

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 268

INTRODUCER: Children, Families, and Elder Affairs Committee; Health Policy Committee; and
Senators Grimsley and Diaz de la Portilla

SUBJECT: Certificates of Need

DATE: April 10, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Looke</u>	<u>Stovall</u>	<u>HP</u>	<u>Fav/CS</u>
2.	<u>Crosier</u>	<u>Hendon</u>	<u>CF</u>	<u>Fav/CS</u>
3.	<u>Brown</u>	<u>Pigott</u>	<u>AHS</u>	<u>Favorable</u>
4.	<u>Brown</u>	<u>Kynoch</u>	<u>AP</u>	<u>Favorable</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 268 amends various sections of the Florida Statutes related to nursing home certificates of need (CON) in order to, among other provisions:

- Repeal the moratorium on CONs for new nursing homes and for adding additional nursing home beds to an existing nursing home;
- Establish a positive CON application factor under certain conditions;
- Allow contiguous sub-districts that each have a need for nursing home beds to aggregate their need for the construction of one nursing home;
- Allow for an expedited CON review for the replacement of a nursing home;
- Allow for an expedited CON review for a nursing home to relocate a portion of its beds to an existing facility or a new facility under certain conditions;
- Create a new exemption to the CON process for an existing nursing home to add beds under certain conditions; and
- Restrict the Agency for Healthcare Administration from issuing any further CONs for nursing home beds once 3,750 total, new beds have been approved.

The bill has an indeterminate fiscal impact.

II. Present Situation:

Certificates of Need (CON)

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, the AHCA must provide approval through the CON review and approval process prior to a provider establishing a new nursing home or adding nursing home beds.

The Florida CON program has three levels of review: full, expedited, and exempt.² The nursing home projects that require CONs are as follows:

Projects Subject to Full Comparative Review

- Adding beds in community nursing homes; and
- Constructing or establishing new health care facilities, which include skilled nursing facilities (SNF).³

Projects Subject to Expedited Review

- Replacing a nursing home within the same district;
- Relocating a portion of a nursing home's licensed beds to a facility within the same district; and
- The new construction of a nursing home in a retirement community if certain population and bed need criteria are met.⁴

Exemptions from CON Review

- Converting licensed acute care hospital beds to Medicare and Medicaid certified skilled nursing beds in a rural hospital;
- Adding nursing home beds at a SNF that is part of a retirement community which had been in operation for at least 65 years on or before July 1, 1994, 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;⁵
- State veteran's nursing homes operated by or on behalf of the Florida Department of Veterans' Affairs;
- Combining the beds or services authorized by two or more CONs issued in the same planning sub-district into one nursing home;

¹ Section 408.032(3), F.S.

² Section 408.036, F.S.

³ Section 408.032(16), F.S., defines an SNF 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.

⁴ These provisions, laid out in s. 408.036(2)(d), F.S., are excepted from the moratorium on CONs for new nursing homes in s. 408.0435, F.S.

⁵ This exemption is repealed upon the expiration of the moratorium by operation of s. 408.036(3)(f), F.S.

- Separating the beds or services that are authorized by one CON into two or more nursing homes in the sub-district;
- 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 of the same site, if the number of licensed beds does not increase.

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

The granting of a CON is based on 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 sub-districts within the agency's 11 service districts⁶ based on a formula⁷ and estimates of current and projected population as published by the Executive Office of the Governor.

Moratorium on Nursing Home CONs

Under the provisions of s. 408.0435, F.S., no CONs for additional community nursing home beds may be approved by the AHCA until the moratorium on nursing home CONs expires. The Legislature first enacted this moratorium in 2001 to last until July 1, 2006.⁸ The Legislature then reenacted the moratorium in 2006,⁹ and again in 2011.¹⁰ The current moratorium lasts until October 1, 2016, or until statewide Medicaid managed care is fully implemented. Full implementation of the statewide Medicaid managed care program is statutorily required to be completed by October 1, 2014.¹¹

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

- The addition of sheltered nursing home beds;¹²
- The addition of beds 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;¹³
- 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:

⁶ The nursing home sub-districts are set forth in Rule 59C-2.200, F.A.C. and generally consist of 1 to 2 counties. Duval County is divided between several sub-districts of district 4.

