

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 2312

SPONSOR: Senator Klein

SUBJECT: Certificate of Need

DATE: March 2, 2002                      REVISED: 03/06/02 \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Harkey</u>	<u>Wilson</u>	<u>HC</u>	<u>Favorable</u>
2.	_____	_____	<u>JU</u>	_____
3.	_____	_____	<u>FT</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

This bill establishes conditions that must apply before an existing health care facility may initiate or intervene in an administrative hearing regarding the application of a competitor facility for a certificate of need (CON). An existing facility may intervene only if it demonstrates that there is a substantial likelihood that its established program “will be forced into imminent closure” if the competitor is issued a CON. The intervening facility must also place in escrow a sum equal to the proposed project cost, but not less than \$500,000. If its challenge to the issuance of a CON fails, and the CON is approved in a final order not subject to appeal, the existing facility must also pay all costs of litigation, as well as the value of net revenues lost due to the delay in implementation of the proposed project caused by the litigation.

This bill amends s. 408.039, F.S.

**II. Present Situation:**

The certificate-of-need regulatory process under chapter 408, F.S., requires that before specified health care services and facilities may be offered to the public they must be approved by the Agency for Health Care Administration (AHCA). The CON process is intended to help ensure that major expenditures and new services proposed by health care providers are needed for quality patient care within a particular region or community.

In an overview of the program prepared by the legislatively mandated Certificate-of-Need Workgroup, the CON process is described as follows:

Florida’s CON program is operated within the Bureau of Health Facility Regulation in the Division of Managed Care & Health Quality (MCHQ) at the Agency for Health Care

Administration. The Division serves as headquarters for the regulation of health care facilities in the state. MCHQ licenses, registers and certifies 36 types of health care providers. Of those, four require CON review to begin or expand operations: hospitals, nursing homes, hospices and intermediate care facilities for the developmentally disabled (ICF-DDs)....

Throughout its history, the Florida CON program has reviewed projects differently depending on their size and scope. Full CON review, which is known in the program as competitive batched review, is applied to major applications for new or expanded beds or services. Other processes, such as expedited reviews or the granting of CON exemptions, are streamlined processes for smaller projects. In order to understand how the program operates, competitive batched review is used as the example.

Every six months, AHCA projects “need” for CON regulated beds and services using algebraic formulas that are included in administrative rule. These formulas look at factors such as service utilization rates and predicted population growth to project need for specific services.

In response to this publication of “need,” applicants submit letters of intent to the Agency. Notice of these letters is published in the Florida Administrative Weekly, allowing interested parties to review them and, if they are interested, to submit competing letters of intent for a similar project in the same geographic area. The publication of need is not a requirement for the submission of a CON letter of intent. In the absence of published need, applicants are free to submit proposals based on special, local circumstances.

A month after the letters of intent are submitted the applicants may submit their first application. Some letters of intent are not followed up with an application, and there is no penalty when this happens. Hospitals, nursing homes and hospices typically, but not always, use private consultants to prepare their CON applications.

Over the following month, AHCA analysts review the information in the applications and prepare a list of omissions for the applicant. During this period a public hearing may be held (if requested) in the local area of the proposed project, although these hearings have become very rare.

A month after the submission of the initial application, the proposal must be finalized. At that point, the Agency must have all of the information it is allowed to consider in the evaluation of the application. Staff experts in health care planning and policy, health care finance and accounting, and hospital architecture and project costs review the applications over the next two months and the Agency publishes initial decisions in the Florida Administrative Weekly.

If AHCA approves the proposal, other providers of similar services in the same planning area are entitled to legally challenge the decision. This begins a formal administrative proceeding at the Division of Administrative Hearings (DOAH) before an administrative law judge. This proceeding involves the introduction of sworn testimony of expert

witnesses and documentary evidence. If AHCA denies the proposal, the denied applicant can challenge the Agency's decision, and other affected providers can intervene in the administrative proceeding to oppose the proposed project.

It takes less than five months for the Agency to reach an initial decision. If the decision is challenged, the time required to complete the remainder of the process is less certain. As in any legal proceeding, witnesses are deposed and there is a period of discovery leading up to the scheduled hearing time. The case can be settled prior to hearing or it can proceed.

