

Understanding Florida's Certificate of Need (CON) Program

Summary of Findings

- Established in 1973, Florida's Certificate of Need (CON) program is a regulatory process designed to promote cost containment, ensure access to high quality care and avoid unnecessary duplication of health care services by requiring certain health care providers to obtain state approval before offering new or modified services or making major capital expenditures.
- The program's primary purpose includes ensuring that Floridians have input in creating health systems in their communities that maximize access to cost-efficient and high quality health care services and facilities. The CON program seeks to achieve this through a state-sponsored health planning and review process designed to ensure that new major expenditures and services proposed by health care providers are needed within a particular region or community.
- The 2005 Florida Statutes identifies which health-related projects are subject to and exempt from CON review. The program evolved from an early focus on regulating hospitals and nursing homes, to regulating a wide variety of services across multiple care settings. More recently, the pendulum appears to be swinging in a direction that favors reducing the number and types of projects covered under CON review.
- 2004 reforms significantly narrowed the number of projects subject to review by eliminating CON requirements for new burn units, interventional cardiology and open heart surgery, as well as for additional acute care, mental health and neonatal intensive care beds at existing hospitals.
- The CON application review timeline, which includes provisions for public hearings and appeals, can be quite lengthy and costly for providers.

Introduction

The Certificate of Need (CON) program originated in 1964 in Rochester, New York, where a community health planning council composed of consumers, insurers and health care providers was established to study the need for hospital beds. The efforts of this group to monitor the number of health care facilities based on assessments of community needs resulted in New York's passage of the nation's first Certificate of Need law in 1966.¹

In 1972, the federal government amended Section 1122 of the Social Security Act to require all states to review health care capital expenditures in excess of \$100,000. This provision served as the beginning of a national Certificate of Need law. Federal support for regional health planning under the auspices of CON laws was further strengthened in 1974 with Congressional passage of the National Health Planning and Resources Development Act. This made state CON programs mandatory and included guidelines for CON review. In the years following, every state adopted Certificate of Need regulations.

The momentum for a national approach faded in 1982, when the inability of a national CON law to reduce health care costs was acknowledged. Since then, only 36 states, including Florida, retained their CON programs after a mandatory repeal of the health planning law by the federal government. Figure 1 (on page 2) depicts the current states with and without Certificate of Need laws, along with a measure of the range of services subject to CON review.

Since its inception in 1973, there have been many studies sponsored by both supporters and critics of the Florida CON program. The purpose of this brief is to provide an objective summary description of Florida's current CON program and review process. This document will address the following questions of interest:

- What is Florida's CON program?
- Why was the CON program established?
- When is a CON review necessary?
- What is the CON review process and timelines?
- What are the perceived benefits and disadvantages of Florida's CON program?

For more information on Florida's CON program, please access the following link to information available on the state web page at http://ahca.myflorida.com/MCHQ/CON_FA/

What is Florida's CON program?

Florida's Certificate of Need program is administered by the Agency for Health Care Administration (AHCA). This is a regulatory process that requires certain health care providers to obtain state approval before offering new or modified services or making major capital expenditures. Examples of health providers requiring a certificate of need for certain types of projects include hospitals, nursing homes and hospital-based skilled nursing units, hospices, and intermediate care facilities for the developmentally disabled.

under Florida Statutes, Section 408.034(3) to develop and project need for CON regulated health facilities and services that at a minimum consider:

- The demographic characteristics of the population;
- The health status of the population;
- Service use patterns, standards and trends;
- Geographic accessibility to needed services, and
- Market economics.

In addition to analyzing the health care needs of the population to be served, the CON regulatory review process also assesses the capabilities of project applicants, including their relative strengths and weaknesses, alternatives to proposed projects and their anticipated health care cost impact.

The CON program has undergone a number of reforms brought about by developments in the local and national health care markets. Since the mid-1990s, the growth of managed care in Florida and the federal budget cuts brought about by the Balanced Budget Act of 1997 (BBA), have resulted in changes in reimbursement policy. The most significant reforms to the CON laws took place in 2004 when changes to the laws included provisions preventing the licensure of niche and specialty hospitals. It also eliminated CON requirements for interventional cardiology and open heart surgery, burn units, additional acute care, mental health and neonatal intensive care beds at existing hospitals.

When is a Certificate of Need review necessary?

