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**HOUSE BILL NO. 349**

Offered January 13, 2016

Prefiled January 5, 2016

A *BILL to amend and reenact §§ 32.1-102.1, 32.1-102.1:1, 32.1-102.3:1, 32.1-102.3:1.1, 32.1-102.3:2, 32.1-102.3:7, 32.1-102.3:8, and 32.1-102.4 of the Code of Virginia, relating to certificates of public need.*

Patrons—Byron, LaRock and Peace

Referred to Committee on Health, Welfare and Institutions

**Be it enacted by the General Assembly of Virginia:**

1. That §§ 32.1-102.1, 32.1-102.1:1, 32.1-102.3:1, 32.1-102.3:1.1, 32.1-102.3:2, 32.1-102.3:7, 32.1-102.3:8, and 32.1-102.4 of the Code of Virginia are amended and reenacted as follows:

**§ 32.1-102.1. Definitions.**

As used in this article, unless the context indicates otherwise:

"Certificate" means a certificate of public need for a project required by this article.

"Clinical health service" means a single diagnostic, therapeutic, rehabilitative, preventive or palliative procedure or a series of such procedures that may be separately identified for billing and accounting purposes.

"Health planning region" means a contiguous geographical area of the Commonwealth with a population base of at least 500,000 persons which is characterized by the availability of multiple levels of medical care services, reasonable travel time for tertiary care, and congruence with planning districts.

"Medical care facility," as used in this title, means any institution, place, building or agency, whether or not licensed or required to be licensed by the Board or the Department of Behavioral Health and Developmental Services, whether operated for profit or nonprofit and whether privately owned or privately operated or owned or operated by a local governmental unit, (i) by or in which health services are furnished, conducted, operated or offered for the prevention, diagnosis or treatment of human disease, pain, injury, deformity or physical condition, whether medical or surgical, of two or more nonrelated persons who are injured or physically sick or have mental illness, or for the care of two or more nonrelated persons requiring or receiving medical, surgical or nursing attention or services as acute, chronic, convalescent, aged, physically disabled or crippled or (ii) which is the recipient of reimbursements from third-party health insurance programs or prepaid medical service plans. For purposes of this article, only the following medical care facilities shall be subject to review:

1. General hospitals.

2. Sanitariums.

3. Nursing homes.

4. Intermediate care facilities, except those intermediate care facilities established for individuals with intellectual disability (ICF/MR) that have no more than 12 beds and are in an area identified as in need of residential services for individuals with intellectual disability in any plan of the Department of Behavioral Health and Developmental Services.

5. Extended care facilities.

6. Mental hospitals.

7. Facilities for individuals with intellectual disability.

8. Psychiatric hospitals and intermediate care facilities established primarily for the medical, psychiatric or psychological treatment and rehabilitation of individuals with substance abuse.

9. Specialized; and

2. Hospitals, specialized centers, or clinics, or that portion of a physician's office developed for the provision of outpatient or ambulatory surgery, cardiac catheterization, computed tomographic (CT) scanning, stereotactic radiosurgery, lithotripsy, magnetic resonance imaging (MRI), magnetic source imaging (MSI), positron emission tomographic (PET) scanning, radiation therapy, stereotactic radiotherapy, proton beam therapy, nuclear medicine imaging, except for the purpose of nuclear cardiac imaging, or such other specialty services as may be designated by the Board by regulation that are located outside of a metropolitan statistical area or in a rural census tract within a metropolitan statistical area.

10. Rehabilitation hospitals.

11. Any facility licensed as a hospital.

The term "medical care facility" does not include any facility of (i) the Department of Behavioral Health and Developmental Services; (ii) any nonhospital substance abuse residential treatment program

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operated by or contracted primarily for the use of a community services board under the Department of Behavioral Health and Developmental Services' Comprehensive State Plan; (iii) an intermediate care facility for individuals with intellectual disability (ICF/MR) that has no more than 12 beds and is in an area identified as in need of residential services for individuals with intellectual disability in any plan of the Department of Behavioral Health and Developmental Services; (iv) a physician's office, except that portion of a physician's office described in subdivision 9 of the definition of "medical care facility"; (v) the Wilson Workforce and Rehabilitation Center of the Department for Aging and Rehabilitative Services; (vi) the Department of Corrections; or (vii) the Department of Veterans Services. "Medical care facility" shall also not include that portion of a physician's office dedicated to providing nuclear cardiac imaging.

