site or relocates its operations to a new facility on another site. See, e.g., Memorial, supra; HCA Health Services of Florida, Inc. d/b/a Oak Hill Hospital vs. Hernando HMA, Inc. d/b/a Brooksville Regional Hospital, 24 F.A.L.R. 1089 (AHCA 2003).

As the District Court stated succinctly below, "The circuit court heard extensive, conflicting expert testimony regarding the statute's potential applicability to parties other than St. Vincent's before the sunset date of January 1, 2008. In the final declaratory judgment, the court accepted the testimony of Appellees' experts as more credible." 928 So.2d 434-435.

The trial court's factual findings, which must be respected, are dispositive of this appeal. The trial court did not find that an entity other than St. Vincent's could conceivably qualify for the exemption in the Challenged Statute prior to its expiration on January 1, 2008; rather, the trial court found that only St. Vincent's could qualify for the exemption by January 1, 2008. In other words, the Challenged Statute is a special law, as the "classification" it contains perfectly describes only St. Vincent's.

II. Florida Law Does Not Require That A Statutory Classification Be Facially "Closed" To Determine That The Statute Is A Special Law. The Challenged Statute Is Invalid Without Regard To The First District Court Of Appeal's Decision In Gulfstream.

In addition to its evidentiary arguments, St. Vincent's argues that a statutory classification must be absolutely and in every sense "closed" on the face of the statute in order for the statute to be declared a special law. This is simply not the law in Florida.

Article III, Section 10 of the Florida Constitution provides as follows:

> Special laws.--No special law shall be passed unless notice of intention to seek enactment thereof has been published in the manner provided by general law. Such notice shall not be necessary when the law, except the provision or the referendum, is conditioned to become effective only upon approval by vote of the electors of the area affected.

A special law is one relating to, or designed to operate upon, particular persons or things, or one that purports to operate upon classified persons or things when classification is not permissible or the classification adopted is illegal. State ex rel. Landis v. Harris, 120 Fla. 555, 562-63, 163 So. 237, 240 (Fla. 1934). A statute is invalid if "the descriptive technique is employed merely for identification rather than classification." West Flagler Kennel Club, Inc. v. Florida State Racing Commission, 153 So.2d 5, 8 (Fla. 1963). Further, a statutory classification scheme must bear a reasonable relationship to the purpose of the statute to constitute a valid general law. Department of Business Regulation v. Classic Mile, Inc., 541 So.2d 1155, 1157 (Fla.1989). Statutes that employ arbitrary classification schemes are not valid as general laws. Classic Mile, supra.

As the trial court stated, the Challenged Statute "is nothing more than a description of the situation involving St. Vincent's and St. Luke's." [R Vol. 5, p.

883] The Challenged Statute cannot be reasonably read any other way. As such, the Challenged Statute is invalid as a special law passed in the guise of a general law. West Flagler, supra.

Further, the classification in the Challenged Statute is completely arbitrary, bearing no rational relationship to any recognizable state interest. This was apparent to the trial court, although not expressly stated in the Final Declaratory Judgment. [Trial Transcript p. 423]

The use of an arbitrary classification is itself be a basis for finding a statute an unconstitutional special or local law passed in the guise of a general law. As this Court stated in Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879 (Fla. 1983):

> The classification scheme must be reasonable and not arbitrary, Waybright v. Duval County, 142 Fla. 875, 196 So. 430 (1940), and must rest on some reasonable relation to the subject matter in respect of which the classification is proposed.
>
> 434 So.2d at 881.

The Sanford-Orlando Kennel Club opinion's citing of Waybright is instructive. Waybright involved an act to establish a plan for creation and operation of a civil service commission in counties of a "Population of Not Less Than One Hundred Sixty-Five Thousand and Not More Than One Hundred Eighty Thousand According to the Last Florida State Census, or Any Subsequent State or Federal Census." In considering the constitutionality of the law, the Supreme Court first noted as follows:

> The only county falling within this classification at the time the measure became effective was the one which is a party to this suit and it is conceivable that it can in a future census pass from the designated

