



**Department
of Health**

New York State Certificate of Need Process for Long-Term Care Facilities

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Topics For Today's Presentation

- I. Long Term Care Certificate of Need Application (CON) Process and Review
- II. Nursing Home Character and Competence Requirements and Challenges
- III. Long-Term Care Public Need and Methodologies

Long-Term Care Certificate of Need Applications

Two Types

- I. Establishment applications

- II. Construction CONs
 - i. Article 28 Residential Health Care Facilities (RHCFs)
 - ii. Article 36 Home Care Service Agencies (CHHAs/LHCSAs)
 - iii. Article 40 Hospice Agencies

Note: Adult Care Facility licensure application requirements are defined in Social Services Law - Article 7. Applications for this facility type are not subject to review or approval by the Public Health and Health Planning Council

Long Term Care CON Application Review Requirements

Three statutory prongs that must be reviewed before granting approval for establishment or construction CONs:

- I. Public Need** - (the original reason and justification for CON laws)
- II. Financial Feasibility** – review of expenses, projected revenues, current financial status and capacity to retire debt
- III. Character and Competence** - based upon experience and past performance in operating health care services, including records of violations, if any, and whether a substantially consistent high level of care was maintained

Other Factors Considered For CON Application Reviews

- Health Equity Impact Assessment
- “All other factors that PHHPC deems pertinent”
- CON requirements have evolved over time and no longer just consider “public need”

Character and Competence (C&C): Nursing Homes

Statutory Requirement:

Public Health Law §2801-a(3) – “*substantially consistent high level of care*”

Public Health Law §2801-a(3-b) – “consistently high level of care. (For RHCs only)

C&C Statutory Requirements: Nursing Homes

A “substantially consistent high level of care” is not found if:

- There was a violation of the state hospital code or other applicable rules and regulations that:
 - Threatened to directly affect the health, safety or welfare of any patient or resident or;
 - Was recurrent and not promptly corrected

C&C Statutory Requirements: Nursing Homes (continued)

Public Health Law §2801(a)(3-b):

- Designed for Residential Health Care Facility (nursing home) applications
- Requires review of each member listed on the application over the past **seven (7)** years and for **each** facility in which they had a “**controlling interest**” or were the “**controlling person**”

C&C Statutory Requirements: Nursing Homes (continued)

Applicants must disclose:

- Any facility that earned a two-star or less CMS star rating
- Any violation of state or federal rules and regulations that affected resident safety (immediate jeopardy or actual harm) that were recurrent and not promptly corrected over a three-year period. (Not limited to repeat deficiencies for the same deficiency over a three-year period)
- Any facility that has been in receivership
- Any facility closed as a result of a settlement agreement from decertification or licensure revocation
- Involuntary termination from Medicaid or Medicare program in the prior five (5) years for any facility or agency under their control

C&C Statutory Requirements: Nursing Homes (continued)

Important to note that it is the role of PHHPC to determine whether the “substantially consistent high level of care” threshold was met.

C&C Regulations: Nursing Homes

10 NYCRR §600.2:

- Outlines in greater detail the statutory framework
- PHHPC decides *whether a consistently high level of care has been rendered after evaluating:*
 - The gravity of any violation
 - The way the applicant/operator exercised supervisory responsibility over the facility operation, and the remedial action, if any, taken after the violation was discovered
 - The percentage of nursing homes in a portfolio with a two-star or less rating

C&C Regulations: Nursing Homes (continued)

In evaluating the gravity of the violation PHHPC shall consider:

- Whether the violation threatened, or resulted in direct, significant harm to the health, safety or welfare of patients/residents
- The manner in which the applicant/operator exercised supervisory responsibility over the facility operation. PHHPC shall consider whether a reasonably prudent individual of the applicant/operator should have been aware of the conditions which resulted in the violation and whether the individual of the applicant/operator was notified about the condition(s) which resulted in the violation

In evaluating any remedial action taken, PHHPC shall consider:

- Whether the applicant/operator investigated the circumstances surrounding the violation and took steps that a reasonably prudent applicant/operator would take to prevent the reoccurrence of the violation

C&C Regulations: Nursing Homes (continued)

In evaluating instances of a facility affiliated with the applicant/operator earning a two-star or less rating, PHHPC shall:

- Determine the percentage of nursing homes in the portfolio, that each individual of the applicant/operator has held an ownership interest for forty-eight (48) months or more and has earned a CMS star rating of two stars or less
- “CMS Litmus Test” (discussed later)

C&C Regulations: Nursing Homes (continued)

When any of the following has occurred in the prior five (5) years, there shall not be a determination of a consistently high level of care:

- Closure of a facility or a facility has closed as a result of a settlement agreement from a decertification action or licensure revocation
- A healthcare-related facility, agency, or program was the subject of a decertification action or licensure revocation
- Involuntary termination of a healthcare-related facility, agency, or program from the Medicare or Medicaid program

C&C Regulations: Nursing Homes (continued)