The Florida CON program has historically reviewed projects based upon their size and scope. Full CON review, referred to by the program as competitive batched review, applies to major applications for new or expanded beds or services. The competitive batch review process and timeline is described in detail on page 4. Other processes, such as the granting of CON expedited reviews, are more

Figure 2: Projects Subject to CON Review

HOSPITAL BEDS & FACILITIES	OTHER BEDS & PROGRAMS
New Hospital Facilities	Open Heart Surgery
Replacement Facilities	Pediatric Cardiac Catheterization
Acute Care Beds in Low Growth Counties	Specialty Burn Units
*NICU Level II and III	Organ Transplantation
Rehabilitation Beds	Nursing Home Beds
Long Term Care Hospitals	Hospice Programs
*NICU=Neonatal Intensive Care Unit	Hospice Inpatient Facilities
SOURCE: http://abca.myflorida.com/MCHQ/CON_FA/Batching/index.shtml	**ICF/DDs
	*SNU=Skilled Nursing Unit
	**ICF/DD=Intermediate Care Facility for the Developmentally Disabled

streamlined processes reserved for certain categories of projects such as transferring a CON or conversion of acute care beds to beds for mental health services.³

Section 408.036 of the 2005 Florida Statutes clarifies which health-care-related projects are currently subject to review and must file an application for a certificate of need with AHCA. Figure 2 above summarizes the types of hospitals and other facilities and programs currently subject to the CON review process.⁴ This section of the statutes also describes the often complicated specific circumstances under which each facility and program type is subject to CON review.

Not all proposed projects require CON review. Section 408.036(3) of the 2005 Florida Statutes also clarifies which health-care-related projects are currently exempt from the review process. Many exemptions appear designed to meet state health and social services policy objectives. Conversions of licensed acute care beds to Medicare- and Medicaid-certified skilled

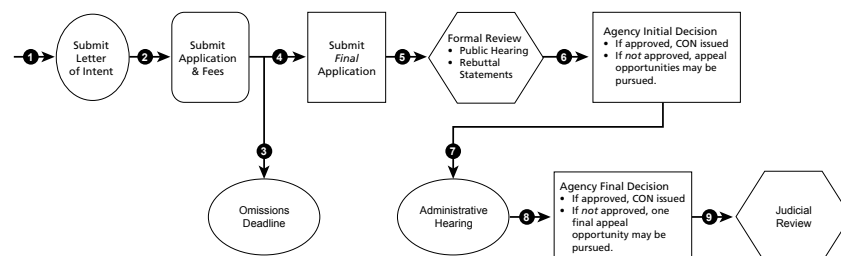
nursing beds in rural hospitals to help meet demand for non-acute institutional care in rural areas, and construction of inmate health care facilities and state veteran’s nursing homes do not require CON review.

What is the timeline for Certificate of Need review?

There are two time frames (also known as “batching cycles”) during the year in which the certificate of need approval process occurs. The first project category includes CON requests for all hospital beds and facilities (e.g., new hospital facilities, rehabilitation beds). The second category includes all other CON requests for beds and projects (e.g., specialty burn units, hospice programs).

Figure 3 below outlines the current CON approval process in Florida. It is followed by a brief description of each of the major steps in the review process.

Figure 3: Florida’s Certificate of Need Approval Process



SOURCE: The Lewin Group based on information presented in “The Certificate of Need Program for Hospitals in Florida” prepared by the Health Council of East Central Florida.

The deadlines included are based on the 2007 batching cycle time frame for CON requests for hospital beds and other facilities.

1. Submit Letter of Intent (February 12, 2007)

At least 30 days prior to the applicable batching cycle application due date, an applicant must file a letter of intent. The letter of intent must indicate the type of project being proposed, the location of the facility/service, as well as the contact information of the applicant. This information is posted for public review in the Florida Administrative Weekly.

2. Submit Application and Fees (March 14, 2007)

After 30 days, but no more than 6 months after receipt of the Letter of Intent, an application for a CON along with associated fees must be submitted to AHCA. Within 15 days after the application filing deadline, agency staff determines if the application is complete. If the application is complete, the formal review process will begin. A public hearing may be held at the agency's discretion if it determines that a proposed project involves issues of great local public interest. The public hearing shall be held at the local level within 21 days after the application is deemed complete.

3. Omissions Deadline (April 18, 2007)

If the application is incomplete, AHCA staff will request specific information from the applicant necessary for the application to be complete; however, the staff may make only one such request. If the requested information is not filed with the agency within 21 days after the receipt of the staff's request, the application shall be deemed incomplete and will be withdrawn from consideration.

4. Submit Final Application (Deadline subject to change)

The applicant must submit a final application within 21 days after the receipt of the agency's request for additional information.

5. Formal Review Period (Deadline subject to change)

The formal review period begins on the fifth working day after the applicant's request to begin review, or the department declares the application complete. The first 35 days of the review period are open to general public comment and conducting a public hearing, if requested. The last 10 days are open for the applicant's rebuttal statements to public comments. Finally, the last 45 days of the formal review period is reserved for the department to prepare its written analysis and decision.