*"Nursing home" means any facility or any identifiable component of any facility licensed pursuant to Article 1 (§ 32.1-123 et seq.) of Chapter 5 in which the primary function is the provision, on a continuing basis, of nursing services and health-related services for the treatment and inpatient care of two or more nonrelated individuals, including facilities known by varying nomenclature or designation such as convalescent homes, skilled nursing facilities or skilled care facilities, intermediate care facilities, extended care facilities, and nursing facilities or nursing care facilities.*

"Project" means:

1. Establishment of a medical care facility;

2. An increase in the total number of beds or operating rooms in an existing medical care facility;

3. Relocation of beds from one existing facility to another, provided that "project" does not include the relocation of up to 10 beds or 10 percent of the beds, whichever is less, (i) from one existing facility to another existing facility at the same site in any two-year period, or (ii) in any three-year period, from one existing nursing home facility to any other existing nursing home facility owned or controlled by the same person that is located either within the same planning district, or within another planning district out of which, during or prior to that three-year period, at least 10 times that number of beds have been authorized by statute to be relocated from one or more facilities nursing homes located in that other planning district and at least half of those beds have not been replaced, provided further that, however, a hospital shall not be required to obtain a certificate for the use of 10 percent of its beds as nursing home beds as provided in § 32.1-132;

4. Introduction into an existing medical care facility of any new nursing home service, such as intermediate care facility services, extended care facility services, or skilled nursing facility services, regardless of the type of medical care facility in which those services are provided;

5. Introduction into an existing medical care facility of any new cardiac catheterization, computed tomographic (CT) scanning, stereotactic radiosurgery, lithotripsy, magnetic resonance imaging (MRI), magnetic source imaging (MSI), medical rehabilitation, neonatal special care, obstetrical, open heart surgery, positron emission tomographic (PET) scanning, psychiatric, organ or tissue transplant service, radiation therapy, stereotactic radiotherapy, proton beam therapy, nuclear medicine imaging, except for the purpose of nuclear cardiac imaging, substance abuse treatment, or such other specialty clinical services as may be designated by the Board by regulation, which the facility has never provided or has not provided in the previous 12 months;

6. Conversion of beds in an existing medical care facility to medical rehabilitation beds or psychiatric beds;

7. The addition by an existing medical care facility of any medical equipment for the provision of cardiac catheterization, computed tomographic (CT) scanning, stereotactic radiosurgery, lithotripsy, magnetic resonance imaging (MRI), magnetic source imaging (MSI), open heart surgery, positron emission tomographic (PET) scanning, radiation therapy, stereotactic radiotherapy, proton beam therapy, or other specialized service designated by the Board by regulation. Replacement of existing equipment shall not require a certificate of public need;

8. Any capital expenditure of \$15 million or more, not defined as reviewable in subdivisions 1 through 7 of this definition, by or on behalf of a medical care facility other than a general hospital. Capital expenditures of \$5 million or more by a general hospital and capital expenditures between \$5 and \$15 million by a medical care facility other than a general hospital shall be registered with the Commissioner pursuant to regulations developed by the Board. The amounts specified in this subdivision shall be revised effective July 1, 2008, and annually thereafter to reflect inflation using appropriate measures incorporating construction costs and medical inflation. Nothing in this subdivision shall be construed to modify or eliminate the reviewability of any project described in subdivisions 1 through 7 of this definition when undertaken by or on behalf of a general hospital; or

9. Conversion in an existing medical care facility of psychiatric inpatient beds approved pursuant to a Request for Applications (RFA) to nonpsychiatric inpatient beds.

"Regional health planning agency" means the regional agency, including the regional health planning board, its staff and any component thereof, designated by the Virginia Health Planning Board to perform the health planning activities set forth in this chapter within a health planning region.

"State Medical Facilities Plan" means the planning document adopted by the Board of Health which shall include, but not be limited to, (i) methodologies for projecting need for medical care facility beds and services; (ii) statistical information on the availability of medical care facilities and services; and (iii) procedures, criteria and standards for review of applications for projects for medical care facilities and services.