- Violations found, which either threatened to directly affect patient/resident health, safety or welfare, or resulted in direct, significant harm to the health, safety or welfare of patients/residents, and were recurrent or were not promptly corrected
 - A violation is recurrent if it has the same root cause as a violation previously cited within the last seven (7) years
 - A violation is not promptly corrected if a plan of correction has not been submitted to the Department within ten (10) calendar days of the issuance of the statement of deficiencies and the facility has failed to provide an acceptable date of compliance based on the violation(s) requiring correction

C&C Regulations: Nursing Homes (continued)

CMS Litmus Test:

- When any individual of the applicant/operator has greater than 40% of the nursing homes in their portfolio with a CMS star rating of two (2) stars or less; **and**
- Has held an ownership interest in such nursing home for forty-eight (48) months or more
- There shall not be a determination of a consistently high level of care; unless the portfolio contains fewer than five (5) facilities, then the PHHPC shall make a determination on a case-by-case basis

Questions to Consider

- What is a same “root cause?”
 - Hard to define: Not just the same survey tag, but the exact same set of circumstances?
- How do we determine “promptly corrected”?

Questions to Consider

How should PHHPC handle the following?

- Applications that include individuals without existing nursing home ownership?
- Applications where an individual who does not pass C&C modifies the application to replace themselves with a family member or associate?

Questions to Consider

Out-of-State Ownership:

Many states do not follow the New York “natural persons” model

- How does PHHPC make C&C determinations in these instances?
 - Home owned as a trust
 - Multi-level LLC
 - Private equity, etc.
- Individuals who meet all the C&C requirements for approval, but their overall portfolio is still not ideal with a number of low rated facilities?
- There is a limited pool of individuals associated with nursing home ownership and it can be a challenge to move projects forward with quality individuals

Long-Term Care Public Need

- One of the prongs necessary for CON review:
 - What defines “Public Need” in Long Term Health Care?
 - How to we determine Public Need?
 - Why is it important in 2024?

Public Need History

- Based on the theories of **Milton Rohmer** (UCLA School of Public Health, 1959):
 - theory that there is a high correlation between the available number of hospital beds and the use of those beds
- **J. Enoch Powell** (Minister of Health, United Kingdom, 1964) – *“Parkinson’s Law” of hospital beds:*
 - “the number of patients always tends to equality with the number of beds available to lie in”

What is “Public Need”?

Statute only requires that the Public Health and Health Planning Council determine public need.

- How is this determination made?

Need Methodology

- Determinations are made via the regulations through a “need methodology”
- Only exception are Licensed Home Care Service Agencies (LHCSAs) – for this provider type, need is determined on a county-by-county basis

Long Term Care Need Methodologies

- **Article 28 Residential Health Care Facilities (RHCFs):**
 - Should be updated every five (5) years. Last update in 2016.
- **Article 40 Hospice Agencies:**
 - Outdated for over 15 years
 - Relies on outdated cancer statistics
- **Article 36 Certified Health Home Agencies (CHHAs):**
 - Outdated need methodology
- **Article 36 Licensed Home Care Service Agencies (LHCSAs):**
 - New regulation in 2021.
 - Counties with five (5) or more LHCSAs = no need
 - Counties with less than five (5) LHCSAs = need

Consequences of Outdated Need Methodologies

- Become unworkable and create “de facto” moratoriums on new CONs
 - Example: Hospice and Certified Home Health Agencies (CHHAs) have outdated and unworkable need methodologies

Current Nursing Home Need Methodology

10 NYCRR §709.3:

- Establishes criteria for determining public need
- Initially implemented to determine the appropriate and efficient allocation of capacity within the long-term care system, promoting access and financial sustainability

2016 Revised Nursing Home Need Methodology

- The methodology sought to ensure access to appropriate and available long-term care settings
- In estimating need, the supply of all provider types (institutional and community-based settings) was considered
- Flexibility was afforded to allow consideration of local factors, including the special needs of a facility's population and the quality of nursing homes in the planning area, and allow responsiveness to the changing environment
- The need methodology was designed to function as a guideline and is not meant to be an absolute predictor of the number of beds needed in each planning area
- The methodology was designed to be effective for a duration that is only as long as is needed to understand the impact on long-term care of ongoing transformative changes and trends in the health care system

Need Criteria Not in a Vacuum

- Remember, there may be a “need” but factors such as character and competence and finances may prevent a CON from being approved
- Many different factors go into considering an approvable CON

Updating Nursing Home Public Need Methodology

Factors to consider:

- What does “public need” mean?
- Are complex need methodologies necessary in 2024 and beyond?
- How frequently should we reassess and revise need methodologies?
- What other data should the State consider when updating the methodology? (workforce, quality indicators, etc.)

Updating Nursing Home Public Need Methodology

- Need methodology functions should serve as a guideline and are not meant to be an absolute predictor of the number of beds needed in a planning area.
- Occupancy rate threshold? (97 percent?)
- What should the planning areas consist of?
 - Counties are a good starting point, but we always need to consider region
 - “Local factors” (public transit availability, geography, weather patterns, workforce)

Questions?