

VIRGINIA ACTS OF ASSEMBLY -- 2004 SESSION

CHAPTER 95

An Act to amend and reenact §§ 32.1-102.3 and 32.1-102.6 of the Code of Virginia, relating to criteria for determining need; local governing body to join with applicant under certain circumstances; certificate of public need for medical care facilities.

[H 391]

Approved March 12, 2004

Be it enacted by the General Assembly of Virginia:

1. That §§ 32.1-102.3 and 32.1-102.6 of the Code of Virginia are amended and reenacted as follows:

§ 32.1-102.3. Certificate required; criteria for determining need.

A. No person shall commence any project without first obtaining a certificate issued by the Commissioner. No certificate may be issued unless the Commissioner has determined that a public need for the project has been demonstrated. If it is determined that a public need exists for only a portion of a project, a certificate may be issued for that portion and any appeal may be limited to the part of the decision with which the appellant disagrees without affecting the remainder of the decision. Any decision to issue or approve the issuance of a certificate shall be consistent with the most recent applicable provisions of the State Medical Facilities Plan; however, if the Commissioner finds, upon presentation of appropriate evidence, that the provisions of such plan are not relevant to a rural locality's needs, inaccurate, outdated, inadequate or otherwise inapplicable, the Commissioner, consistent with such finding, may issue or approve the issuance of a certificate and shall initiate procedures to make appropriate amendments to such plan.

B. In determining whether a public need for a project has been demonstrated, the Commissioner shall consider:

1. The recommendation and the reasons therefor of the appropriate health planning agency.
2. The relationship of the project to the applicable health plans of the Board and the health planning agency.
3. The relationship of the project to the long-range development plan, if any, of the person applying for a certificate.
4. The need that the population served or to be served by the project has for the project, including, but not limited to, the needs of rural populations in areas having distinct and unique geographic, socioeconomic, cultural, transportation, and other barriers to access to care.
5. The extent to which the project will be accessible to all residents of the area proposed to be served *and the effects on accessibility of any proposed relocation of an existing service or facility.*
6. The area, population, topography, highway facilities and availability of the services to be provided by the project in the particular part of the health service area in which the project is proposed, in particular, the distinct and unique geographic, socioeconomic, cultural, transportation, and other barriers to access to care.
7. Less costly or more effective alternate methods of reasonably meeting identified health service needs.
8. The immediate and long-term financial feasibility of the project.
9. The relationship of the project to the existing health care system of the area in which the project is proposed; however, for projects proposed in rural areas, the relationship of the project to the existing health care services in the specific rural locality shall be considered.
10. The availability of resources for the project.
11. The organizational relationship of the project to necessary ancillary and support services.
12. The relationship of the project to the clinical needs of health professional training programs in the area in which the project is proposed.
13. The special needs and circumstances of an applicant for a certificate, such as a medical school, hospital, multidisciplinary clinic, specialty center or regional health service provider, if a substantial portion of the applicant's services or resources or both is provided to individuals not residing in the health service area in which the project is to be located.
14. The special needs and circumstances of health maintenance organizations. When considering the special needs and circumstances of health maintenance organizations, the Commissioner may grant a certificate for a project if the Commissioner finds that the project is needed by the enrolled or reasonably anticipated new members of the health maintenance organization or the beds or services to be provided are not available from providers which are not health maintenance organizations or from other health maintenance organizations in a reasonable and cost-effective manner.
15. The special needs and circumstances for biomedical and behavioral research projects which are

designed to meet a national need and for which local conditions offer special advantages.

16. In the case of a construction project, the costs and benefits of the proposed construction.

17. The probable impact of the project on the costs of and charges for providing health services by the applicant for a certificate and on the costs and charges to the public for providing health services by other persons in the area.

18. Improvements or innovations in the financing and delivery of health services which foster competition and serve to promote quality assurance and cost effectiveness.

19. In the case of health services or facilities proposed to be provided, the efficiency and appropriateness of the use of existing services and facilities in the area similar to those proposed, including, in the case of rural localities, any distinct and unique geographic, socioeconomic, cultural, transportation, and other barriers to access to care.

20. The need and the availability in the health service area for osteopathic and allopathic services and facilities and the impact on existing and proposed institutional training programs for doctors of osteopathy and medicine at the student, internship, and residency training levels.

§ 32.1-102.6. Administrative procedures.

A. To obtain a certificate for a project, the applicant shall file a completed application for a certificate with the Department and the appropriate health planning agency. In order to verify the date of the Department's and the appropriate health planning agency's receipt of the application, the applicant shall transmit the document by certified mail or a delivery service, return receipt requested, or shall deliver the document by hand, with signed receipt to be provided.

Within ~~ten~~ 10 calendar days of the date on which the document is received, the Department and the appropriate health planning agency shall determine whether the application is complete or not and the Department shall notify the applicant, if the application is not complete, of the information needed to complete the application.

At least ~~thirty~~ 30 calendar days before any person is contractually obligated to acquire an existing medical care facility, the cost of which is \$600,000 or more, that person shall notify the Commissioner and the appropriate health planning agency of the intent, the services to be offered in the facility, the bed capacity in the facility and the projected impact that the cost of the acquisition will have upon the charges for services to be provided. If clinical services or beds are proposed to be added as a result of the acquisition, the Commissioner may require the proposed new owner to obtain a certificate prior to the acquisition.

B. The appropriate health planning agency shall review each completed application for a certificate within ~~sixty~~ 60 calendar days of the day which begins the appropriate batch review cycle as established by the Board by regulation pursuant to subdivision A 1 of § 32.1-102.2, such cycle not to exceed 190 days in duration. The health planning agency shall hold one public hearing on each application in a location in the county or city in which the project is proposed or a contiguous county or city. The health planning agency shall cause notice of the public hearing to be published in a newspaper of general circulation in the county or city where a project is proposed to be located at least nine calendar days prior to the public hearing. *The health planning agency shall notify the local governing bodies in the planning district. The health planning agency shall consider the comments of such governing bodies and all other public comments in making its decision. Such comments shall be part of the record provided to the Department.* In no case shall a health planning agency hold more than two meetings on any application, one of which shall be the public hearing conducted by the board of the health planning agency or a subcommittee of the board. The applicant shall be given the opportunity, prior to the vote by the board of the health planning agency or a committee of the agency, if acting for the board, on its recommendation, to respond to any comments made about the project by the health planning agency staff, any information in a staff report, or comments by those voting; however, such opportunity shall not increase the ~~sixty~~ 60-calendar-day period designated herein for the health planning agency's review unless the applicant or applicants request a specific extension of the health planning agency's review period.

The health planning agency shall submit its recommendations on each application and its reasons therefor to the Department within ~~ten~~ 10 calendar days after the completion of its ~~sixty~~ 60-calendar-day review or such other period in accordance with the applicant's request for extension.

If the health planning agency has not completed its review within the specified ~~sixty~~ 60 calendar days or such other period in accordance with the applicant's request for extension and submitted its recommendations on the application and the reasons therefor within ~~ten~~ 10 calendar days after the completion of its review, the Department shall, on the eleventh calendar day after the expiration of the health planning agency's review period, proceed as though the health planning agency has recommended project approval without conditions or revision.

C. After commencement of any public hearing and before a decision is made there shall be no ex parte contacts concerning the subject certificate or its application between (i) any person acting on behalf of the applicant or holder of a certificate or any person opposed to the issuance or in favor of revocation of a certificate of public need and (ii) any person in the Department who has authority to make a determination respecting the issuance or revocation of a certificate of public need, unless the

Department has provided advance notice to all parties referred to in (i) of the time and place of such proposed contact.

D. The Department shall commence the review of each completed application upon the day which begins the appropriate batch review cycle and simultaneously with the review conducted by the health planning agency.

A determination whether a public need exists for a project shall be made by the Commissioner within 190 calendar days of the day which begins the appropriate batch cycle.

The 190-calendar-day review period shall begin on the date upon which the application is determined to be complete within the batching process specified in subdivision A 1 of § 32.1-102.2.

If the application is not determined to be complete within ~~forty~~ 40 calendar days from submission, the application shall be refiled in the next batch for like projects.