**§ 32.1-102.1:1. Equipment registration required.**

~~Within thirty calendar days of becoming~~ Any person who becomes contractually obligated to acquire any medical equipment for the provision of cardiac catheterization, computed tomographic (CT) scanning, stereotactic radiosurgery, lithotripsy, magnetic resonance imaging (MRI), magnetic source imaging (MSI), open heart surgery, positron emission tomographic (PET) scanning, radiation therapy, stereotactic radiotherapy, proton beam therapy, or other specialized service designated by the Board by regulation, ~~any person for the purpose of providing such services at any existing medical care facility~~ shall register such purchase with the Commissioner and the appropriate regional health planning agency ~~within 30 calendar days of becoming so obligated.~~

**§ 32.1-102.3:1. Application for certificate not required of certain nursing facilities or nursing homes.**

An application for a ~~No~~ certificate that there exists a of public need for a proposed project shall not be required for ~~nursing facilities or a proposed project for~~ nursing homes affiliated with facilities which ~~a facility that~~, on January 1, 1982, and thereafter, ~~meet all of the following criteria:~~

1. A facility which is ~~Is~~ operated as a nonprofit institution;
2. A facility which is ~~Is~~ licensed jointly by the Department as a ~~nursing facility or~~ nursing home and by the Department of Social Services as an assisted living facility; ~~and~~
3. A facility which ~~observes~~ Observes the following restrictions on admissions:
  - a. Admissions are only allowed pursuant to the terms of a "life care contract" guaranteeing that the full complement of services offered by the facility is available to the resident as and when needed;
  - b. Admissions to the assisted living facility unit are restricted to individuals defined as ambulatory by the Department of Social Services; ~~and~~
  - c. Admissions to the ~~nursing facility or~~ nursing home ~~unit~~ are restricted to those individuals who are residents of the assisted living facility unit.

**§ 32.1-102.3:1.1. Continuing care retirement communities accessing medical assistance.**

A. On or after July 1, 2010, a nursing ~~facility home~~ in Planning District 8 in a continuing care retirement community registered with the State Corporation Commission pursuant to Chapter 49 (§ 38.2-4900 et seq.) of Title 38.2, which is not already certified for participation in the Medical Assistance Program, may be certified for participation in the Medical Assistance Program, without regard to any condition of a certificate of public need, so long as:

1. The nursing ~~facility home~~ is no longer operating under an open admissions period;
2. Any residents who qualify and receive medical assistance under the state program must have been residents of the continuing care retirement community for at least three years;
3. Not more than 10 percent of the facility may be receiving benefits at any given time; and
4. Any resident who qualifies for and receives medical assistance under the state program in a continuing care retirement community nursing ~~facility home~~ must have first exhausted any refundable entrance fee paid on the resident's behalf, as defined in § 38.2-4900, as a result of expenditures for that resident's care in the continuing care retirement community.

B. Nothing in this section shall alter the conditions of a continuing care retirement community's participation in the Medical Assistance Program if that continuing care retirement community was certified for participation prior to July 1, 2010.

C. For the purposes of this section, "open admissions period" means a time during which a facility may take admissions directly into its nursing home beds without the signing of a standard contract.

**§ 32.1-102.3:2. Certificates of public need; applications to be filed in response to Requests for Applications (RFAs).**

A. Except for applications for continuing care retirement community nursing home bed projects filed by continuing care providers registered with the State Corporation Commission pursuant to Chapter 49 (§ 38.2-4900 et seq.) of Title 38.2 ~~which that~~ comply with the requirements established in this section, the Commissioner shall ~~only~~ approve, authorize, or accept applications for the issuance of any certificate of public need ~~pursuant to this article only in response to Requests for Applications (RFAs)~~ for any project ~~which that~~ would result in an increase in the number of ~~nursing home~~ beds in a planning district ~~in which nursing facility or extended care services are provided~~, except as provided in § 32.1-102.3:7, ~~in response to a Request for Applications (RFA).~~

B. The Board shall adopt regulations establishing standards for the approval and issuance of Requests for Applications by the Commissioner. The standards shall include, but shall not be limited to, a requirement that determinations of need take into account any limitations on access to existing nursing

home beds in the planning districts. The RFAs, which shall be published at least annually, shall be jointly developed by the Department and the Department of Medical Assistance Services. RFAs shall be based on analyses of the need, or lack thereof, for increases in the nursing home bed supply in each of the Commonwealth's planning districts in accordance with standards adopted by the Board by regulation. The Commissioner shall only accept for review applications in response to such RFAs which conform with the geographic and bed need determinations of the specific RFA.

