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PREPARING FOR THE RETURN OF NURSING HOME CON PROCEEDINGS



It's now old news that the Florida Legislature has lifted the 13-year moratorium on the Certificate of Need program for new nursing homes in Florida. In addition to allowing new skilled nursing facility development projects to be authorized by CON, the legislation includes a

variety of provisions that create new CON exemptions and expedited reviews for certain bed additions and facility replacement projects, as well as relaxing some of the standards for assessing need for new skilled nursing facilities and beds. For a full review of the specific provisions adopted in the CON law, see my newsletter article posted on-line at www.smithlawtlh.com. Below I address what skilled nursing facility owners and operators, and potential applicants, should be doing to prepare for the return of nursing home CON proceedings in Florida.

The Batching Cycle Deadlines

Under existing Rules, AHCA has a schedule that governs the procedures and a detailed time-line for applying for a Certificate of Need. Applications for new skilled nursing facilities and bed additions may be submitted two times per year in the "batching cycle" for "other beds and programs." A "batching cycle" review is required for any party that wishes to obtain a CON for a new facility or bed addition that is not authorized under an exemption or expedited review. The key dates for the next available batching cycle are as follows:

Fixed Need Pool Projections	10/03/14
10 days to File Notice of Errors in a Fixed Need Pool	10/13/14

21 Days to File Formal Challenge to Fixed Need Pool	10/24/14
Letter of Intent Filing Deadline	10/20/14
16-day Grace Period Letter of Intent Filing Deadline	11/05/14
CON Initial Application Filing Deadline	11/19/14
Request Public Hearing	14 Days After Publication Of Application Filing in Florida Administrative Register
CON Application Omissions Response Deadline	12/24/14
State Agency Action Reports (SAARs) Issued	2/20/15
Deadline to File Petition for Formal Administrative Hearing to Challenge a SAAR	21 Days After Publication of the SAAR Results in the Florida Administrative Register

Based on the schedule for the next batching cycle, any party wishing to submit a CON Application should immediately begin the process of putting together a "CON Application Team" consisting of at least the following members:

1. Key management for owner/operators;
2. Experienced CON counsel;
3. Experienced health planner;
4. Experienced financial planner; and

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“[A]ny party interested in filing a Certificate of Need application for skilled nursing facilities or bed additions (non-exempt) must file a Letter of Intent by the deadline of October 20, 2014.”

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5. A health care architect.

**FIXED NEED POOL PUBLICATION
AND CHALLENGES**

The process for CON Applications will commence with the publication of fixed need pools on October 3, 2014. The fixed need pool is a projection of the number of new skilled nursing facility beds that will be needed in each nursing home sub-district for a planning horizon that is three years in the future. The Need formula included in AHCA's existing Rule (which should be adjusted by the changes required in the recent legislation lifting the moratorium) takes into account a variety of factors including: a) current and future population in two age groups (65-74 and 75 and older); b) the most recent bed rates for skilled nursing facilities in the District; c) occupancy rates in the district; d) a target occupancy rate; and e) allocation of beds among sub-districts. The “Net Need” number will be published in the *Florida Administrative Register* providing any interested parties with notice of AHCA's projections of the number of needed beds that will be applied to review of any CON Applications submitted in the batching cycle. Unless a party successfully challenges a Fixed Need Pool publication, then the Need is “fixed” and will be applied to all applications



in the batch.

The CON statute and applicable rules allow for a party to file a challenge to the publication of a Fixed Need Pool to correct any errors identified in the calculation. A party wishing to challenge a Fixed Need Pool must notify AHCA in writing within 10 days of publication of the Fixed Need Pool detailing any errors in the calculation. If AHCA agrees that an error was made, then

it will file and publish a Notice of Corrected Fixed Need Pool. If AHCA disagrees that any error was made, a party may file a Petition for Formal Administrative Hearing within 21 days of the original Fixed Need Pool publication, and the matter will be referred to an Administrative Law Judge at the Division of Administrative Hearings for a formal hearing on the evidence.

