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HOUSE BILL NO. 2243

House Amendments in [] - February 5, 2005

A *BILL to amend and reenact § 32.1-102.6 of the Code of Virginia, relating to medical care facilities certificate of public need; parties to the case.*

Patron Prior to Engrossment—Delegate O'Bannon

Referred to Committee on Health, Welfare and Institutions

Be it enacted by the General Assembly of Virginia:**1. That § 32.1-102.6 of the Code of Virginia is amended and reenacted as follows:**

§ 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 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 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 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. 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 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 10 calendar days after the completion of its 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 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 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

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59 revocation of a certificate of public need and (ii) any person in the Department who has authority to
60 make a determination respecting the issuance or revocation of a certificate of public need, unless the
61 Department has provided advance notice to all parties referred to in (i) of the time and place of such
62 proposed contact.

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

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

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

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

72 The Commissioner shall make determinations in accordance with the provisions of the Administrative
73 Process Act (§ 2.2-4000 et seq.) except for those parts of the determination process for which timelines
74 and specifications are delineated in subsection E of this section. Further, [*if an informal fact-finding*
75 *conference is determined to be necessary by the Department or is requested by a person seeking good*
76 *cause standing,*] the parties to the case shall include only the applicant, any person showing good
77 cause, any third-party payor providing health care insurance or prepaid coverage to five percent or more
78 of the patients in the applicant's service area, [*or and*] the relevant health planning agency [*if its (i)*
79 *the health agency's recommendation was to deny the application or (ii) the health planning agency's*
80 *recommendation is to approve the application in whole or in part and the recommendation is not*
81 *consistent with the Department staff's report on the application*] .

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

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

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

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

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

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

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

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

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

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

119 Any person who has sought to participate in the Department's review of such deemed-to-be-approved
120 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.

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