

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 287 Certificates of Need

**SPONSOR(S):** Health & Human Services Committee; Health Innovation Subcommittee; Artes

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 268

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health Innovation Subcommittee	10 Y, 0 N, As CS	Guzzo	Shaw
2) Health & Human Services Committee	15 Y, 0 N, As CS	Guzzo	Calamas

### SUMMARY ANALYSIS

A certificate of need (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. Prior to constructing a new nursing home or adding additional beds, the facility must obtain approval from AHCA through the CON review and approval process.

Since 2001, a moratorium on new CONs for nursing homes has prevented AHCA from approving additional community nursing home beds. The moratorium will expire on October 1, 2016, or upon the date that Medicaid managed care is implemented statewide, whichever is earlier. Full implementation of the statewide Medicaid managed care program is statutorily required to be completed by October 1, 2014.

The bill repeals the moratorium effective July 1, 2014. As a result, AHCA will be authorized to approve new community nursing home beds under the CON process. However, the bill prohibits AHCA from issuing further CONs for nursing home beds once 3,750 total new beds have been approved from July 1, 2014, to June 30, 2017.

Additionally, the bill will allow for increased flexibility in the CON approval process for the construction of new nursing homes and the expansion of existing nursing homes. Specifically, the bill amends ss. 408.034 through 408.036, F.S., to:

- Decrease the required sub-district average occupancy rate that AHCA uses in its nursing home bed-need methodology from 94 to 92 percent.
- Establish a positive CON application factor for an applicant in a sub-district where bed-need has been determined to exist.
- Authorize an applicant to combine the published bed need of geographically contiguous sub-districts within a district for a proposed community nursing home.
- Provide expedited review of a CON application for the replacement of a nursing home within a 30-mile radius of the existing nursing home.
- Provide expedited review of a CON application for the replacement of a nursing home within the same district if the proposed project site is outside a 30-mile radius of the replaced nursing home but within the same sub-district or a geographically contiguous sub-district. If the proposed project site is in the geographically contiguous sub-district, the prior six-month occupancy rate for licensed community nursing homes for that sub-district must be at least 85 percent.
- Provide expedited review of a CON application for a nursing home to relocate a portion of its beds to another facility or to establish a new facility in the same district, or a contiguous district, if the relocation is within a 30-mile radius of the existing facility and the total number of nursing home beds in the state does not increase.
- Create an exemption from nursing home CON review for a nursing home that is adding up to 30 beds or 25 percent of the number of beds in the facility being replaced, whichever is less.

The bill does not appear to have a fiscal impact on state or local government.

The bill provides an effective date of July 1, 2014.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

##### **Certificates of Need**

A certificate of need (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.<sup>1</sup> Under this regulatory program, 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.

Florida's CON program has been in operation since 1973, and has undergone several changes over the years. From 1974 through 1986, the specifics of the program were largely dictated by the 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, but Florida retained its CON program.

A moratorium on the approval of additional nursing home beds has been in effect since 2001.<sup>2</sup> In 2006, the Florida Legislature extended the moratorium through July 1, 2011.<sup>3</sup> The current moratorium, which was last extended in 2011,<sup>4</sup> is scheduled to expire on October 1, 2016, or upon the date that Medicaid managed care is implemented statewide, whichever is earlier. Full implementation of the statewide Medicaid managed care program is statutorily required to be completed by October 1, 2014.<sup>5</sup>

##### Determination of Need

Granting a CON is predicated on a determination of need. The CON formula for determining need for community nursing home beds provides an allocation of projected nursing home beds which will be needed in a specific AHCA CON sub-district within a three-year time horizon. There are 44 sub-districts within AHCA's 11 service districts.<sup>6</sup> However, bed need projections have not been calculated since the moratorium on additional community nursing home beds went into effect on July 1, 2001.<sup>7</sup>

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 older given six times more weight in projecting the population increase.<sup>8</sup> The projected total bed need of a district is then allocated to its sub-districts consistent with the current sub-district distribution.<sup>9</sup> The result for a given sub-district is adjusted to reflect the current sub-district occupancy of licensed beds. A given sub-district is expected to have a minimum occupancy rate of 94 percent.<sup>10</sup> Rules governing CON provide that if current occupancy of licensed

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<sup>1</sup> S. 408.032(3), F.S.

<sup>2</sup> Ch. 2001-45, L.O.F.

<sup>3</sup> Ch. 2006-161, L.O.F.

<sup>4</sup> Ch. 2011-135, L.O.F.

<sup>5</sup> SS. 409.971 and 409.978, F.S.

<sup>6</sup> Nursing home sub-districts are set forth in Rule 59C-2.200, F.A.C., and generally consist of 1 to 2 counties. Sub-district 3/2 consists of 7 small rural counties, which is the highest total number of counties in a sub-district. Duval county is divided between several sub-districts of district 4.

<sup>7</sup> Agency for Health Care Administration, Bill Analysis, House Bill 287, dated December 20, 2013, on file with Health & Human Services Innovation Subcommittee staff.