DOAH hearings on CON cases can last several days or weeks. After hearing the case, the administrative law judge writes a recommended order that is typically ratified by the Department when it issues its final order.

Department final orders can be appealed to the District Court of Appeals. Denied applicants as well as certain competitors who wish to challenge an approval of a CON application can appeal the final order. These appeals are rare and in recent years they have become very rare. If there is an appeal it can add many months or even years to the process of reaching a final decision on a CON application. (*Interim Report of the Florida Certificate of Need Workgroup*, December 2001)

According to AHCA:

In 2001, there were 103 projects comparatively reviewed under the CON program, and 21 projects received expedited review. The agency published its intent to approve 40 of the comparatively reviewed projects and 14 of the expedited projects. Challenges were filed for 12 of the intended approvals. All challenges concerned projects that had been comparatively reviewed - 10 challenged the approval of hospital projects; 2 challenged the approval of new hospice programs.

From 1999 through 2001, excluding nursing home and home health agency projects, the types of intended approvals in comparative reviews that were challenged included:

- 8 proposals for new or replacement acute care hospitals (cost \$30 to \$156 million)
- 3 proposals to add acute care beds (cost \$4 million to \$17 million)
- 5 proposals for adult open heart surgery programs (cost \$6 to \$10 million)
- 3 proposals for long term care hospital beds (cost \$0.1 million to \$13 million)
- 4 proposals for Neonatal Intensive Care Unit beds (cost \$0.5 to \$1.5 million)
- 2 proposals for other specialty beds (cost \$1 million to \$10 million)
- 6 proposals for new hospice programs (cost \$0.1 million to \$0.8 million)

Historical data (1997 through 1999) show that at least 50 percent of challenges to the agency's intended approval of a comparatively-reviewed hospital project are resolved within 9 months, and at least 70 percent are resolved within 1 year. Up to 30 percent take more than one year.

Sections 408.031-408.045, F.S., contain provisions relating to the certificate-of-need program. Section 408.039, F.S., establishes the review process for applications for CONs. Subsection (5) of that section establishes the requirements for administrative hearings for contested awards or denials of CONs. Paragraph (c) specifies that in administrative proceedings challenging the issuance or denial of a CON, only applicants considered in the same batching cycle are entitled to a comparative hearing on their applications. Existing health care facilities may initiate or intervene in an administrative hearing upon a showing that an established program will be substantially affected by the issuance of any certificate of need.

### **III. Effect of Proposed Changes:**

The bill amends s. 408.039(5)(c), F.S., which governs administrative hearings in the CON review process, to permit an existing health care facility to initiate or intervene in an administrative hearing only if it demonstrates that there is a substantial likelihood that its established program “will be forced into imminent closure” if the competitor is issued a CON. An existing facility seeking to initiate or intervene in an administrative hearing regarding a competitive CON application must also place in escrow a sum equal to the proposed project cost, but not less than \$500,000. If its challenge to the issuance of a CON fails, and the CON is approved in a final order not subject to appeal, the existing facility must also pay all costs of litigation, as well as the value of net revenues lost due to the delay in implementation of the proposed project caused by the litigation. The challenging facility may satisfy the escrow requirement with a bond of sufficient type and amount.

The bill will take effect July 1, 2002.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Art. VII, s. 18 of the Florida Constitution.

#### **B. Public Records/Open Meetings Issues:**

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

#### **C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Art. III, s. 19(f) of the Florida Constitution.

#### **D. Other Constitutional Issues:**

Article I, section 21 of the State Constitution provides that the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay. The bill establishes conditions that must apply before an existing health care facility may initiate or intervene in an administrative hearing regarding the

application of a competitor facility for a certificate of need (CON). An existing facility may intervene only if it demonstrates that there is a substantial likelihood that its established program “will be forced into imminent closure” if the competitor is issued a CON. The intervening facility must also place in escrow a sum equal to the proposed project cost, but not less than \$500,000.

If an existing facility did not meet the threshold for initiating or intervening in an administrative hearing, and therefore was not a party in the CON hearing, it might not have a basis upon which to appeal a CON decision to a court. It is unclear whether a facility seeking to initiate or intervene in an administrative hearing can characterize the conditions imposed by the bill as a constitutionally impermissible infringement on its right to seek redress.