**LETTERS OF INTENT AND GRACE
PERIOD LETTERS OF INTENT**

In the upcoming batching cycle, any party interested in filing a Certificate of Need application for skilled nursing facilities or bed additions (non-exempt) must file a Letter of Intent by the deadline of October 20, 2014. If any party files a Letter of Intent in a sub-district, a “grace period” is triggered which allows any other party to submit competing a Letter of Intent to file a competing CON Application in the same sub-district where an applicant has already filed a Letter of Intent. The grace period deadline is November 5, 2014.

THE INITIAL CON APPLICATION

The initial CON Application deadline in the upcoming batching cycle is November 19, 2014. It is not uncommon for parties and their CON team to meet with representatives of AHCA prior to filing the initial CON Application to discuss any potential concerns or issues, and simply to obtain some insight to any issues that AHCA staff may feel are particularly important to address in the CON Application.

Typically a party will file only what is called a “shell application” by the initial application deadline—that is simply signing a blank application form and noting that the remainder of any information will be submitted with the Omissions Response.

Upon receipt of the Initial CON Applications, AHCA notifies each party of any Omissions in the initial Application. These Omissions letters have become boilerplate over the years, and AHCA typically sends a form letter indicating that all responses to all sections of the Application form are required to be submitted by the

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Omissions deadline.

**PUBLIC HEARINGS AND WRITTEN
OPPOSITION STATEMENTS**

A Public Hearing may be requested after initial CON Applications are filed. A public hearing is an opportunity for interested members of the public, or any party, to provide AHCA with comments in support of or in opposition to any Application. The date and time of the Public Hearing will be published by AHCA. The hearings are typically held in the local Health Council offices in the area where the proposed project will be located shortly after the Omissions deadline. A party may use the Public Records Law to obtain a copy of the CON Application prior to the public hearing.

In lieu of a Public Hearing, parties may submit written statements to AHCA. It is not unusual for AHCA to receive detailed opposition statements from existing providers in the same District in response to a CON Application. Opposition statements must be submitted prior to the Omissions deadline, unless a Public Hearing is requested and held in which case written opposition materials can also be submitted at a public hearing.

**OMISSIONS RESPONSES AND
REVIEW CRITERIA**

The deadline in the next batching cycle to file the Omissions Response to a CON Application is December 24, 2014. The Omissions Response is typically the real meat of the Application, and will usually be a document of 150 pages or more of narrative responses addressing the various CON review criteria, along with required financial schedules, audited financial statements, a financial feasibility analysis, and architectural schematic drawings of the proposed facility or bed addition.

CON Review Criteria set forth in Section 408.035(1), Florida Statutes, include the following:

(a) The need for the health care facilities and health services being

proposed.

(b) The availability, quality of care, accessibility, and extent of utilization of existing health care facilities and health services in the service district of the applicant.

(c) The ability of the applicant to provide quality of care and the applicant's record of providing quality of care.

(d) The availability of resources, including health personnel, management personnel, and funds for capital and operating expenditures, for project accomplishment and operation.

(e) The extent to which the proposed services will enhance access to health care for residents of the service district.

(f) The immediate and long-term financial feasibility of the proposal.

(g) The extent to which the proposal will foster competition that promotes quality and cost-effectiveness.

(h) The costs and methods of the proposed construction, including the costs and methods of energy provision and the availability of alternative, less costly, or more effective methods of construction.

(i) The applicant's past and proposed provision of health care services to Medicaid patients and the medically indigent.

(j) The applicant's designation as a Gold Seal Program nursing facility pursuant to s. 400.235, when the applicant is requesting additional nursing home beds at that facility.

There are a number of required schedules that pertain to the CON Application financial analysis, including the following:

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“This form allows an Applicant to accept specific Conditions on the CON which may include “enticements” or “sweeteners” offered by an Applicant to make its CON Application more appealing than other applicants.”

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- Schedule 1: Estimated Project Costs
- Schedule 2: Capital Projects List
- Schedule 3: Source of Funds Documentation
- Schedule 4: Historic Utilization
- Schedule 5: Projected Utilization
- Schedule 6: Staffing and Salaries
- Schedule 7: Projected Revenues
- Schedule 8: Projected Expenses and Net Income
- Schedule 9: Architectural Criteria
- Schedule 10: Project Completion Forecast
- Schedule 11: Fines, Levies and Overpayments.

Additionally, the CON Application includes a required Form setting forth Conditions Predicated on Award of CON. This form allows an Applicant to accept specific Conditions on the CON which may include “enticements” or “sweeteners” offered by an Applicant to make its CON Application more appealing than other applicants. Common conditions include a specific site location; implementation of a specific program or service that may be lacking in the community; enhanced staff or staff qualifications; and a specific minimum percentage of charity, indigent or unfunded patients to be served. Virtually anything may be offered as a Condition, and in some instances CON Conditions may make the difference between approval and denial of an application.

The Nursing Facility CON Rule (59C-1.036(3), Florida Administrative Code) also includes the following Review Criteria pertaining to an Applicant’s Quality of Care:

(e) Quality of Care. In assessing the applicant's ability to provide quality of care pursuant to Section 408.035 (1)(c), F.S., the agency shall evaluate the following facts and circumstances:

1. Whether the applicant has had a Chapter 400, F.S., nursing facility license denied, revoked, or suspended within the 36 months prior to the application.

2. Whether the applicant has had a nursing facility placed into receivership at any time during the period of ownership, management, or leasing of a nursing facility in the 36 months prior to the current application.

3. The extent to which the conditions identified within subparagraphs 1. and 2. threatened or resulted in direct, significant harm to the health, safety or welfare of the nursing facility residents.

4. The extent to which the conditions identified within subparagraph 3. were corrected within the time frames allowed by the appropriate state agency in each respective state and in a manner satisfactory to the agency.

(f) Harmful Conditions. The agency shall question the ability of the applicant to provide quality of care within any nursing facility when the conditions identified in subparagraphs (e)1. and (e)2. resulted in direct, significant harm to the health, safety or welfare of a nursing facility resident, and were not corrected within the time frames allowed by the appropriate state agency in each respective state and in a manner satisfactory to the agency.

There are also additional Review Criteria set forth in Rule 59C-1.030, Florida Administrative Code, which address specific needs of various underserved population groups, and how the applicant proposes to enhance access to services for such groups.

Finally, Applicants typically will include an “adverse impact” analysis to dem-

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onstrate that approval of the CON Application will not imperil or jeopardize the continued operation of other existing skilled nursing facilities.

**COMPARATIVE REVIEW AND THE
STATE AGENCY ACTION REPORT**

Once all CON Omissions Responses are filed, AHCA then conducts a comparative review of CON Applications that are submitted for beds or facilities located in the same sub-district. The review includes an assessment of each Applicant's proposal, and a determination ultimately of which applicant or applicants best meet the statutory and rule review criteria. There is no fixed weight applied to any criteria, and the analysis by AHCA involves a weighing and balancing of all the review criteria.

AHCA's initial decision for all CON Applications submitted in each sub-district is announced in a State Agency Action Report (SAAR). The SAAR sets forth the comparative review of the CON Applications, and the key points that resulted in AHCA's recommendation to approve or deny an Application. Because so many applications are similar, it is often difficult for AHCA to articulate the precise reasons why one applicant may have been selected for approval over other applicants.

In a bygone era of CON review, decisions to outright deny or disqualify a CON Applicant from consideration were often made based upon perceived technical defects in an Application. Today, such disqualification of a defective CON Application is less common. Decisions typically address AHCA's perception of the relative merits of each applicant's proposal; although technical defects can still hurt the overall review of the merits of an application.

**FORMAL ADMINISTRATIVE
HEARINGS**

After issuance of a SAAR, any co-batched applicant, as well as any existing provider of skilled nursing facility services in the same health planning District, may file a Petition for Formal Administrative Hearing to challenge AHCA's initial decision. Thus, a co-batched applicant can request a formal

hearing to demonstrate through evidence that its application is superior to other applicants that were approved, or conversely that other applicants had defects or problems with the application that should have resulted in denial. Similarly, an existing provider in the same District may challenge the approval of an applicant for a new facility based upon a demonstration that its existing facility will suffer an adverse impact, and that a preliminarily approved application does not on balance meet the CON review criteria set forth in statute and rule.

