



## **MEMORANDUM**

RE: New Certificate of Need Law

DATE: July 16, 2008

### **Major Changes in CON Review for General Hospitals**

During the 2008 General Legislative Session, a major overhaul of Certificate of Need review for new general hospital projects was adopted. Senate Bill 2326 was signed into law by the Governor effective May 19, 2008 (Ch. 2008-29, Laws of Florida). These legislative changes do not apply to any CON Application filed prior to the effective date of the Act. Therefore, under AHCA's batching schedule, the new law will be applied for the first time to CON Applications for new hospitals filed in the next batching cycle, which has a Letter of Intent filing deadline of August 11, 2008.

The substantial changes to CON review for new hospitals were the result of the Governor's initiative to completely eliminate CON review for new hospitals. However, as a result of widespread opposition to CON repeal in the hospital industry, including opposition from the Florida Hospital Association, and virtually every hospital provider in the State, the compromise bill that was ultimately adopted by the Legislature significantly streamlines, but does not eliminate, the CON review process for new hospitals. The following is an overview of the substantive and procedural changes to CON review requirements.

### **Reduction in CON Review Criteria for New General Hospitals**

A major component of SB 2326 is the reduction of the statutory review criteria that will apply to review of new general hospital CON projects. It is important to note that these legislative changes apply only to new general hospital projects, and will not effect CON Applications for the dwindling list of other beds or services that are still subject to CON review. Thus, these revisions will not apply to hospice services, specialty hospitals, non-exempt NICU proposals, comprehensive medical rehabilitation proposals, and open heart surgery (until such time as CON for open heart surgery is replaced by AHCA's pending proposed licensure rules for adult cardiovascular services). It is somewhat unclear whether the proposed rules will apply to Long Term Acute Care Hospitals, although it seems likely that AHCA will apply the new law to new LTACH CON proposals.

The current statutory review criteria are contained in Section 408.035, Florida Statutes. The following review criteria are completely eliminated for review of new general hospital CON Applications, and therefore will not be used in reviewing future CON Applications for new hospitals:

(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.

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

(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.

(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.

The rationale for the elimination of these criteria is that a decision on a new hospital should be based on true issues of need and access to hospital care services, and not upon technical application issues. Thus, issues related to "Schedule 6 - Proposed Staffing" and a proposed hospital's ability to recruit qualified medical, clinical, and technical staff in the face of labor shortages, will no longer be relevant to review of new hospital CON proposals. Likewise, issues pertaining to "Schedules 7 and 8 - Projections of Revenues and Expenses" are likewise eliminated as relevant to a new hospital proposal. Finally, any matters that pertain to the proposed architectural plans are eliminated from review.

It will be a difficult task for AHCA to apply the reduced criteria, as many of the eliminated review criteria were issues that have been commonly used as “distinguishers” among competing CON applicants. With the elimination of these criteria, there are fewer issues for AHCA to draw meaningful comparisons and contrasts between applicants proposing to serve the same area.

The criteria remaining that will be reviewed for new general hospital proposals include only 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. *(Note: “quality of care” is eliminated from consideration under this criteria for new hospitals.)*
- (e) The extent to which the proposed services will enhance access to health care for residents of the service district.
- (g) The extent to which the proposal will foster competition that promotes quality and cost-effectiveness.
- (i) The applicant's past and proposed provision of health care services to Medicaid patients and the medically indigent.

Thus, the focus of CON review and administrative hearings will be limited to these criteria focusing primarily upon issues of need, access to services, competition, and provision of indigent care.

### **New CON Application Content Requirements**

The wording of the new statute for CON Application Content is awkward, but appears to eliminate all of the currently existing content requirements for new hospital CON projects. Thus, it appears a CON Application for a new hospital project will no longer be required to include:

- A listing of all capital projects planned, approved or underway
- Sources of funds for planned capital projects
- Two years of financial pro forma projections

- An audited financial statement of the applicant for most recent two years

In replace of these familiar Application Content items, SB 2326 establishes new content items for general hospital projects, including:

- a detailed description of the proposed project and a statement of its purpose and the needs it will meet
- the proposed project's location
- the primary and secondary service area, defined by zip code (primary service area is first 75% of patients, and secondary is all remainder)
- a statement of intent, that if approved, the applicant will supply proof of financial ability to operate within 120 days. (AHCA will establish the financial documentation requirements, such as revenues and expenditures; basis for financing; and anticipated cash flows; and access to contingency financing.)