C. Sixty days prior to the Commissioner's approval and issuance of any RFA, the Board shall publish the proposed RFA in the Virginia Register for public comment together with an explanation of (i) the regulatory basis for the planning district bed needs set forth in the RFA and (ii) the rationale for the RFA's planning district designations. Any person objecting to the contents of the proposed RFA may notify, within 14 days of the publication, the Board and the Commissioner of his objection and the objection's regulatory basis. The Commissioner shall prepare, and deliver by registered mail, a written response to each such objection within two weeks of the date of receiving the objection. The objector may file a rebuttal to the Commissioner's response in writing within five days of receiving the Commissioner's response. If objections are received, the Board may, after considering the provisions of the RFA, any objections, the Commissioner's responses, and if filed, any written rebuttals of the Commissioner's responses, hold a public hearing to receive comments on the specific RFA. Prior to making a decision on the RFA, the Commissioner shall consider any recommendations made by the Board.

D. Except for a continuing care retirement community applying for a certificate of public need pursuant to provisions of subsections A, B, and C, applications for continuing care retirement community nursing home bed projects shall be accepted by the Commissioner only if the following criteria are met: (i) the facility is registered with the State Corporation Commission as a continuing care provider pursuant to Chapter 49 (§ 38.2-4900 et seq.) of Title 38.2, (ii) the number of new nursing home beds requested in the initial application does not exceed the lesser of 20 percent of the continuing care retirement community's total number of beds that are not nursing home beds or 60 beds, (iii) the number of new nursing home beds requested in any subsequent application does not cause the continuing care retirement community's total number of nursing home beds to exceed 20 percent of its total number of beds that are not nursing home beds, and (iv) the continuing care retirement community has established a qualified resident assistance policy.

E. The Commissioner may approve an initial certificate of public need for nursing home beds in a continuing care retirement community not to exceed the lesser of 60 beds or 20 percent of the total number of beds that are not nursing home beds which authorizes an initial one-time, three-year open admission period during which the continuing care retirement community may accept direct admissions into its nursing home beds. The Commissioner may approve a certificate of public need for nursing home beds in a continuing care retirement community in addition to those nursing home beds requested for the initial one-time, three-year open admission period if (i) the number of new nursing home beds requested in any subsequent application does not cause the continuing care retirement community's total number of nursing home beds to exceed 20 percent of its total number of beds that are not nursing beds, (ii) the number of licensed nursing home beds within the continuing care retirement community does not and will not exceed 20 percent of the number of occupied beds that are not nursing beds, and (iii) no open-admission period is allowed for these nursing home beds. Upon the expiration of any initial one-time, three-year open admission period, a continuing care retirement community which has obtained a certificate of public need for a nursing ~~facility~~ home bed project pursuant to subsection D may admit into its nursing home beds (a) a standard contract holder who has been a bona fide resident of the non-nursing home portion of the continuing care retirement community for at least 30 days, (b) a person who is a standard contract holder who has lived in the non-nursing home portion of the continuing care retirement community for less than 30 days but who requires nursing home care due to change in health status since admission to the continuing care retirement community, (c) a person who is a family member of a standard contract holder residing in a non-nursing home portion of the continuing care retirement community, (d) a person who is an employee or a member of the board of trustees or board of directors of the continuing care retirement community, (e) a person who is a family member of an employee or a member of the board of trustees or board of directors of the continuing care retirement community, or (f) a person who is an accredited practitioner of the religious organization or denomination with which the continuing care retirement community is affiliated.