<sup>8</sup> Rule 59C-1.036, F.A.C.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

nursing home beds is less than 85 percent, the net need in a sub-district is zero regardless of whether the formula indicates otherwise.<sup>11</sup>

### Projects Subject to Review and Exemptions

There are three levels of CON review: full, expedited, and exempt.<sup>12</sup>

#### *Projects Subject to Full Review*

The addition of beds in community nursing homes or the new construction or establishment of community nursing home projects are subject to full CON review by AHCA.<sup>13</sup> However, pursuant to s. 408.0435, F.S., a CON for additional community nursing home beds may not be approved by AHCA until the moratorium expires.

#### *Projects Subject to Expedited Review*

Pursuant to s. 408.036(2), certain projects are subject to expedited review. These projects include:

- Replacement of a nursing home within the same district, if the proposed project site is located within a geographic area that contains at least 65 percent of the facility's current residents and is within a 30-mile radius of the replaced nursing home;
- Relocation of a portion of a nursing home's licensed beds to a facility within the same district, if the relocation is within a 30-mile radius of the existing facility and the total number of nursing home beds in the district does not increase; and

Applications for new construction of a community nursing home in a retirement community are subject to expedited review, and are exempt from the moratorium.<sup>14</sup> This provision went into effect on July 1, 2013,<sup>15</sup> and to date, there have been no applications for such projects filed with AHCA.<sup>16</sup>

An applicant is eligible for expedited review for construction of a community nursing home in a retirement community if all of the following criteria are met:

- The residential use area of the retirement community is deed-restricted as housing for older persons;
- The retirement community is located in a county in which 25 percent or more of its population is age 65 and older;
- The retirement community is located in a county that has a rate of no more than 16.1 beds per 1,000 persons age 65 or older;
- The retirement community has a population of at least 8,000 residents within the county; and
- The number of proposed community nursing home beds in an application does not exceed the projected bed need after applying the rate of 16.1 beds per 1,000 persons age 65 and older.

#### *Exemptions from CON Review*

Pursuant to s. 408.036(3), F.S., certain projects are exempt from nursing home CON review. These projects include:

- The creation of a single nursing home within a district by combining licensed beds from two or more licensed nursing homes within a district, regardless of sub-district boundaries; if

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<sup>11</sup> Id.

<sup>12</sup> S. 408.036, F.S.

<sup>13</sup> S. 408.036(1), F.S.

<sup>14</sup> S. 408.036(2), F.S.

<sup>15</sup> Ch. 2013-153, L.O.F.

<sup>16</sup> Agency for Health Care Administration, Bill Analysis, House Bill 287, dated December 20, 2013, on file with Health & Human Services Innovation Subcommittee staff.

- Fifty-percent of the beds in the created nursing home are transferred from the only nursing home in a county and its utilization data demonstrates that it had an occupancy rate of less than 75 percent for the 12-month period ending 90 days before the request for the exemption;
- The addition of nursing home beds, not to exceed 10 total beds, or 10 percent of the number of licensed beds in the facility being expanded, whichever is greater;
- The replacement of 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 consolidation or combination of licensed nursing homes or transfer beds between licensed nursing homes within the same planning sub-district, by providers that operate multiple nursing homes within that planning sub-district; if
  - There is no increase in the planning sub-district total number of nursing home beds and the site of the relocation is not more than 30 miles from the original location.

### *Exceptions to the Moratorium*

Pursuant to s. 408.0435, F.S., the moratorium does not apply to certain projects. These projects include:

- Adding sheltered nursing home beds<sup>17</sup> in a continuing care retirement community;
- Adding nursing home beds in a county that has no community nursing home beds and the lack of beds is the result of the closure of a nursing home that was licensed on July 1, 2001;<sup>18</sup>
- Adding the greater of no more than 10 total beds or 10 percent of the licensed nursing home beds of a facility 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; and
  - The prior 12-month average occupancy rate for the nursing home beds at the facility meets or exceeds 94 percent and the facility has never had a class I or class II deficiency; 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 never had a class I or class II deficiency;
- 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 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.<sup>19</sup>

### **Effect of Proposed Changes**

The bill repeals the moratorium on CONs for new community nursing home beds effective July 1, 2014. This is three months earlier than the current expiration date.

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<sup>17</sup> A “sheltered nursing home bed” is defined by s. 651.118(3), F.S., as nursing home beds located within a continuing care facility for which a certificate of need is issued pursuant to subsection (2) shall be known as sheltered nursing home beds.

<sup>18</sup> The request to add beds under this exception to the moratorium is subject to the full competitive review process for CONs.

<sup>19</sup> The request to add beds under the exception to the moratorium is subject to the procedures related to an exemption to the CON requirements.

The bill amends s. 408.034(5), F.S., to revise the nursing home bed-need methodology threshold from 94 percent to 92 percent. Statewide nursing home bed occupancy rates have remained around 88.5 percent since FY 2004-2005.<sup>20</sup> According to AHCA, reducing the occupancy rate standard from 94 percent to 92 percent may have a marginal effect on total bed need projection in some sub-districts, but it would have no impact on the increase in Medicaid nursing home patients beyond normal anticipated growth.<sup>21</sup>

The bill creates s. 408.034(6), F.S., to allow applicants to combine need numbers when need is shown for geographically contiguous sub-districts to establish a new community nursing home in one of these sub-districts. If need is aggregated from two sub-districts, the proposed nursing home site must be located in the sub-district with the greater need.