> span of population by losing inhabitants until it has fewer than one hundred sixty-five thousand or, more probably, gaining until its population exceeds the larger number. It is possible, too, that some county with residents short of the minimum number upon the taking of one census might pass beyond the other limitation upon a succeeding one, thereby failing to receive the benefits of the civil service
> plan.
>
> We state such possibilities at the outset because they naturally influence the court in a study of the relationship between the population range, within which a county must fall to take advantage of the act, and the subject matter of it.
>
> It is conceded by appellant, however, that, no provision having been included for abolition of the plan when once established, a county could not lose it by an increase in population in excess of one hundred eighty thousand. There must be a reasonable basis for a classification of this character, else the act will be declared a local one. [citations omitted]

142 Fla. at 880. The Court concluded that "because of the indistinct relationship between the purposes of the law and the populations of counties where it would be applicable or available, it is in reality a special act, hence cannot stand, having been enacted by the Legislature as a general one." 142 Fla. at 881.

Waybright demonstrates the fallacy in St. Vincent's argument that a statutory classification must be absolutely and in every sense "closed" to be an unconstitutional special law. In Waybright, the classification was a population of not less than one hundred sixty-five thousand and not more than one hundred eighty thousand, and this Court itself noted that different counties might or might not qualify over time, depending upon fluctuation in their population. What was significant was that the statute had no rational relationship to the establishment of a civil service commission, and it was that absence which led to the conclusion that

the statute was an unconstitutional special law. See, also, Morris v. Bryan, 198 So.2d 18 (Fla. 1967); State ex rel. Cotterill v. Bessenger, 133 So.2d 409 (Fla. 1961); Walker v. Pendarvis, 132 So.2d 186 (Fla. 1961); compare, Lewis v. Mathis, 345 So.2d 1066 (Fla. 1977). The Challenged Statute similarly has no rational basis. It provides for an additional open-heart surgery program in a health planning service district without taking any account of the location of the program, the number of existing programs already in operation, or the potential adverse impact on the quality of care and case volumes of existing providers. Such a result is positively contrary to the underlying policies of the CON Act and the state's legitimate interest in the regulation of health facilities and services.

Significantly, all three health planning expert witnesses agreed at trial that the Challenged Statute provides for an additional open-heart surgery program in a health planning service district without taking into account the number of existing open-heart surgery programs, their location, or the volume of procedures done at any of the existing programs (except for the "replacement hospital" mentioned in the Challenged Statute). [Trial Transcript, pp. 121-122 (Ms. Greenberg); pp. 195-196 (Ms. Dudek); p. 383 (Mr. Luke)] This "blind" aspect of the Challenged Statute cannot be reconciled with CON regulation of open-heart surgery services, which historically has been concerned with access to the service (evaluated based on the location and number of existing providers) and quality of the service (measured by the volume of procedures done by providers). See, e.g., Bethesda Healthcare System, Inc. vs. AHCA et al., 25 F.A.L.R. 3872, 3901-3902 (AHCA 2003).

St. Vincent's could have followed the path typically taken by most hospitals in the state and applied for and obtained a certificate of need (rather than an exemption) to establish a "new hospital" and a new open-heart surgery program at the St. Luke's location. St. Vincent's instead elected to apply for a CON only for

the establishment of "new hospital" at the existing St. Luke's (rather than a new hospital with an open-heart surgery program). Clearly, the objective of the Challenged Statute is simply to provide a CON exemption for the establishment of an open-heart surgery program at St. Vincent's new location. If the District Court's decision is reversed, the end result will be the addition of a new open-heart surgery program to health planning service District 4 that has circumvented the CON process applicable to any other hospital seeking to add a new open-heart surgery program.

The Challenged Statute cannot be salvaged upon the narrow reading of the holding in Sanford-Orlando Kennel Club, supra as suggested by Appellant. In both Sanford-Orlando Kennel Club and Summersport Enterprises, Ltd. v. Pari-Mutuel Commission, 493 So.2d 1085 (Fla. 1st DCA 1986), rev'd denied, 501 So.2d 1283 (Fla. 1986), the courts stated that the state has a legitimate pecuniary interest in pari-mutuel wagering because of the substantial revenue it receives, and noted that the legislature has historically and traditionally enacted valid general laws which make numerous distinctions among classifications of the various pari-mutuel permit holders. Both courts also noted that, because of the nature of the enterprises being regulated, the state was entitled to exercise greater control and use the police power in a more arbitrary manner.

