

Remarks of J. Randal Lee before the Ad Hoc Committee on Certificate of Need- October 21,2014

Mr. Chairman, members of the Committee and Staff, I am Randy Lee, President of the South Carolina Health Care Association. Our Association represents 155 nursing homes in South Carolina. I thank you for the opportunity to speak today and my Board and membership commend you for taking on this important task. I would like to speak to you about why we believe there is a continued need for a Certificate of Need program for nursing homes and to give you some thoughts on how we believe the program could be improved and streamlined. We have taken a hard look at the process with the help of some of our attorneys and will offer suggestions for your consideration..

Certificate of Need is 50 years old in the United States and it was put in place in New York to determine if there was a need for new hospitals or nursing homes. We believe that a Certificate of Need program for construction of nursing homes is still warranted in South Carolina and that the current combination of the Legislature controlling the CON program through statute and the State Health Plan is the best approach. We have concerns about the State Health Plan, without legislative oversight, being the controlling document. Our Certificate of Need program in conjunction with the State Health Plan has resulted in nursing homes being built in all areas of the State. Without this we would not have a nursing home in rural South Carolina. Of the new nursing homes built in South Carolina in the past twenty years as private pay and Medicare only facilities, none have been built in a rural setting. They all want to go to the metropolitan areas and have to a degree put the current homes at a financial disadvantage. While we are very thankful for our Medicaid reimbursement, it is very difficult for a nursing home to operate without a mix of Medicare and private pay residents. Most rural counties do not have these types of patients due to either income levels or, in some cases, the absence of a hospital which provides the majority of Medicare referrals as patients must have a 3 day hospital stay before being eligible for Medicare nursing home benefits. The average age of nursing home physical plants in South Carolina is over 30 years old. Many still in service were built soon after Congress created Medicare and Medicaid and while we need a source for capital and a plan for replacing or refurbishing these homes to more accurately reflect the new patient care models, these facilities are more cost effective to operate. A large part of our business is Medicaid. I will not bore you with the details of the reimbursement methodology but the bottom line is that federal guidelines provide for a cost of capital component in our Medicaid reimbursement. That reimbursement is obviously lower for our existing buildings. Unbridled construction, in our opinion, would jeopardize our Medicaid nursing home program and result in much higher costs to the State and to our customers.

The CON program is in theory is good for patients and providers, but is no better that how it is administered. The program is broken, but does not need to be thrown away. It needs substantial overhaul. In my opinion we are where we are today in large part because of the long delays in processing CON applications. We sometimes have staff delays in processing applications because of reordering the criteria, seeking unnecessary information, or simply ignoring statutory deadlines for making decisions. We should look at eliminating appeals to the DHEC Board and to requiring Judges to

rule and issue orders in a timely manner. Delays can result in harm to the health care system, drive up costs and have a chilling effect on new providers entering the market.

We would ask that you consider shortening the two stage staff review process which can take up to eight months in to one four month period. We believe that the staff can review the application, ask for additional information and publish in the State register in 120 days or 150 if a public hearing is held. Our neighboring state of Georgia has a 120 day time frame. In order to do this we believe that more staff will be needed as the current level is far below what it was prior to DHEC suspending the process.

The 120 day clock currently starts from publication in the State register. The State register is antiquated in the electronic age and we understand the DHEC Commissioner proposes to provide notice through the DHEC website. DHEC could be required to post notice within a week or so and act on the application within 120 days of the online publication. This needs to be a real deadline with applications automatically approved if not acted upon (except in competing applications) in the time period. Several other states have this but it is rarely invoked. This cuts the time frame in half.

Next we would ask that you consider three proposals regarding CON appeals. One is to eliminate the DHEC Board level appeal. The Board rarely chooses to review CON cases. In our opinion the cost for delay far exceeds any limited benefit from giving the Board an opportunity hear a few cases.

Mr. Chairman our attorneys tell us that the scope of discovery can be reduced even more than it was in the 2010 revisions. We suggest the number of witnesses and the amount of time for depositions be reduced to 7 witnesses and 7 hours per deposition. We should eliminate fishing expeditions for documents and limit the information to data and reports about the project. I have provided staff with a more complete version of our proposals.

