



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Provide limited government** --- If a nursing home meets the criteria for the exception from the CON moratorium, it will be able to apply for an exemption from CON review for the addition of nursing home beds and thus will not incur the cost of a CON review.

#### B. EFFECT OF PROPOSED CHANGES:

##### BACKGROUND

During its 2001 session, the Legislature enacted CS/CS/CS/SB 1202,<sup>1</sup> which contained numerous provisions relating to long-term care facilities in Florida. In addition to other requirements, the bill required that notwithstanding the establishment of need as provided for in chapter 408, no certificate of need (CON) for additional community nursing home beds was to be approved by the Agency for Health Care Administration (AHCA) until July 1, 2006. The bill also provided legislative findings that

[T]he continued growth in the Medicaid budget for nursing home care had constrained the ability of the state to meet the needs of its elderly residents through the use of less restrictive and less institutional methods of long-term care. It is therefore the intent of the Legislature to limit the increase in Medicaid nursing home expenditures in order to provide funds to invest in long-term care that is community-based and provides supportive services in a manner that is both more cost-effective and more in keeping with the wishes of the elderly residents of the state.<sup>2</sup>

##### Certificate of Need History

The Certificate of Need (CON) is a regulatory review process administered by AHCA which requires specified health care providers to obtain prior authorization before offering certain new or expanded services. Florida's CON program has been in operation since July 1973 and has undergone several changes over the years.

From 1974 through 1986, the specifics of the program were largely dictated by the federal National Health Planning and Resources Development Act, which established minimum requirements regarding the type of services subject to CON review, review procedures, and review criteria. Each state was required to have a CON program in compliance with those standards as a condition for obtaining federal funds for health programs. The federal health planning legislation was repealed in 1986.

Since 1987, Florida's Certificate of Need formula for community nursing home beds<sup>3</sup> provides an allocation of projected nursing home beds which will be needed in a specific AHCA CON subdistrict within a three-year time horizon. The formula considers the projected increase in the district population age 65 to 74 and age 75 and over, with the age group 75 and over given 6 times more weight in projecting the population increase. Projected future demand is adjusted by the number of existing and currently allocated beds and occupancy rates, producing a net need for additional nursing facility beds. Rules governing certificate of need provide that if current occupancy of licensed nursing home beds is

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<sup>1</sup> Chapter 2001-45, L.O.F.

<sup>2</sup> S. 651.1185(2), F.S.

<sup>3</sup> See Chapter 59C-1.036, F.A.C.

less than 85 percent, the net need in a subdistrict is zero regardless of whether the formula otherwise would show a net need.

Prior to July 2001, projects to increase the number of community nursing home beds by construction of new facilities or addition to existing facilities required CON approval. Pursuant to statute, beginning July 2001 and continuing until July 2006, AHCA is prohibited from approving any project that would add to the total of community nursing home beds in any subdistrict. The prohibition does not apply to sheltered nursing home beds.<sup>4</sup> Projects which increase beds at one nursing home with an identical decrease at another facility in the same subdistrict may be approved, because the subdistrict total would not change.

### Subsequent Legislative Modifications to Moratorium

There have been two modifications to the moratorium since 2001:

- Section 651.1185(4)(a), F.S. permits beds to be added in a county which currently has no community nursing home beds and the lack of beds occurs because all nursing homes in that county that were licensed on July 1, 2001 have closed.
- Section 651.1185(5), F.S. specifies that the moratorium does not apply in a county under 50,000 population. In such counties a nursing home may add up to ten beds or increase its beds by 10 percent, whichever is greater. In addition to other documentation, the facility must:
  - Certify that the facility has not had any class I or class II deficiencies within the 30 months preceding the request for additional beds.
  - Certify that the prior 12-month average occupancy rate for the nursing home beds at the facility meets or exceeds 94 percent and the facility had not had any class I or class II deficiencies since its initial licensure.
  - For a facility that has been licensed for less than 24 months, certify that the prior 6-month average occupancy rate for the nursing home beds at the facility meets or exceeds 94 percent and that the facility has not had any class I or class II deficiencies since its initial licensure (s. 651.1185(5), F.S.).

Despite enactment of these exceptions, no expansion of nursing home beds has occurred since the moratorium was imposed.

### Has the Nursing Home CON Moratorium Affected Access to Nursing Home Care?

After enactment of the moratorium, many believed that due to Florida's growing elder population, the state would experience a substantial increase in nursing home occupancy rates which would likely require an expansion of the number of nursing home beds. However, Florida's statewide nursing home occupancy rate in 2001 was 89.25 percent, and this occupancy rate has declined to a statewide occupancy rate for the year ending June 2005 of 87.41 percent.<sup>5</sup> The national occupancy rate was 82.4 percent in 2002, the latest year for which national data is available.<sup>6</sup> Occupancy rates in other states vary from a high of 94.1 percent in North Dakota, to a low of 68.4 percent in Oklahoma.<sup>7</sup>

The absence of a substantial increase in occupancy rate may be due to a number of factors:

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<sup>4</sup> S. 651.1185(3), F.S. Sheltered beds are those which are a part of a continuing care retirement community.