Unlike the gambling industry, with its unique role in state revenue and taxation and its limited number of permit holders, the state's regulation of hospitals does not create limited specialized distinctions and classifications. Further, there is no revenue justification or other matter of statewide significance to justify creating a special exemption from the CON law for St. Vincent's. There is simply no reason for the Challenged Statute other than to grant St. Vincent's an exemption from the CON laws of the state.

Most of St. Vincent's Initial Brief is dedicated to the argument that the First District Court of Appeal's decision in State of Florida, Dept. of Business and Prof. Reg., Div. of Pari-Mutuel Wagering v. Gulfstream Park Racing Ass'n, Inc., 912 So.2d 616 (Fla. 1st DCA 2005) constitutes a new standard by which to judge whether a statute is a special or general law, which (according to St. Vincent's) was wrongly relied upon by the First District Court of Appeal in upholding the trial court's determination to invalidate the Challenged Statute. However, the standard set forth in Gulfstream (assuming for the sake of argument that it is "new") is not implicated in this appeal.

First, as shown above, Appellees prevailed before the trial court not based upon the "reasonable probability" standard of Gulfstream (which had not been articulated by the First DCA at the time of the Final Declaratory Judgment), but because Appellees' evidence demonstrated that no hospital other than St. Vincent's can possibly qualify for an exemption under the Challenged Statute by January 1, 2008, when it expires. Under the applicable standard of review, it is not only unnecessary, but inappropriate, to now re-evaluate the evidence Appellant's presented at trial and for this Court to determine whether such evidence "establishes" that other hospitals can, as a matter of fact, qualify for the exemption by January 1, 2008. As a matter of fact, there is no "reasonable probability" that any hospital other than St. Vincent's can qualify for the exemption prior to January 1, 2008, but the trial court specifically found that St. Vincent's is the only hospital that can qualify for an exemption under the Challenged Statute. [Trial Transcript, p. 437] For this reason, this Court may affirm the First District's decision below without considering whether or not the "reasonable probability" standard enunciated in Gulfstream is correct.

Further, St. Vincent's argument that Gulfstream was wrongly decided assumes that a statutory classification must, on its face, be absolutely and in every

sense "closed" in order to be a special law; or, alternatively, that the parties must stipulate (as in Classic Mile, supra) that the classification as applied is absolutely "closed". St. Vincent's cites no specific case in support of this proposition, but rather advances what it characterizes as an "unbroken line of precedent" supporting the proposition that a statute is a special law only when the statute is "completely closed, i.e. where it is impossible for others to meet the statute's classification," citing Sanford-Orlando Kennel Club, supra among other cases.

As Waybright, supra (cited in Sanford-Orlando Kennel Club) demonstrates, there is no "bright line" test for determining whether a statute is an invalid special law. Rather, the statutory classification can be theoretically open, and still be impermissible. Further, a review of prior decisions of this Court indicates that statutory classifications are consistently evaluated to determine whether they are, as a matter of fact, open or closed.

City of Miami v. McGrath, 824 So.2d 143 (Fla. 2002) is an example of a classification which has been analyzed for purposes of determining whether the statute is a special law. In McGrath, the Court considered Section 218.503(5), Florida Statutes (1999), which authorized a municipality to impose a parking tax but restricted which municipalities could impose the tax as follows:

> (5)(a) The governing authority of any municipality with a resident population of 300,000 or more by April 1, 1999, and which has been declared in a state of financial emergency pursuant to this section within the previous two fiscal years may impose a discretionary per vehicle surcharge of up to 20 percent on the gross revenues of the sale, lease, or rental of space at parking facilities within the municipality that are open for use to the general public.
> ....
> (c) This subsection is repealed on June 30, 2006.

In July, 1999, the City of Miami implemented the statute by passing an ordinance authorizing a parking tax. McGrath filed suit against the City, alleging that the statute constituted a special law passed in the guise of a general law, and thus was unconstitutional under Article VII, Section 1(a) of the Florida Constitution (which prohibits state ad valorem taxes, but preempts all other forms of taxation to the state except as provided by general law).