The bill also establishes an additional positive CON application factor for an applicant in a sub-district where 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, controls, or has an agreement with another licensed nursing home to ensure that the beds are relinquished.

The bill amends s. 408.036(2)(b), F.S., to allow for the replacement of a nursing home if the proposed site is within a 30-mile radius of the replaced nursing home. If the proposed project site is outside the sub-district where the replaced nursing home is located, the prior 6-month occupancy rate for licensed community nursing homes in the proposed sub-district must be at least 85 percent. As a result, providers will be able to move a nursing home from one district to another as long as it is within a 30-mile radius.

The bill amends s. 408.036(2)(c), F.S., to allow for the replacement of a nursing home within the same district, if the proposed project site is outside a 30-mile radius of the replaced nursing home but within the same sub-district or a geographically contiguous sub-district. If the proposed project site is in the geographically contiguous sub-district, the prior 6-month occupancy rate for licensed community nursing homes for that sub-district must be at least 85 percent.

The bill also provides expedited review of a CON application for a nursing home to relocate a portion of its beds to another facility or to establish a new facility in the same district, or a contiguous district, if the relocation is within a 30-mile radius of the existing facility and the total number of nursing home beds in the state does not increase.

The bill amends s. 408.036(3), F.S., to revise current exemptions to certain CON review projects. Specifically, the bill:

- Creates an exemption for a nursing home that is adding up to either 30 beds or 25 percent of the number of beds in the facility being replaced, whichever is less;
- Repeals an obsolete provision relating to the transfer of beds to establish a new facility. This provision was set to be repealed upon the expiration of the moratorium, which is consistent with the bill's provision to repeal s. 408.0435, F.S.;
- Ensures that the provision being repealed in s. 408.0435(5)(b), F.S., is retained in s. 408.036(3)(j), F.S., which requires an average occupancy rate of 94 percent to be able to apply for additional nursing home beds;
- Expands the distance a replacement facility may be from the original site from three miles to five miles, and clarifies that such a move must remain within the same sub-district;
- Authorizes exemptions for the consolidation or combination of licensed nursing homes, or transfer of beds between licensed nursing homes within the same district, by nursing homes with any shared controlled interest within the district; if
  - There is no increase in the district's total number of nursing home beds; and

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<sup>20</sup> Agency for Health Care Administration, Bill Analysis, House Bill 287, dated December 20, 2013, on file with Health & Human Services Innovation Subcommittee staff.

<sup>21</sup> *Id.*

- The site of the relocation is not more than 30 miles from the original location.

The bill 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 community 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 like CON need methodology or licensing category in the same planning horizon and the same applicable district or sub-district. The bill provides for the repeal of this section on July 1, 2017.

**B. SECTION DIRECTORY:**

- Section 1:** Amends s. 408.034, F.S., relating to duties and responsibilities of the Agency for Health Care Administration; rules.
- Section 2:** Amends s. 408.036, F.S., relating to projects subject to expedited review; exemptions.
- Section 3:** Creates s. 408.0436, F.S., relating to limitation of nursing home certificates of need.
- Section 4:** Repeals s. 408.0435, F.S., relating to the moratorium on nursing home certificates of need.
- Section 4:** Provides an effective date of July 1, 2014.

**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:**

The bill repeals the moratorium that prohibits the Agency for Health Care Administration (AHCA) from issuing certificates of need (CONs) for new community nursing home beds. Repeal of the moratorium will allow 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 sufficient need is determined to exist.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

- 1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

AHCA has sufficient rule-making authority to implement the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 15, 2014, the Health Innovation Subcommittee adopted a strike-all amendment to House Bill 287. The amendment:

- Establishes a positive CON application factor for an applicant in a sub-district where bed-need has been determined to exist if the applicant relinquishes nursing home beds in one or more sub-districts where there is no calculated need;
- Restricts the replacement of a nursing home within 30 miles of the original nursing home from moving to a new sub-district unless that sub-district has had at least an 85 percent occupancy rate for the prior 6 months;
- Provides 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;
- Creates an exemption from nursing home CON review for a nursing home that is adding up to 30 beds or 25 percent of the number of beds in the facility being replaced, whichever is less; and
- Creates s. 408.0436, F.S., to prohibit 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.

The analysis is drafted to the committee substitute as passed by the Health Innovation Subcommittee.

On February 20, 2014, the Health and Human Services Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Reduces the number of new nursing home beds that AHCA may approve through the CON process from 5,000 to 3,750;
- Changes the time period of the limitation on the number of beds that AHCA may approve from July 1, 2014 – June 30, 2019 to July 1, 2014 - June 30, 2017; and
- Changes the repeal date of the newly created s. 408.0436, F.S., from July 1, 2019, to July 1, 2017.

The analysis is drafted to the committee substitute as passed by the Health and Human Services Committee.