<sup>5</sup> Source: Agency for Health Care Administration, Bill Analysis, January 23, 2006.

<sup>6</sup> Source: *Table 113, Nursing Home Beds, occupancy, and residents, according to geographic division and State: United States, 1995-2002.* National Center for Health Statistics. *Health, United States 2004 with Chartbook on Trends in the Health of Americans.* Hyattsville, Maryland: 2004. Available at <http://www.cdc.gov/nchs/fastats/nursingh.htm>.

<sup>7</sup> *Ibid.* According to *Table 113*, Florida's nursing home occupancy rate in 2002 was 85.6 percent.

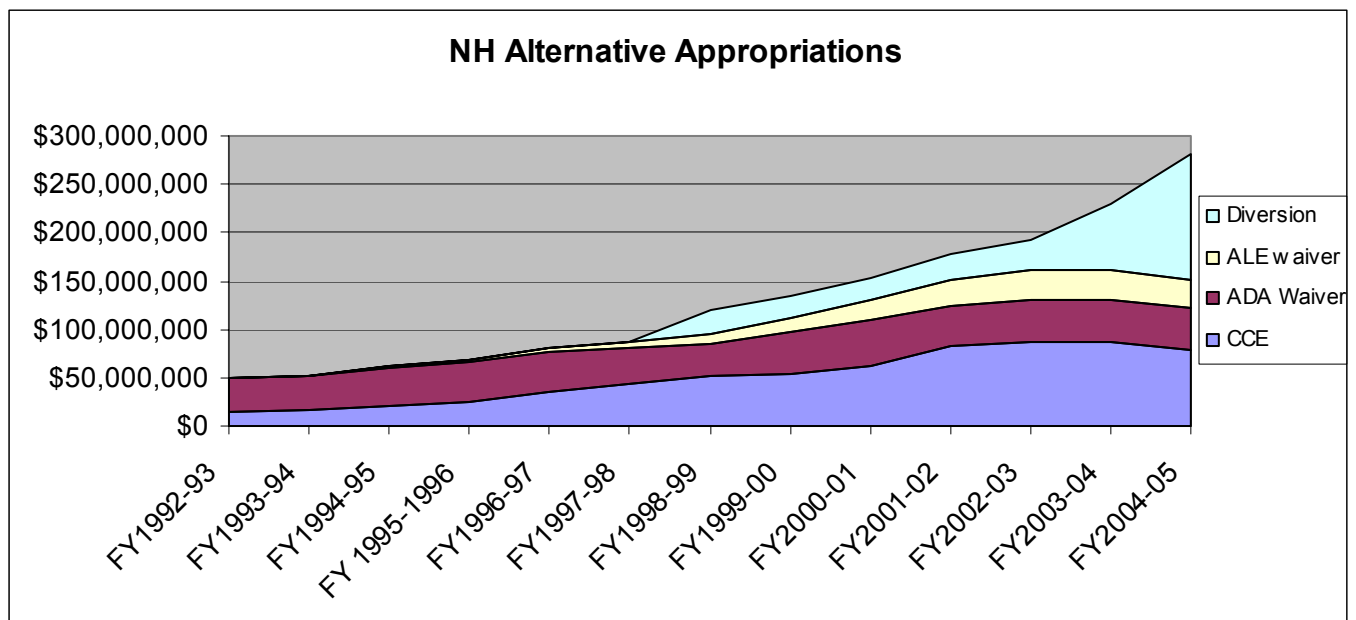
- Florida has increased its investment in home and community-based alternatives, particularly those programs targeted to the frailest seniors
- Florida contains a robust assisted living industry. Many elderly persons prefer assisted living to placement in medically-oriented nursing homes.
- Increasing disability levels of individuals served in nursing homes suggests that those who are less disabled are being cared for in other settings.
- Most recent studies indicate a decline in the rate of functional disability among the U.S. elderly population. Although rates of disability declined for both sexes, the most significant decline in disability is among men, with the largest decline in disability being in men over the age of 80.<sup>8</sup>

Nonetheless, there are four areas in Florida where occupancy rates surpass the 94 percent occupancy threshold in the CON formula; each demonstrates a net bed need.

| County                         | Net Bed Need |
|--------------------------------|--------------|
| Leon                           | 68           |
| Columbia, Hamilton and Suwanee | 70           |
| Nassau/North Duval             | 30           |
| Seminole                       | 111          |

### Resources Devoted to Home and Community-based Services

CS/CS/CS/SB1202 provided that the intent in limiting the growth in new nursing home beds was to increase investments in community-based long term care.<sup>9</sup> The chart below is the Appropriations history for Florida’s four largest Home and Community-based programs serving the elderly: the Nursing Home Diversion Program, the Assisted Living for the Elderly Waiver, the Aging/Disabled Waiver, and the Community Care for the Elderly program:



<sup>8</sup> Costa, Dora L., 2002. "Changing Chronic Disease Rates and Long-term Declines in Functional Limitation Among Older Men." *Demography*. 39(1): 119-138.