The Commissioner shall make determinations in accordance with the provisions of the Administrative Process Act (§ 2.2-4000 et seq.) except for those parts of the determination process for which timelines and specifications are delineated in subsection E of this section. Further, the parties to the case shall include only the applicant, any person showing good cause, any third-party payor providing health care insurance or prepaid coverage to five percent or more of the patients in the applicant's service area, or the health planning agency if its recommendation was to deny the application.

E. Upon entry of each completed application or applications into the appropriate batch review cycle:

1. The Department shall establish, for every application, a date between the eightieth and ninetieth calendar days within the 190-calendar-day review period for holding an informal fact-finding conference, if such conference is necessary.

2. The Department shall review every application at or before the seventy-fifth calendar day within the 190-calendar-day review period to determine whether an informal fact-finding conference is necessary.

3. Any person seeking to be made a party to the case for good cause shall notify the Department of his request and the basis therefor on or before the eightieth calendar day following the day which begins the appropriate batch review cycle.

4. In any case in which an informal fact-finding conference is held, a date shall be established for the closing of the record which shall not be more than ~~thirty~~ 30 calendar days after the date for holding the informal fact-finding conference.

5. In any case in which an informal fact-finding conference is not held, the record shall be closed on the earlier of (i) the date established for holding the informal fact-finding conference or (ii) the date that the Department determines an informal fact-finding conference is not necessary.

6. The provisions of subsection D of § 2.2-4019 notwithstanding, if a determination whether a public need exists for a project is not made by the Commissioner within ~~forty-five~~ 45 calendar days of the closing of the record, the Commissioner shall notify the applicant or applicants and any persons seeking to show good cause, in writing, that the application or the application of each shall be deemed approved ~~twenty-five~~ 25 calendar days after expiration of such ~~forty-five~~ 45-calendar-day period, unless the receipt of recommendations from the person performing the hearing officer functions permits the Commissioner to issue his case decision within that ~~twenty-five~~ 25-calendar-day period. The validity or timeliness of the aforementioned notice shall not, in any event, prevent, delay or otherwise impact the effectiveness of subdivision E 6 of § 32.1-102.6.

7. In any case when a determination whether a public need exists for a project is not made by the Commissioner within ~~seventy~~ 70 calendar days after the closing of the record, the application shall be deemed to be approved and the certificate shall be granted.

8. If a determination whether a public need exists for a project is not made by the Commissioner within ~~forty-five~~ 45 calendar days of the closing of the record, any applicant who is competing in the relevant batch or who has filed an application in response to the relevant Request For Applications issued pursuant to § 32.1-102.3:2 may, prior to the application being deemed approved, petition for immediate injunctive relief pursuant to § 2.2-4030, naming as respondents the Commissioner and all parties to the case. During the pendency of the proceeding, no applications shall be deemed to be approved. In such a proceeding, the provisions of § 2.2-4030 shall apply.

F. Deemed approvals shall be construed as the Commissioner's case decision on the application pursuant to the Administrative Process Act (§ 2.2-4000 et seq.) and shall be subject to judicial review on appeal as the Commissioner's case decision in accordance with such act.

Any person who has sought to participate in the Department's review of such deemed-to-be-approved application as a person showing good cause who has not received a final determination from the Commissioner concerning such attempt to show good cause shall be deemed to be a person showing good cause for purposes of appeal of the deemed approval of the certificate.

In any appeal of the Commissioner's case decision granting a certificate of public need pursuant to a Request for Applications issued pursuant to § 32.1-102.3:2, the court may require the appellant to file a bond pursuant to § 8.01-676.1, in such sum as shall be fixed by the court for protection of all parties interested in the case decision, conditioned on the payment of all damages and costs incurred in consequence of such appeal.

G. For purposes of this section, "good cause" shall mean that (i) there is significant relevant information not previously presented at and not available at the time of the public hearing, (ii) there have been significant changes in factors or circumstances relating to the application subsequent to the public hearing, or (iii) there is a substantial material mistake of fact or law in the Department staff's report on the application or in the report submitted by the health planning agency.

H. The project review procedures shall provide for separation of the project review manager functions from the hearing officer functions. No person serving in the role of project review manager shall serve as a hearing officer.

I. The applicants, and only the applicants, shall have the authority to extend any of the time periods specified in this section. If all applicants consent to extending any time period in this section, the Commissioner, with the concurrence of the applicants, shall establish a new schedule for the remaining time periods.