6. Agency Initial Decision (June 15, 2007)

Within 60 days after all applications in a review cycle are complete, the agency issues its State Agency Action Report and Notice of Intent to grant a CON for the project in its entirety, to grant a CON for identifiable portions of the project, or to deny a CON. The State Agency Action Report sets forth in writing its findings of fact and determinations upon which its decision is based. If the agency intends to grant a CON, the State Agency Action Report or the Notice of Intent also includes any conditions which the agency intends to attach to the CON. The agency designates a senior staff person, other than the Secretary who issues the final order, to issue State Agency Action Reports and Notices of Intent.

If no appeal action is requested, the State Agency Action Report and the Notice of Intent will become the final order of the agency. The agency then provides a copy of the final order to the appropriate local health council.

Appeals Action

When an agency CON decision is appealed, it proceeds to an administrative hearing. The administrative law judge's decision can then be further appealed in the District Court of Appeals. AHCA is required to accept the decision rendered by the District Court of Appeals.

According to the 2001 Florida CON Workgroup Report, between 1996 and 2000 a total of 338 hospital projects

underwent CON review in Florida. During that time, anywhere from 33.3 percent to 70.9 percent of the decisions were appealed. Two years later, 13.6 percent to 25.9 percent were still not finalized.

7. Administrative Hearings (Deadline subject to change)

Within 21 days after publication of notice of the State Agency Action Report and Notice of Intent, any person authorized to participate in a hearing may file a request for an administrative hearing. Failure to file a request for hearing within 21 days of publication of notice constitutes a waiver of any right to a hearing and a waiver of the right to contest the final decision of the agency. Hearings start within 60 days after the administrative law judge has been assigned.

Hearings on CON cases can last several days or weeks. After hearing the case, the administrative law judge writes a recommended order that is typically ratified by the agency when it issues its final order.

8. Agency Final Decision (Deadline subject to change)

The Secretary will issue the agency's final order within 45 days after receipt of the recommended order. If the agency fails to take action within such time, the applicant may take appropriate legal action to compel the agency to act.

9. Judicial Review (Deadline subject to change)

Not more than 30 days after the date of the final order, the applicant has the right to seek judicial review in the District Court of Appeal. In such judicial review, the court will affirm the final order of the agency, unless the decision is arbitrary, or not in compliance with the Florida Statutes. Judicial review is the final action that can be pursued by an applicant if the CON request was denied.

Conclusion

Since its inception in 1973, Florida's CON program has evolved from an initial focus on regulating hospitals and nursing homes, to regulating a wide variety of services across multiple care settings. More recently, policy direction has reduced the number and types of projects covered under the CON review process.

There remain many policy issues to address with Florida's CON program, as well as practical concerns regarding the current review process. These issues continue to be raised by stakeholders both

in favor and opposed to CON regulation. The box below provides examples of frequently cited arguments both for and against continued CON regulation in Florida.

The purpose of this briefing paper has been to provide an informative and educational overview of Florida's Certificate of Need program. By doing so, it is also designed to encourage citizen involvement and public input into an important process that affects the cost and quality of health care services available to all Floridians.

Arguments For CON Regulation

- CON regulation is one of the few practical planning tools available to policymakers to influence quality, cost and access concerns.
- CON regulation helps ensure reasonable geographic distribution of services and facilities.
- CON helps achieve better patient outcomes by ensuring high program volume.
- CON regulation is useful in encouraging competition.

Arguments Against CON Regulation

- CON programs are not effective in meeting goals relating to cost containment and access to care.
- CON hinders diffusion of new and more effective technologies and models of care.
- CON promotes local health care monopolies and oligopolies, stifling innovation and competition.
- CON process is costly and time consuming, discouraging investment in health care.

Endnotes

- 1 "Failure of Government Central Planning: Washington's Medical Certificate of Need Program." Washington Policy Center, January 2006.
- 2 OPPAGA Justification Review: Health Care Regulation Program. Agency for Health Care Administration. Report No. 01-24. May 2001. Accessed on May 5, 2006 at <http://www.oppaga.state.fl.us/reports/pdf/0124rpt.pdf>
- 3 Interim Report of the Florida Certificate of Need Workgroup, December 2001. Page 2.
- 4 Certificate of Need Program Overview. Agency for Health Care Administration. Accessed May 8, 2006 at: http://ahca.myflorida.com/MCHQ/CON_FA
- 5 Improving Health Care: A Dose of Competition. A Report by the Federal Trade Commission and the Department of Justice, July 2004.

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This policy brief was commissioned by the Health Council of East Central Florida and made possible through the support of the Winter Park Health Foundation in hopes of providing an informative and educational overview of Florida's CON program. The author is The Lewin Group, which was supplied with Health Council research.

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