

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) <u>Health Standards (Sub)</u>	_____	<u>Rawlins</u>	<u>Collins</u>
2) <u>Health Care</u>	_____	_____	_____
3) <u>Appropriations</u>	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

In the past few years, the Legislature has considered proposals related to Certificate of Need (CON) 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, stating that the Agency for Health Care Administration (AHCA) 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 service 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 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 are a major reason for the perception that the CON process is burdensome.

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 this right of an existing health care facility to request and participate in the aforementioned public hearing. Rather, the 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.

Previously, the Legislature has restricted the right of persons to intervene in administrative proceedings regarding the issuance or denial of a certificate of need. Prior to 1987, for instance, a substantially affected person who was aggrieved by the issuance, revocation, or denial of a certificate of need 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 certificate of need 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.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|--|---|
| 1. Reduce government? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

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

Taxes are not levied on the certificate of need process, therefore, this bill neither raises nor reduces taxes.

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 hospitals were being built with federal funds, 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 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 service all together, regardless of the state’s findings.

The Certificate-of-Need (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 certificate of need; 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 proceedings regarding the issuance or denial of a certificate of need. Prior to 1987, for instance, a substantially affected person who was aggrieved by the issuance, revocation, or denial of a certificate of need 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 intent to restrict standing in CON cases.

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

It should be noted that this bill does not affect the entitlement of an applicant 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).

In addition, 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.

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).

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's decision on the issuance of a certificate of need; requiring health care facilities that challenge the issuance of a certificate of need to post bond or establish an escrow account; providing for an award and recovery of certain cost and revenue losses by successful certificate of need applicants from facilities that challenge the issuance of a certificate of need; and 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:

See "Fiscal Comments" section.

2. Expenditures:

See "Fiscal Comments" section.

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 cost of providing health care services by limiting the possibility of legal challenges to the CON regulatory process.

D. FISCAL COMMENTS:

At time of analysis, the Agency for Health Care Administration had not provided financial information as requested.

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.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES