

Certificate of Need in Ohio

Frequently Asked Questions

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Please note that the following Frequently Asked Questions (FAQs) regarding Certificate of Need (CON) in Ohio are intended to be informational only, and are not intended to be nor should they be relied upon as legal advice. Rolf Goffman Martin Lang Co., LPA will not be responsible for any actions taken or arrangements structured based upon these FAQs. Nursing facilities should always seek the guidance of competent health care attorneys when contemplating any transactions involving CON.

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1. Once a CON is granted, must the applicant put the beds into service and if so, by when?

Under general CON law, an applicant granted a CON that involves new construction or renovations must begin the project within twenty-four (24) months after the CON was finally approved and continue with construction/renovation uninterrupted until completed. If the approved project does not involve construction/renovation and only involves relocation of nursing facility beds, the beds must be relocated and put into service no later than 24 months of final CON approval. If an applicant does not commence construction/renovation or put the beds into service within the 24 months (non-construction project) the approved CON will be void.

2. Can licensed nursing facility beds be relocated from a closed nursing facility?

Nursing facility beds may only be relocated from “existing health care facilities”. An existing health care facility is a facility that is licensed or otherwise authorized to operate (e.g., a county facility) and is actively providing health services or it has provided health services for at least 365 consecutive days within the 24 months immediately preceding the date a CON application is filed. Therefore, an applicant has one year from the date that a source facility has ceased providing health services to residents (i.e., transferred its last resident) to file a CON to relocate beds from that facility, assuming that the facility provided such services for 365 consecutive days prior to the closure.

3. Can I relocate beds to another county?

Yes. With certain restrictions, beds may be relocated to a contiguous county (contiguous county CON) or they may be relocated from a county determined by ODH to have a bed excess to a county determined by ODH to have a bed need (a “Comparative Review” CON). These two (2) methods are different and independent of each other

4. What are the limitations to relocating beds to a contiguous county?

In addition to the requirements for all CONs (e.g., that the beds must be relocated from an “existing health care facility”, etc.), the nursing facility beds must be relocated to an existing licensed nursing facility in the contiguous county. Therefore, beds cannot be relocated to a new or replacement facility in the contiguous county. Additionally, only a maximum of thirty (30) nursing facility beds can be relocated into a facility from a contiguous county, and after the proposed relocation, there must be existing licensed nursing facility beds remaining in the county from which the beds are being relocated.

5. Are there any restrictions as to when a contiguous county CON may be filed?

There is no specific time period in which a contiguous county CON must be filed. A contiguous county CON may be filed at any time, provided that the source facility is an “existing health care facility” as described above.

6. How does ODH determine which counties have a “bed need” and which counties have a “bed excess”?

The CON statute includes a formula that must be utilized by ODH to determine bed need and bed excess in each of the eighty-eight (88) counties. Once the bed need and bed excess is calculated

in accordance with this formula, ODH publishes the results on its website, identifying the counties determined to have a bed need or excess and the number of beds needed or in excess in each of these counties. See www.odh.ohio.gov/odhprograms/dspc/certn/certneed1.aspx.

7. Are there any restrictions on the number of beds that can be relocated from a county with a bed excess to a county with a bed need?

Yes. The number of beds to be relocated out of a county determined to have a bed excess or into a county determined to have a bed need cannot exceed the bed excess/need number identified by ODH. This includes all Comparative Review CONs filed during the designated batch period. Accordingly, if ODH determines that a county has a bed need of 100 beds, no more than 100 beds may be relocated into that county via the Comparative Review process by any one applicant or by a combination of more than one applicant.

Additionally, there are restrictions as to the number of beds that can be removed from any particular source facility. First, the source facility must be located in a county that ODH has determined to be a bed excess county and the number of beds sought to be relocated must not exceed the amount determined to be in excess. In addition, after beds are removed from the source facility, at least 53.3 licensed beds per 1000 individuals over the age of 65 (as projected in 2015) must remain within 15 miles of that source facility, unless the source facility is located in a health professional shortage area as identified by the US Dept. of Health and Human Services, in which case the number of beds remaining is to be based upon the census tract in which the source facility is located. If there are not a sufficient number of beds remaining within 15 miles of the source facility or within the source facility's census tract, then the applicant will be prohibited or limited as to the number of beds relocated from that particular source location.

8. Can I file a Comparative Review CON to relocate beds from a county with a bed excess to a county with a bed need at any time?

