State v. Profaci, 56 N.J. 346 (1970); *Ahto v. Weaver*, 39 N.J. 418 (1963). However, since we have concluded that the action you propose is not inconsistent with state law in any event, it is unnecessary to explore further the impact of the Economic Stabilization Regulations.

Accordingly, it is our opinion that you may legally agree to accept less than the Governor's $65,000 statutory salary. The appropriate action for you to take to effectuate a temporary reduction in the Governor's salary would be to execute a written instrument similar to that involved in *Long v. Board of Chosen Freeholders of the County of Hudson*, *supra*, indicating that you intend to temporarily waive a portion of the statutory salary in recognition of the prevailing adverse economic conditions and pursuant to the ruling of the Federal Cost of Living Council. The instrument should then be served upon the State Treasurer and a certified copy should be served upon the Director of the Division of Budget and Accounting. By acting in this manner, you would not be changing the statutory terms of the Governor's salary. Therefore, when the temporary reduction established by your unilateral waiver expires, you would be able to take the full Governor's salary of $65,000 without violating the provisions of Article V, Section 1, Paragraph 10 of the State Constitution, which prevents the Governor's salary from being increased during his term of office.

Respectfully,

WILLIAM F. HYLAND
Attorney General

July 31, 1974

JOANNE E. FINLEY, M.D., *Commissioner*
New Jersey State Department of Health
Health and Agriculture Building
Trenton, New Jersey 08625

FORMAL OPINION NO. 2—1974

Dear Dr. Finley:

The Department of Health has asked for advice as to the extent to which health care facilities owned and operated by recognized religious organizations are exempted from the certificate of need requirements of N.J.S.A. 26:2H-1, *et seq.*, the "Health Care Facilities Planning Act."

The Legislature has conferred on the State Department of Health "the central, comprehensive responsibility for the development and administration of the State's policy with respect to . . . hospital and related health care services . . ." N.J.S.A. 26:2H-1. Almost every conceivable type of health care facility has been included by the Legislature within the Department's jurisdiction. The only kinds of facilities specifically excluded from the statute are those "institutions that provide healing

solely by prayer." N.J.S.A. 26:2H-2(a). Ostensibly, the Legislature intended to encompass all health care facilities "whether public or private" within the scope of this statute. Thus, the certificate of need requirement found in N.J.S.A. 26:2H-7 applies to all types of health care facilities (with the one exception noted above) regardless of by whom and for whom they are operated and maintained.

Some of these facilities, of course, are owned and operated by recognized religious bodies or denominations. Nevertheless, these facilities, unless they provide healing solely by prayer, are subject to the same requirements under N.J.S.A. 26:2H-1, *et seq.*, as are those facilities operated and maintained by private, non-sectarian, public or governmental agencies.* The applications for certificates of need submitted by these facilities under N.J.S.A. 26:2H-7 must be reviewed under the criteria found in N.J.S.A. 26:2H-8, which are:

(a) the availability of facilities or services which may serve as alternatives or substitutes,
(b) the need for special equipment and services in the area,
(c) the possible economies and improvement in services to be anticipated from the operation of joint central services,
(d) the adequacy of financial resources and sources of present and future revenues,
(e) the availability of sufficient manpower in the several professional disciplines, and
(f) such other factors as may be established by regulation.

The statute expressly states that the above criteria "shall be taken into consideration" when processing certificate of need applications. The criteria are mandatory and each application must undergo scrutiny with reference to each criterion, whether statutorily or administratively created. The criteria deal with various aspects of both the subject matter presented by an applicant and the financial and practical abilities of the applicant itself. The critical issues to be determined are "the need for health care facilities" in the applicant's particular geographical and service area and the impact of the proposed project on "the orderly development of adequate and effective health care services." N.J.S.A. 26:2H-8.

The request for advice is primarily concerned with the effect of the final sentence of N.J.S.A. 26:2H-8, which provides:

> "In the case of an application by a health care facility established or operated by any recognized religious body or denomination, the needs of the members of such religious body or denomination for care and treatment in accordance with their religious or ethical convictions may be considered to be public need."

This language was originally found in a bill passed by the Legislature and vetoed by the Governor in March 1971. The phrase was deleted in the bill's final passage (L. 1971, c. 136) and was then adopted as it now appears (L. 1971, c. 138). The issues raised herein concern the effect and degree of an exemption on the issuance of certificates of need by reason of this language on the overall administration of a certificate of need program by the Department of Health under N.J.S.A. 26:2H-7. Furthermore, assuming *arguendo* that there is an exemption, is the exemption affected by the Department's moratorium on skilled and intermediate care beds?

It is clear that this sentence in N.J.S.A. 26:2H-8 cannot be read as the grant by the Legislature of a blanket exemption from the Statute's certificate of need requirements. Such an interpretation would be repugnant to the broad definition of a "health care facility" as set forth in N.J.S.A. 26:2H-2 and the specific, narrow exclusions found therein. *Roman v. Sharper,* 53 N.J. 338, 341 (1969). Such an interpretation would also undercut the declared purpose for which the statute was enacted, since the loss of control over the sizable segment of the health care industry operated by and for religious groups would render impotent attempts at health planning and control of rates. *Cf. Asbury Park Press v. City of Asbury Park*, 19 N.J. 183, 196 (1955); *Evans v. Ross*, 57 N.J. Super. 223, 229 (App. Div. 1959).