⁷ Rule 59C-1.036, F.A.C.

⁸ Chapter 2001-45, s. 52, Laws of Florida.

⁹ Chapter 2006-161, Laws of Florida.

¹⁰ Chapter 2011-135, Laws of Florida.

¹¹ Sections 409.971 and 409.978, F.S.

¹² Sheltered nursing home bed is defined in s. 651.118, F.S., as a nursing home bed within a continuing care facility.

¹³ The request to add beds under this exception to the moratorium is subject to the full competitive review process for CONs.

- 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; and
- 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;
- The addition of 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 sub-district 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;¹⁴ and
- The new construction of a nursing home in a retirement community if certain population and bed-need criteria are met.

III. Effect of Proposed Changes:

Section 1 amends s. 408.034, F.S., to reduce the average sub-district nursing home occupancy rate which the AHCA must attempt to maintain by rule from 94 to 92 percent. Potentially, this could result in an increase in nursing home beds. However, statewide bed occupancy rates have remained around 88.5 percent since Fiscal Year 2004-2005.¹⁵

The bill allows an applicant applying for a CON for the construction of a new community nursing home to aggregate bed-need from two or more contiguous sub-districts if:

- The proposed nursing home will be located in the sub-district with the greater need when only two sub-districts are aggregated, or
- The proposed nursing home will be located at a site that provides reasonable geographic access for residents in each sub-district respective of that sub-district's bed-need when more than two sub-districts are aggregated.

Contiguous sub-districts where the nursing home is not built will continue to show bed-need in subsequent batching cycles.

The bill allows for an additional, positive CON application factor for an applicant applying for a CON in a sub-district where nursing home bed-need has been determined to exist if that applicant voluntarily relinquishes licensed nursing home beds in one or more sub-districts where there is no calculated bed-need. The applicant must be able to demonstrate that it operates,

¹⁴ The request to add beds under the exception to the moratorium is subject to the procedures related to an exemption to the CON requirements.

¹⁵ The Agency for Health Care Administration, *Bill Analysis for SB 268*, December 20, 2013, on file with the Senate Health Policy Committee.

controls, or has an agreement with another licensed nursing home to ensure that the beds are relinquished.

The bill deletes obsolete language related to pilot nursing home diversion projects.

Section 2 amends s. 408.036, F.S., to allow for an expedited review of a CON application for the replacement of a nursing home either:

- Within a 30-mile radius of the existing nursing home, regardless of healthcare planning districts, or the geographic location of the majority of the current nursing home's residents, or
- Outside of a 30-mile radius of the existing nursing home if the new nursing home will be within the same sub-district or a contiguous sub-district.

If the nursing home is moved to a contiguous sub-district, existing nursing homes in that sub-district must have at least an 85-percent occupancy rate.

The bill also allows for an expedited CON review for a nursing home that is relocating a portion of its beds, within the same district or a contiguous district, to an established facility or to a new facility. Such a relocation cannot cause the total number of nursing home beds in the state to increase.

The bill makes the following changes to the allowed CON exemptions:

- Creates a new CON exemption for a nursing home that is adding up to either 30 beds or 25 percent of its current beds, whichever is less, when replacing its facility;
- Reduces the required average occupancy rate from 96 percent to 94 percent for a facility to add a number of beds equal to the greater of no more than 10 beds or 10 percent of the facility's current licensed beds;
- Increases the distance a replacement nursing home may be located from the current nursing home to up to five miles, rather than three miles, and clarifies that such a move must remain within the same sub-district; and
- Allows the consolidation of multiple licensed nursing homes with any shared controlled interest or the transfer of beds between such nursing homes if all of the nursing homes are within the same planning district, rather than sub-district. The site of relocation must be within 30 miles of the original sites and the total number of nursing home beds in the planning district may not increase.

The bill also makes technical and conforming changes to s. 408.036, F.S.

Section 3 repeals s. 408.0435, F.S., which establishes the moratorium on nursing home CONs.

Section 4 creates s. 408.0436, F.S., restricting AHCA from issuing any CONs for new nursing home beds following the batching cycle in which the total number of new nursing home beds approved between July 1, 2014, and June 30, 2017, meets or exceeds 3,750. The bill also defines "batching cycle" as the grouping for comparative review of CON applications submitted for beds, services, or programs having a similar CON-need methodology or licensing category in the same planning horizon and the same applicable district or sub-district.

The bill provides a repeal date for s. 408.0436, F.S., of July 1, 2017.

Section 5 provides an effective date of July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

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:

CS/SB 268 repeals the moratorium preventing the AHCA from issuing certificates of need (CONs) for new community nursing home beds in most instances. Repealing this moratorium will allow the AHCA to grant new CONs for the construction of new community nursing homes and the addition of community nursing home beds to existing nursing homes when need is determined. The bill also eases some of the guidelines that the AHCA must follow when issuing new nursing home CONs. Most significantly, the bill allows for a reduced minimum occupancy rate for existing nursing homes and allows CON applicants to aggregate bed need between sub-districts to qualify for a CON.

When taken together, the provisions of the bill will allow for the construction of new nursing homes and the expansion of existing nursing homes where such construction or expansion is restricted under current law. This new construction will likely have indeterminate positive effects on the parts of the private sector responsible for such construction, but may also have indeterminate negative effects on existing nursing homes in or around areas where such new construction is allowed.

C. Government Sector Impact:

According to the AHCA's bill analysis,¹⁶ the AHCA will need to amend its CON rules and revise the bed-need formula to comply with the reduced average sub-district nursing

¹⁶ *Supra*, 14.

home occupancy rate. Rewriting these rules will produce an indeterminate but insignificant fiscal impact.

The number of new nursing home beds created is unknown at this time; however, the construction of new nursing homes and the expansion of existing nursing homes will likely increase the number of Medicaid beds available which could have an impact on the state's Medicaid budget.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The term "reasonable geographic access for residents in the respective sub-districts" on line 46 may prove difficult to define by rule since several of the state's contiguous sub-districts cover large geographic areas. For example, District 3 has seven sub-districts and consists of 16 counties ranging from Hamilton County to Hernando County, District 8 has six sub-districts and includes seven counties, and District 4 has four sub-districts and includes seven counties.¹⁷

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 408.034 and 408.036.

This bill creates section 408.0436 of the Florida Statutes.

This bill repeals section 408.0435 of the Florida Statutes.

IX. 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 Children, Families, and Elder Affairs on March 18, 2014:

The CS reduces the newly-created limit of approved nursing home beds from 5,000 to 3,750 and changes the period of the limit from five years to three years.

CS by Health Policy on January 8, 2014:

The CS:

- Establishes a positive CON application factor for CON applications in sub-districts with bed-need if an applicant relinquishes nursing home beds in one or more sub-districts without need;
- Restricts a nursing home moving to a new location within 30 miles of the original nursing home from moving into a new sub-district unless that sub-district has had at least an 85 percent occupancy rate for the prior 6 months;

¹⁷ *Supra*, 14.

- Allows an expedited CON review for a nursing home to relocate a portion of its beds to an existing facility or a new facility in the same district, or a contiguous district, if the total number of beds in the state does not increase;
- Adds language granting a CON exemption to a nursing home that is adding up to either 30 beds or 25 percent of its current beds, whichever is less, when replacing its facility;
- Adds Section 4 of the bill to restrict the AHCA from issuing any further CONs for nursing home beds once 5,000 total new beds have been approved. This provision expires on June 30, 2019.
- Makes other technical, clarifying, and conforming changes.

B. Amendments:

None.