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Geoffrey D. Smith **April 21, 2014**

Nursing Home Certificate Of Need Returning In Florida: Ready, Set, Go!

After a moratorium that has lasted 13 years, Florida is preparing to reactivate its Certificate of Need (CON) program for new community nursing homes or skilled nursing facilities. Originally enacted in 2001 as a response to concern over an ever-growing state Medicaid budget, Section 408.0435, Florida Statutes, prohibited the Agency for Health Care Administration (AHCA) from issuing any CON for a new nursing home. Under the original legislative bill imposing this moratorium, it was to last only five years. However, it was extended by the Legislature for five more years in 2006 and then extended again in 2011. Now, under a pair of bills winding through the House and Senate, the Florida Legislature appears poised to repeal the moratorium and allow for new nursing home CONs to again be issued in the State. Those in the nursing home or skilled nursing industry who have seen their development plans thwarted over the past decade can prepare now to take advantage of the re-opening of the CON program.

Under committee substitutes for House Bill 287 (now CS/HB 287) and Senate Bill (now CS/SB 268) the moratorium enacted in Section 408.0435, Florida Statutes, would be repealed effective July 1, 2014, and the CON program for nursing homes would be reactivated with some new twists allowing for additional or expanded exemptions and "expedited review" for certain projects, including:

Exemptions:
No CON Approval Needed

- The existing CON exemption for replacement of a nursing home on the same site, or within 3 miles of the same site, would be expanded to allow for replacements within 5 miles of the existing site; and limits this exemption to only those replacements in the same nursing home "sub-district" under AHCA rules.
- Creates a new exemption for facilities to add either 30 beds or 25% bed addition (whichever is less) to a facility that is being replaced.
- Continues the existing "high occupancy" CON exemption to add 10 beds or 10% of the facility's existing number of beds, but lowers the threshold to qualify from 96% annual occupancy to 94% annual occupancy.
- Authorizes a new exemption for facilities with a common ownership interest to combine beds or transfer beds between facilities in the same district if there is no increase in the total number of beds in the district and the site to which beds are transferred is within 30 miles from the original location.

Expedited Reviews:
Fast-Track Approval

- Expands existing law allowing for expedited review to replace a nursing home within the same district under certain conditions, and now allows for replacement anywhere within a 30-mile radius, even outside of the existing District.
- Allows for expedited review of replacement facilities that will be located outside of 30 miles from the existing site provided that the replacement location is within the same sub-district or an adjoining sub-district. However, if the move will be to an adjoining sub-district, the

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existing nursing homes in the adjoining sub-district must have had at least 85% occupancy in the last six month.

- Amends existing provisions for allowing for expedited review of relocation of beds to a facility in the same district, by allowing beds to be relocated to another facility or a new facility in the same district or in an adjoining district, so long as there is no increase in the overall number of beds in the state.

Standing to Challenge Exemptions and Expedited Review Applications

There are clear benefits to a CON exemption or expedited review application, chief among which is the ability to apply at any time without having to wait for the twice-per-year competitive review batching cycles and publication of a "fixed need pool" by AHCA. Instead, an applicant for an exemption or expedited review can apply at any time, and the review and approval process is much shorter.

But does approval under an exemption or an expedited review process protect an applicant from potential legal challenges by existing providers in the same geographic area? It is often erroneously believed by applicants for an exemption or an expedited project that AHCA's decision to approve the project cannot be challenged. However, Section 408.039(5)(c), Florida Statutes, specifically allows that existing providers in the same service district can challenge a proposed AHCA CON approval of a project whether that preliminary approval is the result of a batched comparative review or under an expedited review process. While it is uncommon, there is legal standing for existing providers to challenge the issuance of an expedited CON approval through the normal process under the Florida Administrative Procedure Act (Chapter 120, Florida Statutes) which includes the right to seek a full formal administrative hearing to resolve any factual disputes before an independent Administrative Law Judge assigned by the Division of Administrative Hearings (DOAH). Similarly, the granting of a CON exemption can be challenged and subject to a formal administrative hearing if there are factual disputes as to whether or not an applicant actually meets the legislative criteria for the CON exemption. University Community Hospital v. Department of Health and Rehabilitative Services, 555 So. 2d 922 (Fla. 1st DCA 1990).