Lastly, we would ask that you look at the length of time it takes for the ALC review. We believe this too could be shortened.

We know that CON is about much more than construction of a nursing home. We obviously are not the hot button but I would ask that you look at our history, our buildings and the impact these buildings have on the budget and continue CON for nursing homes. Thank you.

Recommendations

- a. Staff Reviews: Place to start.
- 1) The staff review process now involves two stages, each of which can take up to 4 months or more – decisions can take 8 months and longer.
 - We would propose collapsing these stages into one four-month period.
 - 2) The first stage now consists of a process that includes staff asking applicants for additional information.
 - After this process, the application is deemed "complete," whether it is or not.
 - 3) The second stage is triggered by the publication in the State Register that the application has been deemed complete. The CON Act requires DHEC to make a decision on an application within 120 days after the publication in the State Register that an application is deemed complete (extended to 150 days if a public hearing is held).
 - 4) These 2 stages are unnecessary and could be consolidated into one.
 - Still would be more than enough time for staff to review and evaluate an application, and ask for additional information.
 - If applicants don't provide staff sufficient information to support an application, it can be denied. Other states have a much tighter time frame than in our CON statute – 120 days is considered adequate in Georgia, for example.
 - That is what we would propose – 120 days for staff to make a decision (150 days in cases where a public hearing is held).
 - **Option:** Consider adding more staff to expedite reviews. Only one reviewer now, with two assistants, to do what up to 8-10 professional staff and reviewers and several assistants did in the past.
 - 5) Important Question – When should the clock begin to run to begin the review period?
 - Currently – 120 days from publication in State Register.
 - Use of the State Register no longer makes sense.
 - It can add up to 30 days to the process unless the staff finds the application "complete" just before the monthly deadline for getting the notice into State Register.
 - It is also terribly inaccessible. Who reads the State Register?

- 6) We would propose something I understand the DHEC Director wants to do – provide notices about CON applications electronically on the DHEC website.
 - o We believe DHEC should be required to post a notice of a filing on its website within a short time after the filing (week or so).
 - o And then be required to act on it – approve/deny it – within 120 days of the publication on-line.
- 7) We believe this should be a real deadline with some teeth in it. The most effective way of ensuring that decisions are made within the statutory time frame is to include a provision that would make applications automatically approved if they are not acted on within the 120/150 day review period. Georgia and other states have this provision. Rarely does it need to be invoked. This automatic approval should not apply to competing applications.
- 8) This process could cut in half the time for review and approval of most CON applications.

3. CON Appeals.

- a. The great majority of CON applications are resolved at the staff level. Those that are not are the ones that you hear about. The timeline for resolving those appeals can be shortened considerably as well.
- b. Three things we would ask you to consider to expedite the appeals process:
 - 1) DHEC Board. Eliminate the requirement for appeals of CON decisions to be taken to the DHEC Board. This step can now add several months to the process. The Board rarely chooses to review CON cases. The cost of the delay far exceeds any limited benefit that may flow from giving the Board an opportunity to weigh in on the few cases it chooses to hear.
 - 2) Scope of Discovery. Pre-trial discovery adds time and money to cases appealed to the Administrative Law Court. The scope of discovery has already been reduced substantially by amendments to the CON Act adopted in 2010. Discovery should be reduced further by:
 - o Limiting the number of witnesses a party can call and the length of time of their depositions (7 witnesses; 7 hours @ depo).
 - o Limiting the kinds of documents produced to data and reports about the project. This limitation would have the effect of

excluding all too common fishing expeditions that require extensive and costly electronic searches.

4. Length of ALC Review.

- a. It is not enough to limit discovery. The entire length of the ALC review process should be shortened. It is now 18 months. We believe a case can - and should - be resolved in 12. In most cases that would mean cases would have to be tried in 8 to 9 months of the appeal being filed to give the administrative law judge enough time to issue the opinion before the 12 month period would run (allows time for transcripts and proposed orders after trial before the judge rules). That is a tight time frame and would ensure that the issues before the court would be the ones that are most important.