

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Appropriations

BILL: CS/CS/SB 1482

INTRODUCER: Judiciary Committee; Health Policy Committee; and Senator Hays

SUBJECT: Skilled Nursing Facilities

DATE: April 19, 2013 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Stovall	HP	Fav/CS
2.	Munroe	Cibula	JU	Fav/CS
3.	Brown	Hansen	AP	Pre-meeting
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

CS/CS/SB 1482 provides for a certificate of need (CON) exemption for the construction of a licensed skilled nursing facility for the addition of skilled nursing facility beds within a deed-restricted retirement community if:

- The retirement community is located in a county that has 25 percent or more of its population consisting of persons aged 65 or older;
- The retirement community is located in a county with a ratio of no more than 16.1 beds per 1,000 persons aged 65 or older;
- The retirement community is zoned for a mix of residential and non-residential uses;
- The residential use of the retirement community is deed-restricted as housing for older persons; and
- The retirement community has a population of at least 8,000 residents.

The bill has an indeterminate fiscal impact on the Medicaid program.

The bill takes effect upon becoming a law.

The bill creates section 408.0362 of the Florida Statutes.

II. Present Situation:

Certificates of Need

A CON is a written statement issued by the Agency for Health Care Administration (AHCA) evidencing community need for a new, converted, expanded, or otherwise significantly modified health care facility, health service, or hospice.¹ Under this regulatory program, a provider cannot legally establish a new nursing home or add nursing home beds to an existing facility without first receiving approval from the AHCA through the CON review and approval process.

The Florida CON program has three levels of review: full, expedited, and the granting of an exemption.² The nursing home projects addressed in s. 408.036, F.S., related to CONs are as follows:

*Projects Subject to Full Comparative Review*³

- Adding beds in community nursing homes; and
- Constructing or establishing new health care facilities, which include skilled nursing facilities.⁴

*Projects Subject to Expedited Review*⁵

- Replacing a nursing home within the same district; and
- Relocating a portion of a nursing home's licensed beds to a facility within the same district.

*Exemptions from CON Review*⁶

- Converting licensed acute care hospital beds to Medicare and Medicaid certified skilled nursing beds in a rural hospital;
- Adding nursing home beds at a skilled nursing facility that is part of a retirement community which had been in operation on or before July 1, 1949, for the exclusive use of the community residents;
- Combining licensed beds from two or more licensed nursing homes within a district into a single nursing home within that district if 50 percent of the beds are transferred from the only nursing home in a county and that nursing home had less than a 75 percent occupancy rate;⁷
- State veteran's nursing homes operated by or on behalf of the Florida Department of Veterans' Affairs;

¹ See s. 408.032(3), F.S.

² See s. 408.036, F.S.

³ See s. 408.036(1), F.S.

⁴ Section 408.032(16), F.S., defines a skilled nursing facility as an institution, or a distinct part of an institution, which is primarily engaged in providing, to inpatients, skilled nursing care and related services for patients who require medical or nursing care, or rehabilitation services for the rehabilitation of injured, disabled, or sick persons.

⁵ See s. 408.036(2), F.S.

⁶ See s. 408.036(3), F.S.

⁷ This exemption is repealed upon the expiration of the moratorium by operation of s. 408.036(3)(f), F.S.

- Combining into one nursing home, the beds or services authorized by two or more CONs issued in the same planning subdistrict;
- Separating into two or more nursing homes in the subdistrict, the beds or services that are authorized by one CON;
- Adding no more than 10 total beds or 10 percent of the licensed nursing home beds of that facility, whichever is greater; or if the nursing home is designated as a Gold Seal nursing home, no more than 20 total beds or 10 percent of the licensed nursing home beds of that facility for a facility with a prior 12-month occupancy rate of 96 percent or greater; and
- Replacing a licensed nursing home on the same site, or within three miles, if the number of licensed beds does not increase.

Section 408.036(3), F.S., contains 19 separate exemptions to the CON review process, eight of which are related to nursing homes. Unless a project is exempt, the CON program applies to all nursing home beds, regardless of the source of payment for the beds (private funds, insurance, Medicare, Medicaid, or other funding sources).

Determination of Need

A CON is predicated on a determination of need. The future need for community nursing home beds is determined twice a year and published by the AHCA as a fixed bed need pool for the applicable planning horizon. The planning horizon for CON applications is three years. Need determinations are calculated for subdistricts within the AHCA's 11 service districts⁸ based on a formula⁹ and estimates of current and projected population as published by the Executive Office of the Governor.

Moratorium on Nursing Home CONs

In 2001, the Legislature enacted the first moratorium on the issuance of CONs for additional community nursing home beds which was in effect until July 1, 2006.¹⁰ The Legislature reenacted the moratorium in 2006¹¹ and did so again in 2011.¹² The current moratorium lasts until October 1, 2016, or until Medicaid managed care is implemented statewide pursuant to ss. 409.961-409.985, F.S., whichever is earlier.¹³

The Legislature provided for additional exceptions to the moratorium to address occupancy needs that might arise including:

- Adding sheltered nursing home beds;
- Beds may be added in a county that has no community nursing home beds and the lack of beds is the result of the closure of nursing homes that were licensed on July 1, 2001;¹⁴

⁸ The nursing home subdistricts are set forth in Rule 59C-2.200, F.A.C.

⁹ See Rule 59C-1.036, F.A.C.

¹⁰ See s. 52, ch. 2001-45, L.O.F.

¹¹ See ch. 2006-161, L.O.F.

¹² See ch. 2011-135, L.O.F.

¹³ See s. 408.0435(1), F.S.

¹⁴ The request to add beds under this exception to the moratorium is subject to the full competitive review process for CONs.

- Adding the greater of no more than 10 total beds or 10 percent of the licensed nursing home beds of a nursing home located in a county having up to 50,000 residents, if:
 - The nursing home has not had any class I or class II deficiencies within the 30 months preceding the request for addition;
 - The prior 12-month average occupancy rate for the nursing home beds at the facility meets or exceeds 94 percent and the facility has not had any class I or class II deficiencies since its initial licensure; or
 - For a facility that has been licensed for less than 24 months, the prior 6-month average occupancy rate for the nursing home beds at the facility meets or exceeds 94 percent and the facility has not had any class I or class II deficiencies since its initial licensure; and
- Adding the greater of no more than 10 total beds or 10 percent of the number of licensed nursing home beds if:
 - The facility has not had any class I or class II deficiencies within the 30 months preceding the request for addition;
 - The prior 12-month average occupancy rate for the nursing home beds at the facility meets or exceeds 96 percent;
 - The prior 12-month occupancy rate for the nursing home beds in the subdistrict is 94 percent or greater; and
 - Any beds authorized for the facility under this exception in a prior request have been licensed and operational for at least 12 months.¹⁵

County Populations

According to the AHCA's population estimates from 2012,¹⁶ 10 counties have populations of 25 percent or more persons aged 65 or over.¹⁷ Of those counties, five currently also have ratios of 16.1 or less nursing home beds per 1,000 persons aged 65 or older.¹⁸ Within those five counties, only The Villages retirement community, located in Sumter County, and On Top of the World retirement community, located in Marion County, currently meet the remaining criteria for the bill's exemption from the CON process.

Housing for Older Persons

Section 760.29(4), F.S., defines housing for older persons as housing that:

- Is provided under any state or federal program that the Florida Commission on Human Relations determines is specifically designed and operated to assist elderly persons;
- Is intended for, and solely occupied by, persons age 62 or older; or
- Is intended for, and solely occupied by, persons age 55 or older if:
 - At least 80 percent of the occupied units are occupied by at least one person age 55 or older;
 - The housing facility or community meets policy requirements to demonstrate the intent to restrict the facility to older persons and the facility or community's governing documents meet certain criteria; and

¹⁵ The request to add beds under the exception to the moratorium is subject to the procedures related to an exemption to the CON requirements.

¹⁶ On file with staff of the Senate Committee on Health Policy.

¹⁷ Sumter, Charlotte, Citrus, Highlands, Sarasota, Martin, Indian River, Collier, Marion, and Hernando counties.

¹⁸ Sumter, Indian River, Collier, Marion, and Hernando counties.

- The housing facility or community complies with federal law.

Additionally, s. 760.29(4)(c), F.S., states that housing will not fail to be considered housing for older persons if some current residents¹⁹ do not meet the age requirements or if some housing units are vacant as long as any new residents meet the age requirement.

III. Effect of Proposed Changes:

Section 1 of the bill creates s. 408.0362, F.S., to provide for a CON exemption for the construction of a licensed skilled nursing facility for the addition of skilled nursing facility beds within a deed-restricted retirement community if:

- The retirement community is located in a county that has 25 percent or more of its population consisting of persons aged 65 or older;
- The retirement community is located in a county with a ratio of no more than 16.1 beds per 1,000 persons aged 65 or older;
- The retirement community is zoned for a mix of residential and non-residential uses;
- The residential use of the retirement community is deed-restricted as housing for older persons as defined in 760.29, F.S.; and
- The retirement community has a population of at least 8,000 residents.

The bill caps the maximum number of beds which may be added within the community to the lesser of 240 or the maximum number of beds required to reach a ratio of 16.1 beds per 1,000 residents aged 65 or older in the county where the community is located. To determine the percentage of older persons in a county, and the ratio of 16.1 beds per person aged 65 or older, the AHCA must use county population estimates for three years in the future.

The bill also requires that, in order to receive the CON exemption, a retirement community must make a written request for the exemption in accordance with applicable rules.²⁰ The request must provide evidence of population, mixed-use status, and the results of the calculation showing the gross and net numbers of community skilled nursing home beds in the county in which the requestor intends for a skilled nursing facility to be built. Any skilled nursing facility built pursuant to the exemption, and all new skilled nursing facility beds, must be certified under both Medicare and Medicaid programs. And, the bill provides that s. 408.0362, F.S., as created by the bill, will not authorize more than one skilled nursing facility within a single retirement community.

Section 2 of the bill provides that the bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

¹⁹ Residents who have lived in the housing on or after Oct. 1, 1989.

²⁰ See 59C-1.005, F.A.C.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may have a positive fiscal impact for persons or entities that may be able to construct and open a skilled nursing facility that is currently restricted by the CON process.

The bill may have a negative fiscal impact on skilled nursing facilities that are currently serving the area where new nursing facilities are opened if demand decreases due to the increase in the number of skilled nursing beds. In addition, if the new skilled nursing facility beds are included in the calculations for future skilled nursing facility bed need, the new facility would impact the ability of other providers to compete for beds in the area.

Both the negative and positive impacts of this bill will be restrained by the 240 bed cap provided for in the bill.

C. Government Sector Impact:

The bill has an indeterminate effect on the Medicaid program. The bill requires a skilled nursing facility constructed under the exemption – and all beds in the facility – to be certified under Medicaid. To the extent that the new facility increases the availability of Medicaid nursing home beds that would not otherwise exist under the moratorium, resulting in Medicaid enrollees who would not otherwise have enrolled in the Medicaid program, the bill will increase the state’s Medicaid expenditures to an unknown extent.

VI. Technical Deficiencies:

The bill does not provide a definition of the term “deed-restricted retirement community.” The definition of “housing for older persons” in s. 760.29, F.S., as referenced on lines 30-32 of the bill, makes no mention of deed restrictions, and the term “deed-restricted retirement community” does not appear in the Florida Statutes.

VII. Related Issues:

The AHCA advises that the bill may result in lawsuits filed by nursing home associations or individual nursing homes within the same planning area (county, counties, or districts) as that in which an exemption would be granted under the bill.²¹

One of the criteria for the CON exemption is for the retirement community requesting the exemption to have a population of at least 8,000 residents, based on a population data source accepted by the AHCA. Currently the AHCA possesses no precise or definitive method or tool for gauging the number of residents in a retirement community and would have to rely on the community's self-attestation, followed by confirmation of that self-attestation to the extent possible.

Another criterion for the exemption is for the retirement community to be located in a county that has 25 percent or more of its population consisting of persons aged 65 or older. The bill also requires the AHCA to use a prospective county population estimate three years in the future for certain required calculations. The bill does not specify the source the AHCA must use for these demographic data and projections, which could lead to disputes between the AHCA and an exemption requestor, or between the AHCA and an interested third party, as to whether a retirement community qualifies for the exemption.

The bill requires that to qualify for the exemption, a retirement community must be located in "a county" that has 25 percent or more of its population consisting of persons aged 65 or older and must be located in "a county" that has a rate of no more than 16.1 beds per 1,000 persons aged 65 years or older. The bill makes no provision for a retirement community with boundaries that span multiple counties.

The bill requires that any skilled nursing facility built under the exemption, and all beds in the facility, shall be certified under both the Medicare and Medicaid programs. However, the bill does not provide parameters for this requirement in terms of when the certification must be obtained, what actions the AHCA should take to enforce the requirement, and how the AHCA should sanction a facility that fails to meet the requirement or fails to maintain the certifications after initially obtaining them.

The bill provides that s. 408.0362, F.S., as created under the bill, does not authorize more than one skilled nursing facility within a single retirement community. The effect of this provision is unclear because the bill does not authorize facilities. Skilled nursing facilities are licensed under part II of ch. 400, F.S. The bill provides for an exemption from the CON review process for the construction of a skilled nursing facility, and the provision that s. 408.0362, F.S., will not authorize more than one facility within a single retirement community might have no effect on whether the AHCA is required to grant more than one exemption under the bill.

²¹ The Agency for Health Care Administration, *2013 Bill Analysis & Economic Impact Statement, HB 1159 and SB 1482*, on file with the Senate Committee on Appropriations.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on April 15, 2013

The committee substitute clarifies that the bill does not authorize more than one additional nursing home in a single retirement community.

CS by Health Policy on April 2, 2013:

The committee substitute substantially amends SB 1482 to:

- Conform the bill to the language in CS/HB 1159;
- Exempt the construction of a skilled nursing facility located in a retirement community from the CON process if the retirement community:
 - Is located in a county that has 25 percent or more of its population aged 65 or older;
 - Is located in a county with a ratio of no more than 16.1 beds per 1,000 persons aged 65 or older;
 - Is zoned for mixed use;
 - Is deed restricted for older persons; and
 - Has a population of at least 8,000 residents.
- Caps the number of additional beds at the lesser of either the maximum number of beds to reach a ratio of 16.1 beds per 1,000 persons aged 65 or older in the county where the community is located or 240 beds per community;
- Details how retirement communities can apply for the exemption, what beds qualify, and how the 16.1 beds per 1,000 persons aged 65 or older ratio must be determined.

- B. **Amendments:**

None.