F. Any continuing care retirement community applicant for a certificate of public need to increase the number of nursing home beds shall authorize the State Corporation Commission to disclose such information to the Commissioner as may be in the State Corporation Commission's possession concerning such continuing care retirement community in order to allow the Commissioner to enforce the provisions of this section. The State Corporation Commission shall provide the Commissioner with the requested information when so authorized.

G. For the purposes of this section:

"Family member" means spouse, mother, father, son, daughter, brother, sister, aunt, uncle, or cousin by blood, marriage, or adoption.

"One-time, three-year open admission period" means the three years after the initial licensure of nursing home beds during which the continuing care retirement community may take admissions directly into its nursing home beds without the signing of a standard contract. The facility or a related facility on the same campus shall not be granted any open admissions period for any subsequent application or authorization for nursing home beds.

"Qualified resident assistance policy" means a procedure, consistently followed by a facility, pursuant to which the facility endeavors to avoid requiring a resident to leave the facility because of inability to pay regular charges and which complies with the requirements of the Internal Revenue Service for maintenance of status as a tax exempt charitable organization under § 501(c)(3) of the Internal Revenue Code. This policy shall be (i) generally made known to residents through the resident contract and (ii) supported by reasonable and consistent efforts to promote the availability of funds, either through a special fund, separate foundation or access to other available funds, to assist residents who are unable to pay regular charges in whole or in part.

This policy may (a) take into account the sound financial management of the facility, including existing reserves, and the reasonable requirements of lenders and (b) include requirements that residents seeking such assistance provide all requested financial information and abide by reasonable conditions, including seeking to qualify for other assistance and restrictions on the transfer of assets to third parties.

A qualified resident assistance policy shall not constitute the business of insurance as defined in Chapter 1 (§ 38.2-100 et seq.) of Title 38.2.

"Standard contract" means a contract requiring the same entrance fee, terms, and conditions as contracts executed with residents of the non-nursing home portion of the facility, if the entrance fee is no less than the amount defined in § 38.2-4900.

H. This section shall not be construed to prohibit or prevent a continuing care retirement community from discharging a resident (i) for breach of nonfinancial contract provisions, (ii) if medically appropriate care can no longer be provided to the resident, or (iii) if the resident is a danger to himself or others while in the facility.

I. The provisions of subsections D, E, and H shall not affect any certificate of public need issued prior to July 1, 1998; however, any certificate of public need application for additional nursing home beds shall be subject to the provisions of this act.

**§ 32.1-102.3:7. Application for transfer of nursing home beds.**

A. Notwithstanding the provisions of § 32.1-102.3:2, the Commissioner shall accept and may approve applications for the transfer of nursing ~~facility~~ home beds from one planning district to another planning district when no Request for Applications has been issued in cases in which the applicant can demonstrate (i) there is a shortage of nursing ~~facility~~ home beds in the planning district to which beds are proposed to be transferred, (ii) the number of nursing ~~facility~~ home beds in the planning district from which beds are proposed to be moved exceeds the need for such beds, (iii) the proposed transfer of nursing ~~facility~~ home beds would not result in creation of a need for additional beds in the planning district from which the beds are proposed to be transferred, and (iv) the nursing ~~facility~~ home beds proposed to be transferred will be made available to individuals in need of nursing ~~facility~~ home services in the planning district to which they are proposed to be transferred without regard to the source of payment for such services.

B. Applications received pursuant to this section shall be subject to the provisions of this article governing review of applications for certificate of public need.

**§ 32.1-102.3:8. Application for an open admission period for a continuing care retirement community.**

A. Notwithstanding the provisions of § 32.1-102.3:2, the Commissioner shall accept and may approve applications for a two-year or three-year open admission period for a continuing care retirement community nursing ~~facility~~ home approved as part of an initial certificate of public need pursuant to subsection E of § 32.1-102.3:2.

B. Any person seeking an open admission period pursuant to subsection A shall provide written notice of the proposed open admission period to all nursing ~~facilities~~ homes located within the planning district. The Commissioner shall accept public comment on an application for an open admission period pursuant to subsection A for a period of 14 days following submission of the application.