The McGrath Court stated in pertinent part as follows:

> To determine whether section 218.503(5)(a) constitutes a special law, which must decide whether the law is designed to operate upon particular municipalities through its restrictive classification system, and whether the classification in this case, which limits application of the statute to municipalities with over 300,000 residents on or before April 1, 1999, is arbitrary. In other words, we must determine whether this statute is "based upon proper distinctions and differences that inhere in or are peculiar or appropriate to a class," Classic Mile, 541 So.2d at 1157, or whether this statute is designed to operate upon or benefit only particular municipalities and thus is essentially no different than if the statute had identified the particular municipalities by name...
>
> In this case, section 218.503(5)(a) falls squarely within the definition of a special law as articulated by this Court in [Fort v. Dekle, 138 Fla. 871, 190 So. 542 (1939)], Walker v. Pendarvis, 132 So.2d 186, 192-93, 195 (Fla. 1961), and Department of Bus. Regulation v. Classic Mile, Inc. 541 So.2d 1155, 1157 (Fla. 1999)]. First, the population classification in this case constitutes nothing more than a "descriptive technique" used merely to identify three particular municipalities to which the statute applies. See, Classic Mile, 541 So.2d at 1159. Limiting the statute to only those municipalities with populations of more than 300,000 on April 1, 1999, is tantamount to restricting the statute to those particular municipalities [Miami, Tampa and Jacksonville] that met this population threshold on that particular date.

In theory, numerous Florida municipalities could have had populations of more than 300,000 on April 1, 1999, the operative date for the classification in the statute at issue in McGrath. However, the McGrath Court did not consider the statute in a theoretical sense, but rather, as applied, and determined that only three counties met the population threshold. Similarly, in the instant case, the Challenged Statute is nothing more than a description of the CON applications filed by St. Vincent's and St. Luke's, with a sunset provision that gives only St. Vincent's a chance of meeting the Exemption Provision's criteria before the law is repealed effective January 1, 2008. It is a special law in the same sense that section 218.503(5)(a), Florida Statutes was found a special law in McGrath.

Strict enforcement of the procedural requirements for special laws is particularly important in dealing with legislation that creates an exemption or exclusion from a state-wide regulatory system such as the CON law. In State ex rel. Coleman v. York, 190 So. 599 (Fla. 1939), the Florida Supreme Court overturned a law which purported to amend existing statutes that regulated the practice of dentistry in Florida. The existing statutes were of general applicability, providing uniform standards for the regulation of dentistry throughout the state. The invalidated law provided an exemption from the requirements for dentists in counties falling within certain population brackets. No county was named in the law. The Florida Supreme Court concluded that "although it appears to be a general act on its face, it is in reality a special law applicable to but one county". Id. at 600.[1] Just as legislation applicable only to dentists who practice in

[1]Similarly, in Housing Authority of City of St. Petersburg, supra, the Court reviewed two statutes which restricted the powers granted housing authorities throughout the state. Since the two statutes only applied to a single county, the Court found they were local laws passed in the guise of general laws. Id. at 311. Since the statutes were not passed in a manner that met the requirements of Article III, Section 10, the Supreme Court ruled they were a "nullity."

Okeechobee County must pass muster under Article III of the Constitution, the legislature can only create special legislation for a single hospital in Duval County in accordance with those Constitutional requirements. If special legislation is necessary to remedy a particular problem, the constitutionally mandated procedures should be followed.

As the trial court recognized in its Final Declaratory Judgment below, the requirements of the Florida Constitution are not mere niceties; to the contrary, they are to be"thoroughly enforced by the courts." Housing Authority of City of St. Petersburg v. City of St. Petersburg, 287 So.2d 307 (Fla. 1973); Milner v. Halton, 129 So. 2d 593, 596 (Fla. 1930). Article III, Section 10 of the Florida Constitution cannot be "thoroughly enforced" under the standard urged by St. Vincent's for review of special laws. Under St. Vincent's standard, there would be no mixed questions of fact and law in an Article III, Section 10 case. Instead, whether or not a statutory classification was "closed" would be determined strictly as a matter of law, with any ambiguities resolved in favor of the statute's constitutionality and without the taking of evidence. That standard would surely lead to the passage of laws written for the benefit of particular persons (such as St. Vincent's, in this case) and without regard to the general welfare, contrary to the meaning and intent of Article III, Section 10.