In effect, the last sentence of N.J.S.A. 26:2H-8 merely gives to the Department the discretion to consider, when processing an application of a recognized religious body or denomination, the issue of the needs of the members of that particular religious body or denomination, rather than the needs of the general populace in the facility's geographic or service area. Since the needs of a particular religious sect may be so specialized or localized, the Department is not bound to review an application from such sect under the broad "need" criterion found in the sentence preceding it.

On October 4, 1973, the Commissioner of Health, with the approval of the Health Care Administration Board, adopted pursuant to N.J.S.A. 26:2H-8(f) a general moratorium on the approval of certificates of need for both skilled nursing and intermediate care beds. The regulation was adopted as follows:

> "Effective immediately and until March 31, 1974, certificates of need shall not be issued to health care facilities requesting additional skilled nursing or intermediate care beds, or proposing to construct new facilities to accommodate skilled nursing or intermediate care beds." N.J.A.C. 8: 33-1.11.

Thereafter, on February 7, 1974, the Commissioner of Health again with the Board's approval, amended the above language and substituted "September 30, 1974" for "March 31, 1974." See 5 N.J.R. 408(c) and 6 N.J.R. 63(b). The effect of this regulation was and is to proscribe the erection of any new skilled nursing or intermediate care beds until October 1, 1974. The regulation does not on its face draw any distinction among the various types of skilled nursing or intermediate care homes, whether religious or otherwise, being operated in New Jersey.

We have been advised that the policy considerations underlying this regulation had their origins in 1971. At that time, the 1971 State Plan for the Construction and Modernization of Hospitals and Related Medical Facilities indicated a statewide surplus of 4,300 long term care beds, and no differentiation at all was drawn therein between skilled nursing beds and intermediate care beds. By the middle of 1972, federal and state officials estimated that as many as 40% of the patients occupying nursing home beds could be cared for in a less intensive, or intermediate, care facility. However, since there was no federal or state program of standards and reimbursement fully developed for intermediate care nursing services, the need for such beds could not be accurately calculated. Therefore, the Commissioner and the Health Care Administration Board (hereinafter "HCAB") on July 25, 1972, decided to maintain the one classification of "long term care beds" for an indefinite period.

When the 1973 State Plan was approved by the HCAB, long term care beds

were broken down into skilled nursing beds and intermediate care beds. It was decided, however, that because the new State Plan showed a large surplus of skilled nursing beds and a great need for intermediate care beds, a number of nursing homes might wish to change the classification of their existing long term care beds (which were skilled nursing beds under the 1973 State Plan) to intermediate care beds. Thus, the HCAB approved the initial general moratorium on the erection of any skilled or intermediate beds to enable reclassification of existing beds. Once the general moratorium has ended on October 1, 1974, N.J.A.C. 8:33-1.11, the Department will be able to determine more accurately the need for both new skilled and new intermediate care beds. It is therefore clear from both the face of the regulation itself and the reasons behind its adoption, that the general moratorium is equally applicable to religious as well as to non-religious nursing homes.

Thus, the terms of the above regulation effectively preclude the processing of certificate of need applications under *any* of the criteria found in N.J.S.A. 26:2H-8. All applications for the types of beds encompassed by the regulation must be treated equally by the Department. See, *e.g.*, *Hercules Powder Co. v. State Bd. of Equalization*, 66 Wyo. 268, 208 P. 2d 1096, 1112 (Sup. Ct. 1949); *New York Telephone Co. v. United States*, 56 F. Supp. 932, 938 (D.C.N.Y. 1944), rev'd on other grounds 326 U.S. 638, 66 S. Ct. 393, 90 L. Ed. 371 (1946). See also Cooper, 1 State Administrative Law §4(E). Therefore, no applications for certificates of need for either skilled nursing beds or intermediate beds should be granted until the regulation expires, regardless of by whom or for whom they are submitted.

For these reasons, you are accordingly advised that the provisions of N.J.S.A. 26:2H-8 do not provide a blanket exemption for religiously sponsored nursing homes from the certificate of need requirements imposed by law, but that the criteria of "religious need" shall be evaluated as a factor along with other pertinent factors in the exercise of administrative discretion. You are also advised that the general moratorium imposed by the Department on the issuance of certificates of need for either skilled nursing beds or intermediate care beds until October 1, 1974, is applicable to both religious and non-religious nursing homes.

Very truly yours,
WILLIAM F. HYLAND
Attorney General

BY: JONATHAN WEINER
Deputy Attorney General

* Although not an issue raised in the Administrative Agency Advice Request, the appropriateness of State regulation of health care facilities owned and operated by religious bodies or denominations is not open to question. "[I]t is axiomatic that, while the right of religious belief is absolute, the exercise of practices corollary to that belief may be subjected to reasonable regulation by the police power and must be considered in light of the general public welfare." *State v. Congdon*, 76 N.J. Super. 493, 509 (App. Div. 1962). The public welfare has been balanced and has prevailed against the religious needs or tenets of a particular church or group in many areas. For example, in *Allendale Congregation of Jehovah's Witnesses v. Grosman*, 30 N.J. 273 (1959), the church's proposed meeting hall violated a municipal zoning ordinance. The church claimed that compliance with the ordinance would not allow it to utilize its property in the manner it desired and hence such an ordinance abridged the church's right to "freedom of assembly." The court, in rejecting this argument, held that the ordinance was necessary to promote the public safety and general welfare. Thus, the property, despite its use for religious purposes, was subject to the ordinance. See also, *Sexton v. Bates*, 17 N.J. Super. 246 (Law Div. 1951), *aff'd* 21 N.J. Super. 329 (App. Div. 1952).