

**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.)

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Prepared By: The Professional Staff of the Committee on Children, Families, and Elder Affairs

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**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:** March 18, 2014

**REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Stovall	HP	Fav/CS
2.	Crosier	Hendon	CF	Fav/CS
3.			AHS	
4.			AP	

**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:

- Repeal the moratorium on CONs for new community nursing homes and for adding additional community nursing home beds to an existing nursing home.
- Establish a positive CON application factor for CON applications in subdistricts with bed need if the applicant relinquishes nursing home beds in one or more subdistricts without need.
- Decrease the statutorily set goal minimum average sub-district nursing home occupancy rate from 94 to 92 percent.
- Allow contiguous sub-districts that each have nursing-home-bed-need to aggregate their need for the construction of one nursing home.
- Allow for an expedited review of a CON application for the replacement of a nursing home:
  - 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.
  - Outside of a 30-mile radius of the existing nursing home if the new nursing home is within the same sub-district or a contiguous sub-district within the same district.
  - If the nursing home is moved to a contiguous sub-district with either provision, existing nursing homes in that sub-district must have at least an 85 percent occupancy rate.

- Allow 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.
- Create a new exemption to the CON process 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.
- Amend several existing provisions granting exemptions to the nursing home CON process, without increasing the number of nursing home beds.
- Restrict the Agency for Healthcare Administration (AHCA or agency) from issuing any further CONs for nursing home beds once 3,750 total new beds have been approved. This provision expires on July 1, 2017.

## II. Present Situation:

### Certificates of Need

A CON is a written statement issued by the 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, the agency 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.<sup>2</sup> 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).<sup>3</sup>

#### *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; or
- The new construction of a nursing home in a retirement community if certain population and bed need criteria are met.<sup>4</sup>

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

<sup>2</sup> Section 408.036, F.S.

<sup>3</sup> 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.

<sup>4</sup> 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.

***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;<sup>5</sup>
- 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;
- 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, 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***

Granting a CON is based on need. The future need for community nursing home beds is determined twice a year and published by the agency as a fixed bed need pool for the applicable planning horizon. The planning horizon for CON applications is 3 years. Need determinations are calculated for sub-districts within the agency's 11 service districts<sup>6</sup> based on a formula<sup>7</sup> 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 agency until the moratorium on nursing home CONs expires. The Legislature first enacted this moratorium in 2001 which was slated to last until July 1, 2006.<sup>8</sup> The Legislature then reenacted the moratorium in 2006,<sup>9</sup> and again in 2011.<sup>10</sup> The current

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

<sup>6</sup> The nursing home subdistricts 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 subdistricts of district 4.

<sup>7</sup> Rule 59C-1.036, F.A.C.

<sup>8</sup> Chapter 2001-45, s. 52, Laws of Fla.

<sup>9</sup> Chapter 2006-161, Laws of Fla.

<sup>10</sup> Chapter 2011-135, Laws of Fla.

moratorium lasts until October 1, 2016, or until Medicaid managed care is implemented statewide. Full implementation of the statewide Medicaid managed care program is statutorily required to be completed by October 1, 2014.<sup>11</sup>

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

- Adding sheltered nursing home beds<sup>12</sup>;
- Beds may be added 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;<sup>13</sup>
- 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:
  - 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; 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 not had any class I or class II deficiencies since its initial licensure;
- 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;
  - Any beds authorized for the facility under this exception in a prior request have been licensed and operational for at least 12 months;<sup>14</sup> 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** of the bill amends s. 408.034, F.S., to reduce the average sub-district nursing home occupancy rate which 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 2004-05.<sup>15</sup>

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:

<sup>11</sup> ss. 409.971 and 409.978, F.S.

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

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

<sup>14</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.

<sup>15</sup> *AHCA bill analysis for SB 268*, December 20, 2013, on file with the Senate Health Policy Committee.

- 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 subdistrict where nursing home bed need has been determined to exist if that applicant voluntarily relinquishes licensed nursing home beds in one or more subdistricts 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 deletes obsolete language related to pilot nursing home diversion projects.

**Section 2** of the bill 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 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 5, rather than 3, miles and clarifies that such a move must remain within the same subdistrict; 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 this section.

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

**Section 4** of 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 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 subdistrict.

The bill provides a repeal date for this section of July 1, 2017.

**Section 5** of the bill 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 AHCA from issuing CONs for new community nursing home beds in most instances. Repealing this 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 need is determined. The bill also eases some of the guidelines that 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 the 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 would have been previously restricted. 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 agency's bill analysis,<sup>16</sup> AHCA will need to amend its CON rules and revise the bed need formula to comply with the reduced average sub-district nursing home occupancy rate. Rewriting these rules will produce a minor indeterminate fiscal impact for the agency.

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 will 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.<sup>17</sup>

**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.

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<sup>16</sup> *Supra*, 14.

<sup>17</sup> *Supra*, 14.

**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 amendment 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:**

- Establish 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.
- Restrict 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.
- Allow 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.
- Add 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.
- Create section 4 to restrict 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.
- Make other technical, clarifying, and conforming changes.

- B. **Amendments:**

None.