In the instant case, St. Vincent's sought summary judgment in its favor as to all counts of Appellees' complaint. The trial court correctly recognized that the convoluted qualification scheme in the Challenged Statute presented a mixed question of fact and law, and that the determination of the statute's validity could not be made based on arguments of counsel, but instead had to be based on an understanding of the meaning and effect of the statutory language. As set forth above, the evidence demonstrated that the Challenged Statute was designed only to address the unique and unprecedented circumstances of St. Vincent's.

III. The 2008 Sunset Provision Supports The Conclusion That The Challenged Statute Is A Special Law.

St. Vincent's Initial Brief argues that "[s]imply because a statute is time-limited does not mean that the statute's class is closed, or turn an otherwise general law into either a special or a local law." Cited in support of this proposition are three cases from other jurisdictions: Walters v. City of St. Louis, 259 S.W.2d 377 (Mo. 1953); Wheeler Sch. Dist. v. Hawley, 137 P.2d 1010 (Wash. 1943); and State ex rel. Atty. Gen. v. Lee, 99 S.W.2d 835 (Ark. 1936).

Contrary to St. Vincent's argument, appellees submit that the limited duration of a law (such as the Challenged Statute) can indeed turn an otherwise general law into a special law. This has to be the case if the requirements of Article III, Section 10 of the Florida Constitution are to be "thoroughly enforced" by the courts. Milner, supra.

The Walters case cited by St. Vincent's is a good example of why the limited duration of a statute should be a factor in determining whether the statute is a special law or general law in Florida. In Walters, a Missouri statute provided that "Any constitutional charter city in this state which now has or may hereafter acquire a population in excess of seven hundred thousand inhabitants, according to the last federal decennial census, is hereby authorized to levy and collect, by ordinance for general revenue purposes, an earnings tax on the salaries, wages, commissions and other compensation earned by its residents..." 259 S.W.2d at 381. The statute became effective on July 29, 1952, and by its own terms was scheduled to expire April 1, 1954. Appellants argued that the statute applied only

to the City of St. Louis, thus amounting to unconstitutional special legislation. The Missouri Supreme Court disagreed, finding in pertinent part:

> The fact that a statute is limited as to the time of its duration does not make it local or special so long as it applies to all within, or that may come within, the enumerated class during its effective period.
>
> ....
>
> The conceded fact that it is a practical certainty no other city in this State [other than St. Louis] will attain a population of more than 700,000 prior to the expiration date of the act, April 1, 1954, does not in the least affect the situation. The act still does not exclude any city that may come within the classification therein made during its effective existence; to the contrary, it expressly includes any such city.

259 S.W.2d at 383 (emphasis in original).

Thus, with it agreed that no city other than St. Louis would attain a population of more than 700,000 during the brief life of the statute at issue, the Walters court nevertheless found that statute to be of general application. Appellees submit that the same facts would be decided differently in Florida. Indeed, the Walters case is strikingly similar to McGrath, supra, where the statute at issued concerned "any municipality with a resident population of 300,000 or more by April 1, 1999," and after due inquiry this Court found the statute an unconstitutional special law as applying only to Miami, Tampa and Jacksonville.

Walters also bears similarities to Classic Mile, supra. In Classic Mile, the parties agreed that only Marion County would ever fall within the statutorily designated class of counties eligible for licensure of a facility for live thoroughbred simulcast wagering. This Court found the statute at issue to be an unconstitutional special law. As mentioned, in Walters it was agreed that no city other than St. Louis would attain a population of more than 700,000 during the brief life of the

statute at issue. The Walters court apparently chose to disregard the facts before it, and find instead that the classification was "open" in a theoretical sense and, thus, legally "open." Appellees do not believe that it is the obligation of Florida courts to disregard the facts in an Article III, Section 10 case. To the contrary--the facts are part and parcel of the obligation to thoroughly enforce the requirements of the Florida Constitution.