## **V. Economic Impact and Fiscal Note:**

### **A. Tax/Fee Issues:**

None.

### **B. Private Sector Impact:**

A facility challenging a CON application by a competitor would have to place in escrow a sum equal to the proposed project cost, but not less than \$500,000. If an existing facility challenged a CON application and the challenge failed, the existing facility would have to pay all costs of litigation, as well as the value of net revenues lost due to the delay in implementation of the proposed project caused by the litigation.

The overall impact of the bill would be a reduction in challenges of CONs awarded and a resulting reduction in costs for market entry or expansion.

### **C. Government Sector Impact:**

AHCA reports that it will have to contract for the services of expert witnesses to participate in appeals of initial CON denials. These experts would include, but would not be limited to, physicians, nurses, statisticians and traffic engineers. AHCA estimates costs for these expert witnesses to range from \$50,000 to \$100,000, or an average of \$75,000 per case. AHCA estimates 20 initial denial cases to be appealed annually, for an annual contract cost of \$1,500,000. The frequency of challenges to initial CON denials is not likely to change substantially, but those cases will involve a third party intervener much less often, requiring a much greater dedication of legal resources by the Agency to effectively litigate. To the extent that existing facilities do seek to participate, it is expected that extensive litigation both on issues of standing as well as the amount of fees, costs and particularly the prospective “value of net revenues lost due to the delay in implementation of the proposed project...” Given an estimated 20 denial cases annually involving full litigation and final hearing, it is estimated each case will require 20 hours of written discovery; 96 hours of depositions; 10 hours for motion hearings/research time; 20 hours of pre-hearing preparation; 40 hours for proposed final orders for a total of 3,720 hours.

Given that 1 FTE equals approximately 1,854 hours annually, 2 Senior Attorney and 1 Administrative Assistant 1 positions will be required to handle the increased caseload. Expenses for three additional FTEs in the General Counsel’s Office would break out as follows:

2.00 Senior Attorneys @ \$60,515	\$	123,030
1.00 Administrative Assistants @ \$29,866		<u>29,866</u>
		\$152,896
 Expense (3.00 professional FTE @ \$11,057)	\$	<u>33,171</u>

	<b>Amount Year 1 (FY 02-03)</b>	<b>Amount Year 2 (FY 03-04)</b>
<b><u>Non Recurring Expenditures:</u></b>		
Salaries	\$ 0	\$ 0
OPS	\$ 0	\$ 0
Expense – contract for expert witnesses	\$ 1,500,000	\$ 1,500,000
Agency std pkg. for 3 prof. positions @ \$2659 each	\$ 7,977	0
OCO (2 laptops & 1 desktop computers)	\$ 4,971	\$ 0
<b>Total Non-Recurring Expenditures:</b>	<b>\$ 1,512,948</b>	<b>\$ 1,500,000</b>

	<b>Amount Year 1 (FY 02-03)</b>	<b>Amount Year 2 (FY 03-04)</b>
<b><u>Recurring Expenditures:</u></b>		
Salaries w/27.5 Benefits #FTE	\$ 152,896	\$ 152,896
Senior Attorneys PG 230 2		
Administrative Assistant I, PG 15 1		
OPS	\$ 0	\$ 0
Expense (Agency std pkg. – 3 prof. FTE @ 11,057)	\$ 33,071	\$ 33,071
OCO	<u>\$ 0</u>	<u>\$ 0</u>
<b>Total Recurring Expenditures</b>	<b>\$ 185,967</b>	<b>\$ 187,967</b>

	<b>Amount Year 1 (FY 02-03)</b>	<b>Amount Year 2 (FY 03-04)</b>
<b><u>Expenditures:</u></b>		
Sub-total Non-Recurring Expenditures	\$ 1,512,948	\$ 1,500,000
Sub-total Recurring Expenditures	<u>\$ 185,967</u>	<u>\$ 185,967</u>
<b>Total Expenditures</b>	<b>\$ 1,698,915</b>	<b>\$ 1,685,967</b>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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