It is likely that AHCA will propose new rules and develop a new CON Application form to address these new requirements for hospital projects.

### **Limits on Ability to Challenge a CON Award**

In addition to limiting the specific statutory review criteria at issue for new hospitals, the new law also imposes specific procedural limits on the ability of an existing hospital to file a challenge to approval of a new hospital.

Within 21 days of a CON Application for a new general hospital being filed and deemed complete, any existing hospital seeking to ultimately challenge the award of a CON must provide a detailed written statement of opposition to AHCA and to the CON applicant. Although not specified in the new law, these opposition statements should include both health planning information and data, as well as legal arguments, evaluation of case precedent, and overall application of statutory and rule criteria to the specific facts of the case. In many ways, such opposition statements should be similar in scope and depth to a Proposed Recommended Order - summarizing and detailing all of the facts and law that support the denial of a proposed CON Application. The applicant will then have 10 days from the receipt of the detailed statement of opposition to file a written response.

Only competing applicants, and existing hospitals that filed the required detailed written statement of opposition have the right to petition for a formal administrative hearing to challenge the Agency's preliminary approval of a CON for a new hospital. Such challenges are limited in scope to only those issues raised in the detailed written statement of opposition.

However, an administrative law judge may, upon showing of good cause, expand the scope of the hearing. In seeking to expand the issues, the moving party must provide substantial and detailed facts and reasons for the failure to include the issues in the written statement of opposition. In all likelihood, administrative law judges will be reluctant to allow any significant expansion of the issues beyond the matters addressed in the detailed written statement of opposition, absent a showing that the matters could not have been raised at that time. But exceptions are allowed. For example, an administrative law judge could allow new issues to be litigated based upon information produced during the discovery process only after the submittal of the statement of opposition, and could not have been otherwise available to the opponent of the project.

### **New Time Frame for Hearing**

The legislative amendments mandate that administrative hearings for new hospital CON Applications must be commenced within six months after an administrative law judge has been assigned. The law specifically provides that a continuance may not be granted absent a finding of extraordinary circumstances by the administrative law judge. This will likely eliminate the current practice where it is common for new hospital cases to take up to a year or longer to proceed to final hearing.

### **New Post Final Order Procedures**

The legislative amendments include several new post Final Order procedures for new hospital CONs.

First, the new law provides that AHCA shall revoke the CON if the proposed location of the new hospital changes from what is specified in the CON Application, or if the primary service area of the proposed hospital changes from what is identified in the CON Application. Parties that participated in the administrative hearing, have standing to participate in any subsequent CON revocation proceedings based upon changed hospital location or service area. AHCA may allow such changes to location or service area if it is determined that such changes will enhance access to hospital services. It is not clear in the law whether this provision on CON revocation will apply to a hospital that is constructed, licensed, and becomes operational and then has a significant deviation in Primary Service Area from what was projected in the CON Application.

Second, the new law provides that a CON Applicant must submit proof of financial ability to operate and fund the project within 120 days of issuance of the Final Order. AHCA is to determine (presumably through rulemaking) the type and form of financial documentation to be submitted. Any party who participated in an administrative hearing on the CON may submit written comments concerning the adequacy of the financial documentation submitted; however, such party does not have standing to initiate or participate in any formal administrative hearing that may occur on the issue of financial ability to operate.

Additionally under the new law, AHCA may require a hospital licensee to provide proof of financial ability to operate at any time there is evidence of financial stability, including but not limited to unpaid expenses necessary for basic operations of the provider. This provision is interesting as it applies to “hospital licensees” (as opposed to CON applicants), and thus could be applied at any time after the hospital is operational. This appears to provide AHCA with new authority to “revoke a CON” for an operational hospital based upon financial instability.

### **Judicial Appeals**

The new law includes some very substantial changes concerning attorney fees and costs for parties that undertake an appeal of a Final Order to the District Court of Appeal. Under these changes, an Appellant is liable for up to \$1 million in attorney fees and costs, including fees and costs from the beginning of the original administrative hearing. Additionally, the party appealing must post a \$1 million appeal bond. This will provide a strong disincentive for any party to pursue a judicial appeal of a Final Order in a CON proceeding. This provision may be subject to legal challenge as an unconstitutional impediment to access to the courts.

### **Conclusion**

Legislative changes to CON regulation for proposed new hospitals will have significant impact on future CON Application review and challenges by existing hospital providers. Whether this streamlining of the CON process will satisfy critics of CON review remains to be seen.

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