Further, the law in at least one other jurisdiction demonstrates that a statute may be an unconstitutional special law even with a "sunset" provision longer than that of the Challenged Statute in the instant case. Allegheny County v. Monzo, 500 A.2d 1096 (Pa. 1985).

Monzo involved a Pennsylvania statute enacted in 1977, which provided for "each county of the second class" to impose a hotel room rental tax, and for the treasurer of each such county to "deposit the revenues received from the tax in a special fund established solely for purposes of a convention center or exhibition hall." The statute provided further that "[t]he provisions of [the statute] shall remain in force from year to year until December 31, 1983, at which time such provisions shall terminate without further action on the part of the county commissioners." Allegheny County sued to enforce collection of tax proceeds collected by a hotel operator but not paid over to the County Treasurer, and the hotel operator defended its action on the ground that the statute was unconstitutional. The trial court invalidated the statute.

On appeal, the Pennsylvania Supreme Court first noted that "Testimony adduced at trial supports Appellee's claim that...the tax benefits only the Convention Center, which brings convention business into downtown Pittsburgh and takes patrons away from Appellee and other Allegheny County hotels located outside of downtown Pittsburgh." 500 A.2d at 1100-01. This finding (and others made by the trial court), the Court held, was supported by competent evidence. Id.

at 1101. The Court went on to note that, while there is a presumption that tax enactments are constitutionally valid, "it is incumbent upon the court in determining the validity of a tax to consider the nature and effect of the measure." [citations omitted] The Court then found in pertinent part:

> We see no reason to restrict the benefits of the tax to Pennsylvania's only second class county. The opportunity for development of local meeting facilities should be afforded to all of the state's smaller municipalities...[W]e are compelled to agree with the trial court that the subject taxing scheme...is local or special legislation contrary to both the Constitution of the United States and the Constitution of the Commonwealth of Pennsylvania."

500 A.2d at 1106. Thus, the six-year life of the taxing statute at issue in Monzo did not save the statute from being adjudicated a special law. Indeed, it was due to the limited duration of the law that it was found unconstitutional. As the Pennsylvania Supreme Court later commented in Leventhal v. City of Philadelphia, 542 A.2d 1328 (Pa. 1988):

> Allegheny County is the only second class county in the Commonwealth and, due to the limited duration of the statute [at issue in Monzo], there was no possibility that any other county would achieve second class status before the termination date of December 31, 1983.

542 A.2d at 1332 (emphasis added).

Contrary to the Missouri Supreme Court in Walters, supra, the Pennsylvania Supreme Court in Monzo gave due regard to the facts, and found the law at issue to be for the unconstitutional special benefit of one county. Appellees respectfully submit that the approach of the Pennsylvania Supreme Court is much more in accord with Florida constitutional law than the approach taken by the courts in the cases cited by St. Vincent's. Monzo demonstrates that the limited duration of a law is a factor in determining whether it is a special or general law. The limited duration of the Challenged Statute should be considered accordingly.

CONCLUSION

Appellees proved by competent, substantial evidence that the Challenged Statute is a special law passed in the guise of a general law in violation of Article III, Section 10 of the Florida Constitution. The decision below can and should be upheld with or without reference to the First District Court of Appeal's decision in Gulfstream.

RESPECTFULLY SUBMITTED this 4th day of August, 2006.

STEPHEN A. ECENIA, ESQUIRE
Florida Bar no. 316334
RICHARD M. ELLIS, ESQUIRE
Florida Bar no. 892777
Rutledge, Ecenia, Purnell
& Hoffman, P.A.
215 South Monroe St., Suite 420
Post Office Box 551
Tallahassee, Florida 32302-0551
(850) 681-6788

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by Hand Delivery to Major Harding, Esq. and Stephen C. Emmanuel, Esq., Ausley & McMullen, 227 South Calhoun Street, Tallahassee, Florida 32301; and to Douglas B. MacInnes, Esq., Attorney General's Office, PL-01 The Capitol, Tallahassee, Florida 32399-1040 this 4th day of August, 2006.

_____
STEPHEN A. ECENIA, ESQUIRE

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Answer Brief was prepared using Times New Roman 14-point font and complies with Fla. R. App. P. 9.210(a).

_____
STEPHEN A. ECENIA, ESQUIRE