No. Generally, Comparative Review CONs may only be filed every 4 years during the month of July. Applicants were permitted to file Comparative Review CONs in July 2010. The next time Comparative Review applications will be accepted by ODH is July 2012, and then they may be filed during the month of July every four (4) years thereafter.

9. Must I relocate beds to an "existing health care facility" when filing a Comparative Review CON?

No. Beds that are being relocated via the Comparative Review process may be relocated to a newly constructed nursing facility.

10. When I file a Comparative Review CON, does that mean that my CON application will be compared to other CON applications during the review process for purposes of determining approval?

Yes. It is possible that applications filed pursuant to the Comparative Review process will be compared with other Comparative Review applications. This will occur if all of the Comparative Review CON applications filed for a particular county exceed the bed need numbers identified for that county by ODH. Therefore, if a county is determined to have a bed need of 100 beds and ODH receives two Comparative Review CONs each seeking to relocate 100 beds into that county, then the applications will be batched together and "compared" by ODH to determine which project should be approved. However, if each of the CONs involves the relocation of only 50

beds, which would not exceed the 100 bed need limit identified by ODH, then ODH would not batch and compare the two CONs together. The projects would then be reviewed independently.

11. What criteria does ODH use when comparing two CONs filed under the Comparative Review process?

Assuming that each of the batched CONs being compared complies with all of the general and special review CON criteria, ODH awards the applicants points based on whether the application meets additional criteria, such as whether the facility will be a nurse aide training site, whether it will have an alternative level of care (e.g., assisted living), whether it will offer Medicaid waivers, and ODH will award points based on the results of the facility's five star rating and resident satisfaction surveys, if applicable. The CON(s) will then be awarded to the applicant(s) with the most points based on the applicant's response to the additional comparative review criteria.

12. What is the time schedule for ODH's review of a CON?

A relocation of beds within a county and a contiguous county CON bed relocation follow the same time schedule. Assuming that there are no objections to the CON application, it generally takes approximately six (6) to eight (8) months to obtain a decision after the CON application has been filed, depending on how quickly the applicant responds to ODH's requests for additional information.

Comparative Review CONs follow a specific time line contained in the statute. For the applications filed in July 2010, the Director of Ohio Department of Health's decision was due on or about May 1, 2011 (approximately 10 months after filing), unless the Director received an objection to the project. The next time Comparative Review CON's can be filed is in July 2012.

13. Can I change the site of a proposed project in a CON application after it is filed?

Yes, subject to specific limitations and restrictions. An applicant for a CON can now change the site of a proposed project after the CON is filed provided that the following conditions are met: 1) the change in location occurs prior to ODH mailing the applicant a written notice that the CON application is declared complete; 2) the change in site does not involve a Comparative Review CON application; 3) the change in site must be to a new site in the same county as originally proposed in the CON application; and 4) the only revision that may be made in the revised application is the change in site. An additional fee of 25% of the original fee charged for filing the original application must be paid for a revised CON application for a change in site.

14. Am I required to pay bed taxes during the development of an approved CON if the beds are not in service?

No. Under current law and interpretation, beds that are to be relocated as part of an approved CON may be delicensed from the source facility at any time after the project is approved. The beds may remain delicensed during the development of the approved project, provided the beds are not being utilized at the source facility during that time frame. Ohio's franchise permit fee ("bed tax") is assessed based upon the number of nursing facility beds licensed at each nursing facility as of May 1st of every year. Therefore, if beds that are part an approved CON are delicensed prior to May 1st of a year, no bed tax will be assess on the delicensed beds for the

“SNAP-SHOT” DATE FOR “BED TAX” ASSESSMENTS RAPIDLY APPROACHING

Nursing facilities that wish to reduce their franchise permit fee for the first half of fiscal year 2013 by de-licensing beds must act by April 30, 2012.

The franchise permit fee (or “bed tax”) imposed on each Ohio nursing facility bed is expected to be approximately \$11.47 and \$11.67 per day for State fiscal year 2012 and 2013 (July 1 – June 30). Accordingly, a 100-bed nursing facility is likely to be assessed a bed tax of \$418,655.00 for State fiscal year 2012. Therefore, in light of this significant expense, now more than ever, many of our clients may find it beneficial to explore the possibility of “de-licensing” beds from their nursing facilities to potentially reduce their bed tax liability in the upcoming State fiscal year 2012.