If Petitions are filed, the cases are referred to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge to review the decisions being challenged. This hearing is considered a "de novo" proceeding, which means that the ALJ should not be influenced by AHCA's preliminary decision set forth in the SAAR—and the SAAR is "not clothed with a presumption of correctness."

An administrative hearing is similar to a civil court trial, with slightly relaxed rules of evidence. Parties conduct written discovery, and conduct pre-trial depositions of witnesses. The parties then present their case through expert testimony, lay witness testimony, and submission of documentary evidence. There is an opening statement, direct examination and cross examination of witnesses by attorneys, and legal arguments over admissibility of evidence. One of the most common arguments in CON cases concerns whether the evidence being presented amounts to an "impermissible amendment" of a CON Application. By Rule and established case law, a CON Applicant cannot amend its application to include new concepts or theories for approval that were not set forth in the CON Application. However, an Applicant may introduce new evidence, new or updated data, and testimony that elaborates and explains concepts or theories that were included in the CON Application. These issues are often hotly debated during the course of a CON hearing.

By statute, a party requesting a hearing has a right to demand that the hearing be commenced within 60 days of assignment of an ALJ at DOAH. Most hearings are not done on this expedited schedule, how-

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ever, and it is not unusual for the hearing process to take 4-6 months or longer. Hearings typically last about 2-3 days for each party involved. In multi-party proceedings involving several applicants, existing providers, and AHCA, a final hearing may last 3-4 weeks. All final hearings are held at DOAH headquarters in Tallahassee.

Upon conclusion of a formal hearing, the parties are required to submit a Proposed Recommended Order (PRO) for the ALJ’s review and consideration. This is typically filed 30 days or so after the final hearing. The PRO includes proposed Findings of Fact as well as proposed Conclusions of Law. By Rule a PRO is supposed to be no longer than 40 pages; but is not unusual for an ALJ to expand the number of pages to 60 or 80 pages depending on the number of parties involved. The ALJ reviews all PROs submitted by the parties and then issues a decision in a Recommended Order.

EXCEPTIONS AND THE FINAL ORDER

Once the ALJ issues a Recommended Order, the case is remanded back to AHCA for issuance of a Final Order. Parties may file “Exceptions” to the Recommended Order to explain why the ALJ’s decision is in error. In issuing a Final Order, AHCA may not reject an ALJ’s findings of fact, unless the Agency reviews the entire record, and finds that there is no “competent, substantial evidence” to support a specific finding. It is not the role of AHCA to reweigh the evidence, or judge the credibility of witnesses, or to substitute its balancing of the evidence for that of the ALJ. As to Conclusions of Law, AHCA cannot

disturb a conclusion unless it is on a legal matter that is within AHCA’s expertise and jurisdiction (e.g., its governing statute and rules) and AHCA must state with particularity its reasons for rejecting or modifying the conclusion of the ALJ, and must make a finding that its substituted or modified conclusion of law is as or more reasonable than the ALJ’s conclusion.

The issuance of a Final Order by AHCA is the end of the formal hearing process, and unless a judicial appeal is taken, the CONs will be issued or denied as set forth in the Final Order.

FURTHER APPEALS

A party may appeal the Final Order to a District Court of Appeal. This appeal is limited only to a review of the record by a three judge panel based upon legal arguments submitted by the parties’ attorneys in legal briefs.

CONCLUSION

Anyone who operates or wishes to operate a Skilled Nursing Facility in Florida should pay careful attention to the CON process that will begin in October of this year. There will be ample opportunities for parties that are seeking to expand skilled nursing operations in Florida. The CON process also includes protections for those with existing operations that could be adversely impacted by a CON being issued to another facility. Thus, whether you are seeking approval for new nursing home development or are simply seeking to protect your existing operation, the return of nursing home CON in Florida is likely to be of interest.

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.