**§ 32.1-102.4. Conditions of certificates; monitoring; revocation of certificates.**

A. A certificate shall be issued with a schedule for the completion of the project and a maximum capital expenditure amount for the project. The schedule may not be extended and the maximum capital expenditure may not be exceeded without the approval of the Commissioner in accordance with the regulations of the Board.

B. The Commissioner shall monitor each project for which a certificate is issued to determine its

305 progress and compliance with the schedule and with the maximum capital expenditure. The  
306 Commissioner shall also monitor all continuing care retirement communities for which a certificate is  
307 issued authorizing the establishment of a nursing home facility or an increase in the number of nursing  
308 home beds pursuant to § 32.1-102.3:2 and shall enforce compliance with the conditions for such  
309 applications which are required by § 32.1-102.3:2. Any willful violation of a provision of § 32.1-102.3:2  
310 or conditions of a certificate of public need granted under the provisions of § 32.1-102.3:2 shall be  
311 subject to a civil penalty of up to \$100 per violation per day until the date the Commissioner determines  
312 that such facility is in compliance.

313 C. A certificate may be revoked when:

314 1. Substantial and continuing progress towards completion of the project in accordance with the  
315 schedule has not been made;

316 2. The maximum capital expenditure amount set for the project is exceeded;

317 3. The applicant has willfully or recklessly misrepresented intentions or facts in obtaining a  
318 certificate; or

319 4. A continuing care retirement community applicant has failed to honor the conditions of a  
320 certificate allowing the establishment of a nursing home facility or granting an increase in the number of  
321 nursing home beds in an existing facility which was approved in accordance with the requirements of §  
322 32.1-102.3:2.

323 D. Further, the Commissioner shall not approve an extension for a schedule for completion of any  
324 project or the exceeding of the maximum capital expenditure of any project unless such extension or  
325 excess complies with the limitations provided in the regulations promulgated by the Board pursuant to  
326 § 32.1-102.2.

327 E. Any person willfully violating the Board's regulations establishing limitations for schedules for  
328 completion of any project or limitations on the exceeding of the maximum capital expenditure of any  
329 project shall be subject to a civil penalty of up to \$100 per violation per day until the date of  
330 completion of the project.

331 F. The Commissioner may condition, pursuant to the regulations of the Board, the approval of a  
332 certificate (i) upon the agreement of the applicant to provide a level of care at a reduced rate to  
333 indigents or accept patients requiring specialized care or (ii) upon the agreement of the applicant to  
334 facilitate the development and operation of primary medical care services in designated medically  
335 underserved areas of the applicant's service area.

336 The certificate holder shall provide documentation to the Department demonstrating that the  
337 certificate holder has satisfied the conditions of the certificate. If the certificate holder is unable or fails  
338 to satisfy the conditions of a certificate, the Department may approve alternative methods to satisfy the  
339 conditions pursuant to a plan of compliance. The plan of compliance shall identify a timeframe within  
340 which the certificate holder will satisfy the conditions of the certificate, and identify how the certificate  
341 holder will satisfy the conditions of the certificate, which may include (i) making direct payments to an  
342 organization authorized under a memorandum of understanding with the Department to receive  
343 contributions satisfying conditions of a certificate, (ii) making direct payments to a private nonprofit  
344 foundation that funds basic insurance coverage for indigents authorized under a memorandum of  
345 understanding with the Department to receive contributions satisfying conditions of a certificate, or (iii)  
346 other documented efforts or initiatives to provide primary or specialized care to underserved populations.  
347 In determining whether the certificate holder has met the conditions of the certificate pursuant to a plan  
348 of compliance, only such direct payments, efforts, or initiatives made or undertaken after issuance of the  
349 conditioned certificate shall be counted towards satisfaction of conditions.

350 Any person willfully refusing, failing, or neglecting to honor such agreement shall be subject to a  
351 civil penalty of up to \$100 per violation per day until the date of compliance.

352 G. Pursuant to regulations of the Board, the Commissioner may accept requests for and approve  
353 amendments to conditions of existing certificates related to the provision of care at reduced rates or to  
354 patients requiring specialized care or related to the development and operation of primary medical care  
355 services in designated medically underserved areas of the certificate holder's service area.

356 H. For the purposes of this section, "completion" means conclusion of construction activities  
357 necessary for the substantial performance of the contract.