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challenges to
AHCA’s SAARs.”***



Geoffrey D. Smith

March 9, 2015

Update on Return of Nursing Home CON in Florida



The deadline is looming to challenge AHCA’s preliminary Decisions. March 16, 2015, is the final day for competing CON Applicants to file challenges to AHCA’s State Agency Action Reports (“SAAR”). Existing Providers wanting full party status to challenge preliminary decisions

should also file challenges by March 16, 2015. AHCA’s preliminary decisions that are not challenged by March 16, 2015, will become final and the preliminary approved Applicants will be issued CONs.

If a challenge is filed by a substantially affected party demonstrating that there are material disputed issues of fact, the matter will be referred to the Division of Administrative Hearings (“DOAH”) and assigned to an Administrative Law Judge (“ALJ”) for a quasi-judicial proceeding (“Final Hearing”). At the Final Hearing, AHCA’s preliminary decision is not entitled to any deference. The Applicants have the burden of proving the information contained in their CON Applications, and the Florida Evidence Code is applicable, with limited exceptions such as a more lenient rule on admissibility of hearsay evidence. For more information on the DOAH Final Hearing process, see our newsletter published February 11, 2015, posted at: <http://smithlawtlh.com/blog/update-on-return-of-nursing-home-con-in-florida/>.

DISTRICTS RIPE FOR CHALLENGES

At this point, any area where there is a pending CON approval is an opportunity for a legal challenge. Basis for challenges are unlimited and can include any combination of factors, such as a better fit for the market, technical flaws in a CON Application, under or over filling the gap

in need demonstrated by the fixed need publication, etc.

The chart below indicates sub-districts where AHCA’s preliminary approvals were less than the published fixed need determinations, which is one basis to argue a different provider or combination of providers might be a better fit.

Sub-district	Deficit/ Surplus
1-1	40 Bed Surplus
3-2	60 Bed Surplus
4-4	47 Bed Surplus
5-2	56 Bed Surplus
7-4	78 Bed Surplus
8-5	40 Bed Surplus

WHO CAN CHALLENGE

Existing Providers in the same district or competing CON Applicants in the same sub-district can challenge the preliminary decisions. Once challenged, an approved CON Applicant should challenge the other CON Applicants in their sub-district within 10 days of the Notice

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Update on Return of Nursing Home CON in Florida

of Litigation being filed in the *Florida Administrative Register*, or they could be left merely defending their approval without being able to raise flaws in competitors’ CON Applications.

UNCERTAIN APPLICANTS AND PROVIDERS SHOULD CHALLENGE

With March 16, 2015, rapidly approaching, many CON Applicants and Existing Providers may not have had the opportunity to fully comprehend the potential implications of AHCA’s preliminary decisions. If you are in this position, it is best to go ahead and file a challenge. A challenge can always be dismissed if you decide not to proceed, but if you miss the opportunity to challenge, you may have missed the only window of opportunity.

In some instances, denied CON Applicants have been able to reach settlements that resulted in their approval in addition to the approval of the preliminarily approved Applicant. In other instances, denied CON Applicants have been able to recoup some of their costs through settlements.

Existing Providers may have enhanced reasons to participate in challenges to avoid settlements that allow multiple approvals of preliminarily denied Applicants in addition to preliminarily approved Applicants. While this potential is always present in CON cases, it seems particularly likely in this batching cycle because there are so many potential sub-districts that may have litigation, several sub-districts have more fixed need for beds than have been preliminarily approved, and the Legislature has predetermined a limited window for the total number of beds that will be approved statewide before the moratorium is reactivated, and this number may be reached before need is triggered in the specific sub-district at issue in the future.

Further, a recent circuit court case provides additional reasons why Existing Providers should stay engaged in the process. In that case, a preliminarily denied CON Applicant challenged its denial. There was no competing CON Applicant. AHCA settled and approved the CON, including giving the CON Applicant several years beyond the

time where the CON should have expired to begin construction. Several years later, when the project was about to commence construction, the Existing Provider tried to challenge the CON arguing it should have expired 18 months after it was issued, instead of several years after it was issued. The circuit court held the Existing Provider waived its rights to challenge by not filing a challenge within 21 days, even though the Existing Provider had no reason to assume AHCA would have extended the CON for several years beyond the statutory validity period. This case stands for the position that if an Existing Provider fails to challenge a CON, it could be strapped with far reaching consequences.

CONCLUSION

March 16, 2015, is an important deadline to file challenges to AHCA’s preliminary approvals. Failure to timely file a challenge could waive your rights to any future challenges, even if the litigation ultimately results in settlements that go beyond expectations.

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.