Comparative Review Process

In addition to the changes to CON exemptions and CON expedited review applications described above, the lifting of the moratorium on CON approvals for new nursing homes will revive the existing process for comparative review of competing CON Applications for new facilities or bed additions to existing facilities that are not exempt or subject to expedited review. This process includes the following procedural steps with the changes being proposed in the pending House and Senate Bills noted:

- *Publication of a Fixed Need Pool*: Under the established CON process, AHCA will publish a "fixed need pool" for nursing home beds in the *Florida Administrative Register* two times per year under the formula set forth in Rule 59C-1.036, Florida Administrative Code. The current rule formula projects the need for new nursing home beds in a future three year planning horizon, taking into account: the projected population in the District for population ages 65 to 74 and ages 74 and above; the use rates for usage of nursing homes by these age groups in the District; and the current bed inventory and occupancy. Any party may challenge the accuracy of AHCA's published fixed need pool by filing a notice of any errors within 10 days of the publication, and filing a Petition for Formal Administrative Hearing to challenge any uncorrected errors within 21 days of the published Fixed Need Pool.

- *Filing of Letters of Intent*: Once the need is established, any person or entity that wishes to apply for a new nursing home, or addition of beds, must first submit a "Letter of Intent" identifying the number of beds being

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sought and the location by District, sub-district and county. The filing of a Letter of Intent triggers a "grace period" during which any other parties may submit a competing Letter of Intent for a project that will be located in the same District. A party is free to apply for any number of beds that are within AHCA's published projection of fixed need. A party may also apply for beds under "special circumstances" or "not normal circumstances" for a new facility or bed addition regardless of the number of beds projected in the published fixed need pool.

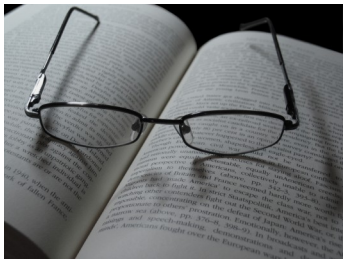
- *The CON Application and Omissions Response*: Once AHCA receives all initial and grace period Letters of Intent, the CON Applications are submitted by the applicants setting forth in detail the basis of the application and presenting data and analysis to demonstrate compliance with the statutory and Rule review criteria. See Section 408.035, Florida Statutes, and Rule 59C-1.030 and 59C-1.036, Florida Administrative Code. The Application is typically submitted in two filings: an initial or "Shell" application that includes the required forms, and an Omissions response with detailed information and analysis. Typically, an application will include a Need Analysis, Utilization Forecast, Financial Pro Formas, a short-term and long-term financial feasibility analysis, and an architectural narrative and detailed schematic drawings for the proposed project.

If the application is alleging "not normal circumstances," the applicant must demonstrate need by showing that existing facilities are unavailable or inaccessible, the quality of care in the service area is suffering from overutilization, or by providing other information to illustrate that the situation is not "normal" in the service area. Humana, Inc. v. Department of Health and Rehabilitative Services, 469 So. 2d 889 (Fla. 1st DCA 1985); Department of Health and Rehabilitative Services v. Johnson & Johnson Home Health Care, Inc., 447 So. 2d 361, 363 (Fla. 1st DCA 1984); Balsam v. Department of Health and Rehabilitative Services, 486 So. 2d 1341 (Fla. 1st DCA 1986). It has been held that there is no limitation to circumstances that may be shown to constitute a "not normal" situation warranting approval of an application in the absence of published need, but it is common for applicants to discuss "barriers to access" including geographic, financial, cultural or programmatic barriers.

- *AHCA Review of Competing Proposals in the Same District*: Once all applications and responses are submitted, AHCA is required to conduct a comparative review of applications for new facilities or beds located in the same District. In conducting its review, AHCA approves the application or applications it finds best meet the projected need and the statutory and rule review criteria.

