# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1293 Certificate of Need
**SPONSOR(S):** Mayfield
**TIED BILLS:** None. **IDEN./SIM. BILLS:** None.

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Health Standards (Sub) | 4 Y, 3 N | Rawlins | Collins |
| 2) Health Care | | | |
| 3) Appropriations | | | |
| 4) | | | |
| 5) | | | |

## SUMMARY ANALYSIS

In the past few years, the Legislature has considered proposals related to the Certificate of Need (CON ) regulatory process that call into question whether or not CON is still an appropriate market entry and quality control mechanism for Florida hospitals. There have been anecdotal examples given in public testimony that illustrate this problem. For example, testimony has been given that the Agency has issued a CON to a facility, yet the operation of a program has been impeded - in some cases for decades- by the CON challenge process, which effectively kept competing hospitals at bay or out of a particular services all together, regardless of the state's findings.

State law allows existing hospitals to initiate or intervene in an administrative hearing upon a showing that an established program will be substantially affected by the issuance of any CON. Applicants competing for a CON may also challenge the Agency's intended issuance or denial of a CON. Challenges to an application and the cost of defending against challenges are a major reason for the perception that the CON process is burdensome, and therefore not in the public's best interest with regard to appropriate options for delivery of health care services.

Florida law specifies that upon the request of any applicant or substantially affected person within 14 days after notice that an application has been filed; a public hearing may be held at the agency's discretion if the agency determines that a proposed project involves issues of great local public interest. The public hearing shall allow applicants and other interested parties reasonable time to present their positions and to present rebuttal information. A recorded verbatim record of the hearing shall be maintained. The public hearing shall be held at the local level within 21 days after the application is deemed complete.

This bill does not affect the right of an existing health care facility to request and participate in the aforementioned public hearing. Rather, it eliminates the standing of an existing facility to challenge, in a formal administrative hearing, the issuance of a CON to another health care facility.

Previously, the Legislature has restricted the right of persons to intervene in administrative proceeding regarding the issuance or denial of a certificate of need. For example, prior to 1987, for instance, a substantially affected person who was aggrieved by the issuance, revocation, or denial of a CON had the right to seek an administrative hearing. In 1987, the Legislature enacted the current statutory provisions, which have been noted and interpreted by the courts as the intent to restrict standing in CON cases.

In addition, the bill specifies that a facility seeking to challenge or intervene in the issuance of a CON is required to place in escrow or acquire and provide a bond in an amount equal to 25 percent of the proposed project cost or $500,000 whichever is greater. The bill specifies that the applicant may recover from the challenging facility all cost of litigation.

According to AHCA this will not have an impact on state revenues or state expenditures.

The bill provides for an effective date of July 1, 2003.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

| | | | |
|---|---|---|---|
| 1. Reduce government? | Yes[x] | No[] | N/A[] |
| 2. Lower taxes? | Yes[] | No[] | N/A[x] |
| 3. Expand individual freedom? | Yes[x] | No[] | N/A[] |
| 4. Increase personal responsibility? | Yes[x] | No[] | N/A[] |
| 5. Empower families? | Yes[] | No[] | N/A[x] |

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

**Certificate of Need Regulatory Process**

CON programs emerged in the late 1960s and early 1970s as a way to regulate growth of facilities and costs in health care at a time when many of the hospitals built were federally funded through grants known as Hill-Burton Grants. After the passage of the National Health Planning and Resources Development Act of 1974 (PL93-641) most states implemented CON programs. After the act was repealed in the 1980s, a number of states abolished their CON programs.

In the past few years, the Legislature has considered proposals related to CON that call into question whether or not CON is still an appropriate market entry and quality control mechanism for Florida hospitals. Several issues are brought to the discussion. One issue is the question of whether the CON process is a mechanism for maintaining quality, or actually functions as an outdated planning mechanism that thwarts competition among providers. There have been anecdotal examples given in public testimony where the Agency has issued a certificate of need to a facility and the operation of a program has been impeded, in some cases for decades, by the CON challenge process, which effectively kept competing hospitals at bay or out of a particular services all together, regardless of the states findings.

The CON 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).

Section 408.036, F.S., specifies which health care projects are subject to review:

- Subsection (1) of that section lists the projects that are subject to full comparative review in batching cycles by AHCA against specified criteria.
- Subsection (2) lists the kinds of projects that can undergo an expedited review. These include: research, education, and training programs; shared services contracts or projects; a transfer of a CON; certain increases in nursing home beds; replacement of a health care facility when the proposed project site is located in the same district and within a 1-mile radius of the replaced facility; and certain conversions of hospital mental health services beds to acute care beds.
- Subsection (3) lists projects that may be exempt from full comparative review upon request.

**Challenges to Applications**

Section 408.039(5) (c), F.S., allows existing hospitals to 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. Applicants competing for a CON may also challenge the Agency's intended issuance or denial of a certificate of need. Challenges to an application and the cost of

defending against challenges is a major reason for the perception that the CON process is burdensome.