<sup>9</sup> See fn. 1, *infra*.

## Nursing Home Industry Recommendations Regarding the Moratorium

Representatives of the Florida Health Care Association (representing primarily for-profit nursing homes), the Florida Association of Homes for the Aging (representing primarily not for profit and religious nursing homes) and the Florida Long-Term Health Care Association (representing primarily for profit nursing home chains) report that members of their associations do not see a need to lift the moratorium at this time. All of the associations cautioned that future projections of Florida's elder population suggest that at some point there will be an increased demand for nursing home services.

Nursing home representatives recommended that, due to the lag time in nursing home construction and difficulty obtaining capital for construction, the state should continue to monitor potential demand and structure lifting of the moratorium sufficiently in advance of projected need. All of the provider associations suggested that there will be a likelihood that some counties or CON subdistricts may experience local population growth which may create the need for a localized exception to the moratorium. In the nursing home industry, normal turnover produces a slight vacancy rate, meaning that a facility with a 95 percent occupancy rate is, for practical purposes, full. Industry representatives suggested the state should provide an exception to the moratorium in the instance that the average occupancy rate in facilities in a CON subdistrict exceeds 96 percent for a specified period of time.

In addition, many Florida nursing homes operate with CON conditions that specify a certain number of Medicaid patient days the facility must serve. The increased investments in community-based long-term care --- leading to a decrease in placements in nursing homes --- have resulted in some facilities needing to request a reduction in those CON conditions. These reviews are time consuming for both the licensee and AHCA. As the Nursing Home Diversion program continues to expand<sup>10</sup> and Medicaid long-term care reform is implemented,<sup>11</sup> the necessity for these reviews will increase.

### **PROPOSED CHANGES**

HB 7051 proposes to extend the moratorium on approval of certificates of need for nursing homes until July 1, 2011. The bill provides an exception to the moratorium. In an AHCA planning subdistrict where the nursing home occupancy rate is 94 percent or greater, a nursing home with a 96 percent or greater occupancy rate could add ten beds or 10 percent of the number of licensed beds, if the home had no class I or class II deficiencies in the past 30 months, and if any beds licensed before the exception was requested had been licensed and operational for at least 12 months. A nursing home may request additional beds under this exception as an exemption from full comparative review.

The bill allows a nursing home located in a county where the Nursing Home Diversion program or Florida Senior Care has been implemented to request a reduction in its annual Medicaid patient days that is a condition of its certificate of need until June 30, 2011. AHCA is required to automatically grant the request if the reduction is no more than 15 percent of the nursing home's annual condition. A nursing home may make only one request every two years and must make such request in writing 60 days in advance of making a reduction. The revised CON condition must be changed in the record and acknowledged in writing by the agency.

The bill relocates the sections on the nursing home CON moratorium from those statutes dealing with continuing care contracts to those dealing with certificate of need review for ease of use. This bill amends s. 651.1185, F.S., transfers that section, and renumbers it as s. 408.0435, F.S., and amends s.408.040, F.S.

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<sup>10</sup> Forty nine counties are approved for operation of nursing home diversion programs; 25 of those counties have active programs.

<sup>11</sup> Two pilot areas have been designated to implement Florida Senior Care, an integrated, fixed-payment delivery system for Medicaid recipients age 60 or older. One area --- Osceola, Orange, Seminole, and Brevard counties --- is to provide voluntary participation; the other --- Escambia, Santa Rosa, Okaloosa, and Walton counties--- is mandatory.

C. SECTION DIRECTORY:

**Section 1.** Transfers s. 651.1185, F.S., and renumbers and amends it as s. 408.0435, F.S.; extends moratorium on nursing home CON until July 1, 2011; provides exceptions to moratorium.

**Section 2.** Amends s. 408.040(1), F.S.; provides for reduction in patient days as condition of CON in certain areas under certain conditions.

**Section 3.** Provides the act is effective upon becoming law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

If a nursing home meets the criteria for the exception from the CON moratorium, it will be able to apply for an exemption from CON review for the addition of nursing home beds and thus will not incur the cost of a CON review.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**