Important Dates. The annual bed tax is assessed against a nursing facility based upon the number of licensed beds on May 1 of each calendar year and nursing homes will pay bed tax based upon its licensed bed capacity on May 1. If licensed beds are permanently removed from a nursing home licensed bed capacity in a manner that reduces the total licensed bed capacity of all nursing homes between May 1 and December 31, those beds permanently removed will not be counted in the bed tax to be paid for the second half of that fiscal year.

Opportunity to Re-license Beds for CON Projects. In addition, please note that there is a potential opportunity to de-license beds that are the subject of a final, non-appealable certificate of need without losing the right to subsequently “re-license” the beds when the project that is the subject of the certificate of need is completed. Once again, this action must be completed on or before April 30, 2012, in order for the beds to be excluded from the State fiscal year 2012 bed tax assessment and should not be taken absent specific counsel and advice. Please be mindful that it usually takes approximately six to eight months to receive CON approval for the relocation of beds (assuming no objection) and therefore, if you are potentially interested in obtaining final CON approval and de-licensing beds prior to May 1, 2012 and saving bed taxes for fiscal year 2012, we would suggest that you apply for your CON no later than August 2011. It is important to note, however, that if any beds that are the subject of a final, non-appealable certificate of need are de-licensed and the certificate of need holder does not proceed with its project in the manner contemplated by its certificate of need grant letter, or abandons the certificate of need, the holder may permanently lose the right to re-license or operate those beds in the future.

Considerations Prior to Proceeding. Although de-licensing beds can potentially result in a significant financial savings for a nursing facility, it is important to be aware that once beds are de-licensed, those beds cannot be operated, sold, leased, transferred, or relocated to another facility, or relicensed at the existing facility. Also, in addition to the need to evaluate the potential strategic and financial effects of permanently relinquishing beds, nursing facilities whose assets are encumbered by a security interest of a bank or other third party will need to review the applicable financing documents and/or consult with legal counsel to determine whether the de-licensure of beds and resulting reduction in bed capacity is permitted. In virtually all cases, the applicable



financing documents provide that the prior written consent of the lender and/or certain accommodations to the lender is required.

Please contact us if you would like further information or assistance with these matters, or if you have any questions regarding this alert.

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The Long-Term Care Law Firm

Rolf Goffman Martin Lang is the law firm of long-term care providers. Our focused practice is dedicated to partnering with our clients to assist them with strategizing for the future, and in responding to all of their current needs. Over the years we have established ourselves as true advocates of not only our clients, but of the LTC profession as well. We serve as legal counsel to providers across Ohio in a wide range of matters, including, but not limited to:

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Ira Goffman concentrates his practice in the representation of hospitals, physicians, nursing homes and health provider organizations concerning transactional, administrative and regulatory issues affecting their interests, including reimbursement, managed care contracting, joint venture contracting, acquisitions, mergers, reorganizations, corporate compliance, fraud and abuse matters and health care business planning.

Mr. Goffman has been certified as a health care law specialist by the Florida Bar Association since 1996. He has been selected as one of the best health lawyers in the country by “The Best Lawyers in America” (since 1995), one of the best lawyers in northeastern Ohio by the magazine Northern Ohio Live, and one of Ohio’s “Super Lawyers” in the area of health care by Law & Politics Magazine and Cincinnati Magazine every year since the magazines started publishing this honor.

His community and governmental involvement includes the following appointments: Board of Trustees of Jewish Community Housing, Inc.; Board of Trustees for the ALS Association of Northern Ohio; Chairman of the Board of Trustees of Neighborhood Family Practice, 1990-1997; Board Member of Georgetown of the Highlands Condominium Associations, 1985-1990; Member of the Ohio Certificate of Need Task Force, 1994-1995; and Ohio Health Care Quality Advisory Committee, 1995-1996. Mr. Goffman is also an active member of Park Synagogue.

Mr. Goffman received his Juris Doctorate from the University of Toledo in 1981, where he graduated cum laude and was a member of its Law Review. He earned his Bachelor of Science degree in accounting from the State University of New York at Binghamton in 1978.

Mr. Goffman is admitted to practice in any state court in Ohio and Florida, and the U.S. District Court for the Northern District of Ohio. He is a member of the Cleveland and Ohio State Bar Associations, American Health Lawyers and Ohio Health Lawyers Association.

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Ms. Conroy focuses her practice in the areas of health care regulatory compliance, including all aspects of licensure, certification, information and administrative appeals, and the development of healthcare policies. Ms. Conroy also practices in the area of Certificate of Need, from drafting applications through the appeal process.

Having worked as a registered nurse for nearly 20 years prior to joining the firm, she offers a unique perspective with respect to various issues affecting health care providers.

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