The proposed legislation to lift the moratorium on nursing home CON approval includes some important changes to AHCA's review of applications under existing statutes and rules, including the following:

- Aggregating Need in Sub-Districts: Allows an Applicant to aggregate the need in contiguous sub-districts for purposes of demonstrating need for a new facility or new beds. The current statute and rule require the applicant to only consider need in the sub-district where the facility will be located. If using an aggregated "need" from two or more sub-districts under the new bill requirements, the facility must be located in the sub-district where the highest annual occupancy of two sub-districts are aggregated. If more than two sub-districts are aggregated to support an argument for need, then the facility must be located so as to provide reasonable geographic access to residents of all the sub-districts.



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"The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion."

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Interestingly, the bills provide that need will continue to be shown under the Rule formula in contiguous sub-districts where the facility is not built, even though the facility is being located to address the projected need in that sub-district.

- Lower Occupancy Target in Rule: Requires that AHCA lower the desired occupancy rate that the agency uses in its rule for determining need from 94% to 92% occupancy in the sub-district.

- Positive Treatment for De-licensing Beds in Areas with No Need: The bills require that AHCA establish a positive CON application factor for an applicant in a sub-district where need has been published, if the applicant agrees to voluntarily relinquish licensed nursing home beds in one or more sub-districts where no need is projected. The applicant must show that it operates, controls, or otherwise has an agreement with the owner to ensure that such relinquishment of beds will occur if the new application is approved.

- Challenges to State Agency Action Reports: AHCA's decision is announced in a State Agency Action Report (SAAR). Any competing applicant in the same District, as well as existing providers in the same District, have legal standing to initiate or intervene in a formal administrative proceeding to challenge the Agency's preliminary decision that is announced in the SAAR. Thus, an applicant who believes it has a superior CON application, or who otherwise believes that AHCA improperly denied its application has the right to a formal hearing before an Administrative Law Judge (ALJ) at DOAH to present evidence to support its application, or to demonstrate that another applicant should not be approved or has an inferior application, or to demonstrate that more than one applicant should have been approved under the circumstances that exist. Similarly, existing providers have the right to initiate or intervene in formal proceedings to demonstrate that a new applicant or applicants should not be approved under the statutory or rule review criteria. The review by the ALJ is "de novo," meaning that the agency's SAAR is not entitled to any presumption of correctness; but, rather, the ALJ reviews the evidence anew to make a determination.

Parties in an administrative hearing have the right to present witnesses, documentary evidence, and to submit Proposed Recommended Orders that include Findings of Fact and Conclusions of Law. An ALJ reviews the evidence, and the Proposed Recommended Orders and then issues a "Recommended Order."

A party may file "Exceptions" to the Recommended Order within 15 days after the ALJ's issuance of the order. AHCA then reviews all Exceptions to the Recommended Order and issues a Final Order. However, AHCA, as a state agency, is limited by the Administrative Procedure Act in its authority to overturn the findings by an ALJ. Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the ALJ as the finder of fact." Heifetz v. Dep't of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (citing McDonald v. Dep't of Banking & Fin., 346 So. 2d 569 (Fla. 1st DCA

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1977)). This includes consideration of the evidence presented, resolution of conflicts in the evidence, judging credibility of the witnesses, drawing permissible inferences from the evidence, and reaching "ultimate finding [s] of fact based on competent, substantial evidence." Id. (citing State Beverage Dep't v. Ernal, Inc., 115 So. 2d 566 (Fla. 3d DCA 1959)). An "agency may not reject the [ALJ's] findings unless there is no competent, substantial evidence from which the finding could reasonably be inferred. *The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.*" Id. (emphasis added) "If there is competent[,] substantial evidence in the record to support the ALJ's findings of fact, the agency may not reject them, modify them, substitute its findings, or make new findings." Rogers v. Dep't of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2005). Only in the narrow area where a Conclusion of Law or recommendation is within the substantive jurisdiction of the agency under its governing statutes and rules, may the agency overturn such conclusions and recommendations. Even in these narrow circumstances, the agency, in rejecting or modifying a conclusion of law by the ALJ, must state with particularity its reasons for rejecting or modifying the conclusion, and must make an affirmative finding that its conclusion is as, or more reasonable than, the ALJ's conclusion that is being rejected.

A party may appeal the issuance of a Final Order to the District Court of Appeal where the project would be located, or to the First District Court of Appeal in Tallahassee.

Limitation on New Nursing Home CONs

Although the lifting of the moratorium on CONs for nursing homes will present some new opportunities, there are limitations. First and foremost, the bills currently under consideration would each place a statewide cap on the number of new nursing home beds that could be approved from July 1, 2014 to July 1, 2019. Under both the House and Senate Bills the cap would be 3,750 beds statewide. Once the cap is reached, both bills provide that no further CONs may be granted by AHCA.

Based upon a preliminary analysis conducted by National Healthcare Associates (NHA), a national consulting firm with headquarters in Coral Gables, it is likely that positive fixed need for additional nursing home beds will occur under the rule need formula, including the new statutory changes. Bed need using currently available data, would be shown for the following sub-districts:

Sub-District	Counties	Net Need
1-1	Escambia, Santa Rosa	185
1-2	Okaloosa	14
2-1	Gadsden, Holmes, Jackson, Washington	71
2-2	Bay	82
2-3	Calhoun, Franklin, Gulf, Liberty, Wakulla	33
2-4	Leon	106
2-5	Jefferson, Madison, Taylor	23
3-1	Columbia, Hamilton, Suwannee	121
3-2	Alachua, Bradford, Dixie, Gilchrist, Lafayette,	275

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Sub-District	Counties	Net Need
3-3	Putnam	57
3-4	Marion	167
3-5	Citrus	100
3-6	Hernando	82
3-7	Lake, Sumter	159
4-1	Nassau, Duval	144
4-2	Baker, Clay, Duval	214
4-3	St. Johns, Duval	178
4-4	Flagler, Volusia	160
5-1	Pasco	62
5-2	Pinellas	82
6-1	Hillsborough	219
6-2	Manatee	1
6-4	Highlands	30
6-5	Polk	244
7-1	Brevard	133
7-2	Orange	353
7-3	Osceola	151
7-4	Seminole	129
8-1	Charlotte	10
8-2	Collier	32
8-5	Lee	279
9-1	Indian River	12
9-2	Martin	2
9-3	Okeechobee	25
11-1	Miami-Dade	269

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Under the new Bill changes, an applicant could have the option of aggregating the need in multiple contiguous sub-districts to demonstrate sufficient need for a new facility. Importantly, the current need rule contains a "default to zero" provision based on occupancy rate in a sub-district – i.e., if the sub-district average occupancy is less than 85% for the most recent six month any calculated need defaults to zero. There is presently no proposed legislative change to this required average occupancy. According to NHA the average occupancy in the following sub-districts was below the required 85% based upon the most recent six month reporting period (July 1, 2013 through December 31, 2013), and therefore there would be no need for any additional beds under the "default to zero" provisions of the Rule:

1-3 (Walton)
6-2 (Manatee)
6-3 (Hardee)
8-1 (Charlotte)
8-3 (DeSoto)
8-4 (Glades and Hendry)
8-6 (Sarasota)
9-4 (Palm Beach)
9-5 (St. Lucie)
10 (Broward)
11-2 (Monroe)

Thus for large portions of the State, it is expected that there will be published numeric need and applicants will have the ability to compete for the published bed need.

Looking at factors other than published need, according to NHA, there are barriers that exist in some parts of the State. These barriers must be identified and analyzed by an applicant to determine whether there is sound health planning justification for approval of a new facility, or of additional beds, even where there is zero published need. Every area or sub-district must be analyzed based upon the unique facts and circumstances applicable to that area.

"The lifting of the 13-year moratorium will bring dramatic changes to the CON landscape for nursing homes in Florida."

Conclusion

The lifting of the 13-year moratorium will bring dramatic changes to the CON landscape for nursing homes in Florida. It will undoubtedly present new opportunities for nursing home and skilled nursing facility providers that have been unable to proceed with business expansion plans over the past 13 years. For existing providers who are operating efficiently at high occupancy, the lifting of the moratorium may present challenges by prospective CON applicants and market entrants taking advantage of the new and expanded exemption and expedited review process.

Although the legislative session is not yet over, and it is possible that the bills to lift the moratorium will not pass, current progress of the bills indicates likely passage. All nursing home and skilled nursing operators and prospective applicants should take note and should be ready to respond to this dramatic change.

Geoffrey D. Smith is a shareholder in the law firm of Smith & Associates, and has practiced in the area of health care law and CON regulation for over 20 years.