

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

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HOUSE BILL 83
Committee Substitute Favorable 3/19/13
Committee Substitute #2 Favorable 5/2/13

Short Title: Enact CON Committee Recommendations.

(Public)

Sponsors:

Referred to:

February 11, 2013

A BILL TO BE ENTITLED

1 AN ACT TO ELIMINATE THE MONETARY THRESHOLD FOR EXPEDITED
2 CERTIFICATE OF NEED REVIEW; TO INCREASE THE MONETARY THRESHOLDS
3 TRIGGERING CERTIFICATE OF NEED REVIEW FOR CAPITAL EXPENDITURES
4 AND THE PURCHASE OF MAJOR MEDICAL EQUIPMENT; TO EXEMPT
5 REPLACEMENT EQUIPMENT FROM CERTIFICATE OF NEED REVIEW
6 REGARDLESS OF COST; TO REQUIRE AFFECTED PERSONS SEEKING TO FILE A
7 PETITION FOR A CONTESTED CASE OR AN APPEAL CHALLENGING
8 CERTIFICATE OF NEED APPROVAL TO DEPOSIT A SEPARATE BOND FOR EACH
9 APPROVED APPLICATION THAT IS THE SUBJECT OF THE PETITION OR
10 APPEAL; TO INCREASE THE AMOUNT OF THE MAXIMUM BOND
11 REQUIREMENT; TO GIVE THE COURT OF APPEALS GREATER DISCRETION IN
12 IMPOSING A HIGHER BOND AMOUNT; AND TO REQUIRE THE COURT TO
13 AWARD COSTS AND REASONABLE ATTORNEYS' FEES TO ANY CERTIFICATE
14 OF NEED APPLICANT WHOSE APPROVED NEW INSTITUTIONAL HEALTH
15 SERVICE IS THE SUBJECT OF A CONTESTED CASE PETITION DETERMINED TO
16 BE FRIVOLOUS OR FILED TO DELAY THE APPLICANT.
17

18 The General Assembly of North Carolina enacts:

19 **SECTION 1.(a)** G.S. 131E-176(7b) reads as rewritten:

20 "(7b) "Expedited review" means the status given to an application's review process
21 when the applicant petitions for the review and the Department approves the
22 request based on findings that all of the following are met:

- 23 a. The review is not competitive.
24 b. ~~The proposed capital expenditure is less than five million dollars~~
25 ~~(\$5,000,000).~~
26 c. A request for a public hearing is not received within the time frame
27 defined in G.S. 131E-185.
28 d. The agency has not determined that a public hearing is in the public
29 interest."

30 **SECTION 1.(b)** G.S. 131E-185(a1)(2) reads as rewritten:

31 "(2) No more than 20 days from the conclusion of the written comment period,
32 the Department shall ensure that a public hearing is conducted at a place
33 within the appropriate service area if one or more of the following
34 circumstances apply; the review to be conducted is competitive; ~~the~~
35 ~~proponent proposes to spend five million dollars (\$5,000,000) or more; a~~



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1 written request for a public hearing is received before the end of the written
 2 comment period from an affected party as defined in G.S. 131E-188(c); or
 3 the agency determines that a hearing is in the public interest. At such public
 4 hearing oral arguments may be made regarding the application or
 5 applications under review; and this public hearing shall include the
 6 following:

- 7 a. An opportunity for the proponent of each application under review to
 8 respond to the written comments submitted to the Department about
 9 its application;
- 10 b. An opportunity for any person, except one of the proponents, to
 11 comment on the applications under review;
- 12 c. An opportunity for a representative of the Department, or such other
 13 person or persons who are designated by the Department to conduct
 14 the hearing, to question each proponent of applications under review
 15 with regard to the contents of the application;

16 The Department shall maintain a recording of any required public
 17 hearing on an application until such time as the Department's final decision
 18 is issued, or until a final agency decision is issued pursuant to a contested
 19 case hearing, whichever is later; and any person may submit a written
 20 synopsis or verbatim statement that contains the oral presentation made at
 21 the hearing."

22 **SECTION 2.** G.S. 131E-176(14e) reads as rewritten:

23 "(14e) "Kidney disease treatment center" means a facility that is certified as an
 24 end-stage renal disease facility by the Centers for Medicare and Medicaid
 25 Services, Department of Health and Human Services, pursuant to 42 C.F.R.
 26 § 405.494."

27 **SECTION 3.** G.S. 131E-176(16)b. reads as rewritten:

28 "(16) "New institutional health services" means any of the following:

29 ...

- 30 b. Except as otherwise provided in G.S. 131E-184(e), the obligation by
 31 any person of a capital expenditure exceeding ~~two~~four million dollars
 32 ~~(\$2,000,000)~~(\$4,000,000) to develop or expand a health service or a
 33 health service facility, or which relates to the provision of a health
 34 service. The cost of any studies, surveys, designs, plans, working
 35 drawings, specifications, and other activities, including staff effort
 36 and consulting and other services, essential to the acquisition,
 37 improvement, ~~or expansion,~~expansion of any plant or equipment or
 38 the replacement of any plant or equipment with respect to which an
 39 expenditure is made shall be included in determining if the
 40 expenditure exceeds ~~two~~four million dollars
 41 ~~(\$2,000,000)~~(\$4,000,000). The cost of replacement equipment shall
 42 not be included in determining whether an expenditure exceeds the
 43 capital expenditure threshold."

44 **SECTION 4.** G.S. 131E-176(22a) reads as rewritten:

45 "(22a) "Replacement equipment" means equipment that ~~costs less than two~~
 46 ~~million dollars~~ ~~(\$2,000,000)~~ ~~and is purchased for the sole purpose of~~
 47 ~~replacing comparable medical equipment~~ equipment, as defined by
 48 10A NCAC 14C .0303(c), currently in use which will be sold or
 49 otherwise disposed of when replaced. The purchase of replacement
 50 equipment shall not be considered a new institutional health service
 51 and shall not require a certificate of need from the Department.~~In~~

1 ~~determining whether the replacement equipment costs less than two~~
2 ~~million dollars (\$2,000,000), the costs of equipment, studies, surveys,~~
3 ~~designs, plans, working drawings, specifications, construction,~~
4 ~~installation, and other activities essential to acquiring and making~~
5 ~~operational the replacement equipment shall be included. The capital~~
6 ~~expenditure for the equipment shall be deemed to be the fair market~~
7 ~~value of the equipment or the cost of the equipment, whichever is~~
8 ~~greater."~~

9 **SECTION 5.** G.S. 131E-184(e) reads as rewritten:

10 "(e) The Department shall exempt from certificate of need review a capital expenditure
11 that exceeds the ~~two~~four million dollar ~~(\$2,000,000)~~(\$4,000,000) threshold set forth in
12 G.S. 131E-176(16)b. if all of the following conditions are met:

13 (1) The proposed capital expenditure would:

- 14 a. Be used solely for the purpose of renovating, replacing on the same
15 site, or expanding an existing:
16 1. Nursing home facility,
17 2. Adult care home facility, or
18 3. Intermediate care facility for the mentally retarded; and
19 b. Not result in a change in bed capacity, as defined in
20 G.S. 131E-176(5), or the addition of a health service facility or any
21 other new institutional health service other than that allowed in
22 G.S. 131E-176(16)b.

23 (2) The entity proposing to incur the capital expenditure provides prior written
24 notice to the Department, which notice includes documentation that
25 demonstrates that the proposed capital expenditure would be used for one or
26 more of the following purposes:

- 27 a. Conversion of semiprivate resident rooms to private rooms.
28 b. Providing innovative, homelike residential dining spaces, such as
29 cafes, kitchenettes, or private dining areas to accommodate residents
30 and their families or visitors.
31 c. Renovating, replacing, or expanding residential living or common
32 areas to improve the quality of life of residents."

33 **SECTION 6.** G.S. 131E-188 reads as rewritten:

34 "**§ 131E-188. Administrative and judicial review.**

35 (a) After a decision of the Department to issue, deny or withdraw a certificate of need
36 or exemption or to issue a certificate of need pursuant to a settlement agreement with an
37 applicant to the extent permitted by law, any affected person, as defined in subsection (c) of
38 this section, shall be entitled to a contested case hearing under Article 3 of Chapter 150B of the
39 General Statutes. A petition for a contested case shall be filed within 30 days after the
40 Department makes its decision. When a petition is filed, the Department shall send notification
41 of the petition to the proponent of each application that was reviewed with the application for a
42 certificate of need that is the subject of the petition. Any affected person shall be entitled to
43 intervene in a contested case.

44 A contested case shall be conducted in accordance with the following timetable:

- 45 (1) An administrative law judge or a hearing officer, as appropriate, shall be
46 assigned within 15 days after a petition is filed.
47 (2) The parties shall complete discovery within 90 days after the assignment of
48 the administrative law judge or hearing officer.
49 (3) The hearing at which sworn testimony is taken and evidence is presented
50 shall be held within 45 days after the end of the discovery period.

- 1 (4) The administrative law judge or hearing officer shall make a final decision
2 within 75 days after the hearing.
- 3 (5) Repealed by Session Laws 2011-398, s. 46, as amended by Session Laws
4 2011-326, s. 23, effective January 1, 2012, and applicable to contested cases
5 commenced on or after that date.

6 The administrative law judge or hearing officer assigned to a case may extend the deadlines
7 in subdivisions (2) through (4) so long as the administrative law judge or hearing officer makes
8 a final decision in the case within 270 days after the petition is filed.

9 (a1) On or before the date of filing a petition for a contested case hearing on the approval
10 of an applicant for a certificate of need, the petitioner shall deposit a bond for each approved
11 application that is the subject of the petition with the clerk of superior court where ~~the~~ any new
12 institutional health service that is the subject of the petition is proposed to be located. The bond
13 shall be secured by cash or its equivalent in an amount equal to five percent (5%) of the cost of
14 the proposed new institutional health service in each approved application that is the subject of
15 the ~~petition, but~~ petition. The bond required for each approved application subject to a petition
16 may not be less than five thousand dollars (\$5,000) and may not exceed ~~fifty thousand dollars~~
17 ~~(\$50,000);~~ one hundred thousand dollars (\$100,000). A petitioner who received approval for a
18 certificate of need and is contesting only a condition in the certificate is not required to file a
19 bond under this subsection.

20 The applicant who received approval for ~~the~~ any new institutional health service that is the
21 subject of the petition may bring an action against a bond filed under this subsection in the
22 superior court of the county where the bond was filed. Upon finding that the petition for a
23 contested case was frivolous or filed to delay the applicant, the court may award the applicant
24 part or all of the bond filed under this ~~subsection.~~ subsection and shall award the applicant
25 reasonable attorneys' fees and costs incurred in the contested case. At the conclusion of the
26 contested case, if the court does not find that the petition for a contested case was frivolous or
27 filed to delay the applicant, the petitioner shall be entitled to the return of the bond deposited
28 with the superior court upon demonstrating to the clerk of superior court where the bond was
29 filed that the contested case hearing is concluded.

30 (b) Any affected person who was a party in a contested case hearing shall be entitled to
31 judicial review of all or any portion of any final decision in the following manner. The appeal
32 shall be to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal
33 shall be as provided by the rules of appellate procedure. The appeal of the final decision shall
34 be taken within 30 days of the receipt of the written notice of final decision, and notice of
35 appeal shall be filed with the Office of Administrative Hearings and served on the Department
36 and all other affected persons who were parties to the contested hearing.

37 (b1) Before filing an appeal of a final decision granting a certificate of need, the affected
38 person shall deposit a bond with the Clerk of the Court of Appeals. The bond requirements of
39 this subsection shall not apply to any appeal filed by the Department.

- 40 (1) The bond shall be secured by cash or its equivalent in an amount equal to
41 five percent (5%) of the cost of the proposed new institutional health service
42 in each approved application that is the subject of the appeal, but may not be
43 less than five thousand dollars (\$5,000) and may not exceed ~~fifty thousand~~
44 ~~dollars (\$50,000);~~ one hundred thousand dollars (\$100,000); provided that
45 the applicant who received approval of the certificate of need may petition
46 the Court of Appeals for a higher bond amount for the payment of such costs
47 and damages as may be awarded pursuant to subdivision (2) of this
48 subsection. This amount shall be determined by the Court in its ~~discretion,~~
49 ~~not to exceed three hundred thousand dollars (\$300,000).~~ discretion. A holder
50 of a certificate of need who is appealing only a condition in the certificate is
51 not required to file a bond under this subsection.

1 (2) If the Court of Appeals finds that the appeal was frivolous or filed to delay
2 the applicant, the court shall remand the case to the superior court of the
3 county where a bond was filed for the contested case hearing on the
4 certificate of need. The superior court may award the holder of the certificate
5 of need part or all of the bond. The court shall award the holder of the
6 certificate of need reasonable attorney fees and costs incurred in the appeal
7 to the Court of Appeals. If the Court of Appeals does not find that the appeal
8 was frivolous or filed to delay the applicant and does not remand the case to
9 superior court for a possible award of all or part of the bond to the holder of
10 the certificate of need, the person originally filing the bond shall be entitled
11 to a return of the bond.

12 (c) The term "affected persons" includes: the applicant; any individual residing within
13 the service area or the geographic area served or to be served by the applicant; any individual
14 who regularly uses health service facilities within that geographic area or the service area; any
15 person who provides services, similar to the services under review, to individuals residing
16 within the service area or the geographic area proposed to be served by the applicant; any
17 person who, prior to receipt by the agency of the proposal being reviewed, has provided written
18 notice to the agency of an intention to provide similar services in the future to individuals
19 residing within the service area or the geographic area to be served by the applicant; third party
20 payers who reimburse health service facilities for services in the service area in which the
21 project is proposed to be located; and any agency which establishes rates for health service
22 facilities or HMOs located in the service area in which the project is proposed to be located."

23 **SECTION 7.** G.S. 131E-176(16)l. is repealed.

24 **SECTION 8.** This act becomes effective October 1, 2013, and applies to certificate
25 of need applications, contested case petitions, and appeals filed on or after that date.