Section 408.039(3) (b), F.S., provides that:

> " Upon the request of any applicant or substantially affected person within 14 days after notice that an application has been filed, a public hearing may be held at the agency's discretion if the agency determines that a proposed project involves issues of great local public interest. The public hearing shall allow applicants and other interested parties reasonable time to present their positions and to present rebuttal information. A recorded verbatim record of the hearing shall be maintained. The public hearing shall be held at the local level within 21 days after the application is deemed complete."

This bill does not affect this right of an existing health care facility to request and participate in the aforementioned public hearing.

Section 408.039(5) (c), F.S., states:

> "In administrative proceedings challenging the issuance or denial of a certificate of need, only applicants considered by the agency 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, whether reviewed under s. 408.036(1) or (2), to a competing proposed facility or program within the same district."

This bill eliminates the standing of an existing facility to challenge in a formal administrative hearing the issuance of a certificate of need of another health care facility[1]

Previously, the Legislature has restricted the right of persons to intervene in administrative proceeding regarding the issuance or denial of a certificate of need. For example, prior to 1987, for instance, a substantially affected person who was aggrieved by the issuance, revocation, or denial of a CON had the right to seek an administrative hearing. In 1987, the Legislature enacted the current statutory provisions, which have been noted and interpreted by the courts as the intent to restrict standing in CON cases.

In fact, the current statute has been found to preclude a holder of a CON for an approved but not yet established facility or program from challenging the granting of a CON to another facility[2]

It should be noted that this bill does not affect the entitlement of an applicants considered by AHCA in the same batching cycle to a comparative hearing on their applications. This right has been upheld by the court in Bio-medical Applications of Clearwater, Inc. v Department of Health and Rehabilitative Services, 370 So.2d 19 ( Fla. 2d DCA 1979). It is also noteworthy that it has been recognized that "Bio-Medical will not aid an applicant who is otherwise precluded from meeting the standing requirement of section 381.709(5) (b)." HCA Health Services of Florida, Inc. v Department of Health and Rehabilitative Services, 599 So. 2d 211, 213 (Fla. 1st DCA 1992).

The table below, which was provided by the AHCA, reflects the number of CON applications filed and the percentage of applications that are challenged up to end of FY 01-02:

[1] AAMIS VB North Ridge General Hospital, Inc. v Department of Health and Rehabilitative Services, 577So2d 648 (Fla 1st DCA 1991)
[2] Charter Hospital of Pasco Co. v Department of Health and Rehabilitative Services, 563 So.2d 181 (Fla 1st DCA 1990).

| | TOTAL | # Litigated or Pending Litigation | % of TOTAL | # Pending Final Order | % of TOTAL | # Overturned/ % | # Licensed | % of TOTAL | Number Voided**/ % of TOTAL | Number Pending Licensure***/ % of TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|
| Completed CON Reviews, 1/1/1996 to 2002 | 1037 | 561 | 54.09% | 75 | 7.23% | | | | | |
| | | | | | | | | | | |
| Agency Approved the Initial Application | 426 | 156 | 37.5% | 10 | 2.4% | 24/ 16.66% | 210 | 49% | 56/ 13.15 | 126/ 29.58% |
| Agency Denied the Initial Application | 439 | 402 | 91.57% | 65 | 14.81% | | | | | |
| Application Withdrawn* | 172 | 3 | 1.74% | 0 | | | 0 | | | |

* Typically reflects applicants who did not respond to omissions

As well, the bill specifies that a facility seeking to challenge or intervene in the issuance of a certificate of need be required to place in escrow or acquire and provide a bond in an amount equal to 25 percent of the proposed project cost or $500,000 whichever is greater.

The bill specifies that the applicant may recover from the challenging facility all cost of litigation.

C. SECTION DIRECTORY:

**Section 1.** Amends s. 408.039, F.S., eliminating the requirement that an existing health care facility may challenge the Agency decision on the issuance of a CON; requiring health care facilities that challenge the issuance of a CON to post bond or establish an escrow account; providing for an award and recovery of certain cost and revenue losses by successful CON applicants from facilities that challenge the issuance of a CON; providing the award to be made by an administrative law judge and to be enforceable as an agency final order.

**Section 2**. Provides for an effect date of July 1, 2003.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   According to AHCA this bill will not have an impact on state revenues.

2. Expenditures:

   According to AHCA this bill will not have an impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

It is anticipated that the bill will reduce the cost of providing health care services by limiting the possibility of legal challenges to the CON regulatory process. As well, provisions of the bill allow a facility that loses revenue based on the challenge of a CON to recoup lost revenues that resulted from the legal process.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenues.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

As written, the bill disallows an existing facility the ability to challenge a CON, while establishing bond and escrow requirements for existing facilities that challenge a CON.

The Agency for Health Care Administration provided the following:

> "The language requiring that an intervener must provide the escrow amount or a bond apparently fails to recognize that a facility may intervene in support of the intended approval of an application. There is no apparent logic to requiring those supporters to establish an escrow account or provide a bond.
>
> For clarity, the bill should specify that only interveners on behalf of the challenger are required to establish an escrow account or provide a bond.
>
> If it is intended that only interveners who support the challenger must provide the escrow or bond, then it is not clear whether those funds are also available to pay the approved applicant's litigation costs. The bill language states that the approved applicant may recover litigation costs

from the challenging facility. There is no specifically defined financial obligation for the challenger's supporting interveners."

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES