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***“In 9 sub-districts,
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Health Care, Environmental, Governmental Relations,
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Geoffrey D. Smith

March 2, 2015

Update on Return of Nursing Home CON in Florida



AHCA announced the preliminary winners and losers in the first nursing home CON batching cycle since the Legislature lifted the moratorium in 2014. The State Agency Action Reports (“SAARs”) released on February 20 had a few surprises, but perhaps the biggest surprise is

not contained within the decisions on the 102 completed CON Applications, but instead in the significant number of areas that are still left with unmet need.

While most of the talk surround nursing home CON Applications filed in this batching cycle has been about the large number of CON Applications filed, perhaps the more interesting story is that in 9 sub-districts, where there was a combined published fixed need of 365 beds, no one applied. In 13 other sub-districts, AHCA’s preliminary decisions awarded less beds than the fixed need determination calculated despite having CON Applications that would have met the need, for a combined deficit of 443 beds. For example, in Lee County, sub-district 8-5, there was fixed need for 40 beds, yet AHCA denied the only CON Application filed in that sub-district, leaving the 40 bed fixed need determination unmet.

This article focuses on the fixed need determinations by sub-district and the net surplus or deficit that would be created if AHCA’s preliminary determinations stand. Note, however, that AHCA’s preliminary determinations may be overturned by legal challenges filed before March 16, 2015, so these numbers are subject to and will almost definitely change significantly before all of the legal challenges are completed. For a more detailed discussion on the legal challenge process and timeline, see our newsletter dated February 11, 2015.

**SUB-DISTRICTS WITH FIXED NEED
WITHOUT A CON APPLICANT**

No one applied for a nursing home CON in 9 sub-districts where there was published fixed need in the Second Batching Cycle for Other Beds and Programs 2014. The chart below shows the sub-district, counties, and fixed need that was not applied for by any nursing home provider.

Sub-district	Counties	Unmet Need
2-1	Gadsden, Holmes, Jackson, and Washington	56
2-3	Calhoun, Franklin, Gulf, Liberty, and Wakulla	14
3-1	Columbia, Hamilton, and Suwannee	99
3-3	Putnam	43
5-1	Pasco	67
6-4	Highlands	25
9-1	Indian River	18
9-2	Martin	37
9-3	Okeechobee	6

While it is too late for anyone to apply for a CON in these sub-districts in this batching cycle, it is extremely likely that similar fixed need will be published for these sub-districts in the next batching cycle on April 3, 2015.

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SUB-DISTRICTS WHERE NEED IS GREATER THAN AHCA AWARDS

In 13 sub-districts, AHCA preliminarily awarded CONs for less beds than the current projected need. The chart below provides the sub-district, counties, and deficit between the fixed need calculations and preliminary awards.

Sub-district	Counties	Unmet Need
1-1	Escambia and Santa Rosa	40
3-2	Alachua, Bradford, Dixie, Gilchrist, Lafayette, Levy and Union	60
3-5	Citrus	43
3-6	Hernando	16
3-7	Lake and Sumter	25
4-3	St. Johns and south-eastern Duval	47
5-2	Pinellas	56
7-2	Orange	18
7-3	Osceola	10
7-4	Seminole	78
8-1	Charlotte	3
8-2	Collier	7
8-5	Lee	40

Any Applicant that filed a CON in the current batching cycle has the right to challenge their denial or the approval of another CON in the same sub-district prior to March 16, 2015.

SUB-DISTRICTS WHERE AHCA AWARDS EXCEEDED FIXED NEED

There were 4 sub-districts where AHCA awarded more beds than the fixed need publications showed were needed. The chart below shows the sub-district, counties, and surplus of beds over the published fixed need.

Sub-district	Counties	Surplus Beds
2-2	Bay	14
3-4	Marion	12
4-2	Baker, Clay, and south-western Duval	47
6-5	Polk	51

Any Applicant that filed a CON in the current batching cycle has the right to challenge their denial or the approval of another CON Application filed in the same sub-district prior to March 16, 2015.

RIGHTS OF EXISTING PROVIDERS

Existing providers in the same district that will be substantially affected by the approval of a competing proposed facility or program can initiate or intervene in a challenge pursuant to Fla. Stat. §408.039(5)(c) (2014). Thus, by way of example, an existing provider in sub-district 6-3 can challenge a preliminary approval of a proposed provider in sub-district 6-5 because they are both in district 6. This is different from competing Applicants that must be filing in the same sub-district to prove standing. Existing providers may also intervene in legal proceedings challenging preliminary approvals after March 16, 2015, however, they do so subject to the standing of the other parties to the proceeding, as discussed in our prior newsletter on February 11, 2015. Thus, existing providers that wait until after March 16, 2015, do so at the risk that no one else challenges the preliminary approval.

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AREAS 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 an application, under or over filling the gap in need demonstrated by the fixed need publication, etc. There are literally countless basis for challenging a preliminary CON approval. Notably, final hearings are *de novo* proceedings, meaning AHCA’s preliminary decision is not given any weight or presumption of correctness.

Without a full detailed review of all of the competing Applications within a sub-district, it’s difficult to make any specific conclusions about where successful opportunities for challenges could be found. That said, there are some sub-districts that seem to stand out in a macro-analysis shown in the chart below.

Sub-district	Deficit/ Surplus	Reason
1-1	40 Bed Surplus	Other Applicant met the published need
3-2	60 Bed Surplus	Other Applicants met the published need
4-4	47 Bed Surplus	Other Applicants met the published need
5-2	56 Bed Surplus	Denied 56 bed Applicant
7-4	78 Bed Surplus	Other Applicants met the published need
8-5	40 Bed Surplus	Denied 31 bed Applicant

If these preliminary approvals are not challenged, they become final approvals and CONs will be awarded in these sub-districts.

Thus, if you are uncertain about whether you want to challenge a denial or someone else’s approval, it’s 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, then you may have missed the window of opportunity. That said, we have conservatively used March 16, 2015, as the deadline to file challenges throughout this article. However, there are certain facts and subsequent notice that have occurred in this batching cycle that might extend the period of time to file such challenges. Thus, if you have not decided to file a challenge until after March 16, 2015, and are just now reading this article and thinking you are too late, please contact us to discuss whether there may be additional ways to challenge a preliminary denial or approval.

CONCLUSION

February 20, 2015, held a few surprises for the bountiful field of CON Applicants, particularly that there is still a significant amount of unmet need where either no one applied for a CON or where AHCA did not award the beds to the full amount projected by the need formula. It will be interesting to see on April 3, 2015, whether AHCA again publishes similar need for these unclaimed areas, and if so, whether any CON Applicants will jump into the arena to compete for these unclaimed areas. There are also many areas of the State that are potentially subject to legal challenges to AHCA’s preliminary approvals. It will be interesting to see how many of AHCA’s preliminary decisions ultimately remain after these legal challenges are completed.

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.