



January 12, 2018

Mr. Paul E. Parker  
Director, Center for Health Care Facilities Planning and Development  
Maryland Health Care Commission  
4160 Patterson Avenue  
Baltimore, MD 21215

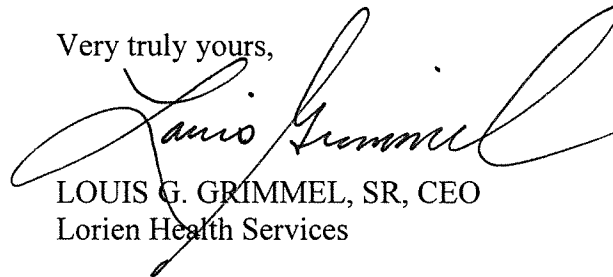
Re: Comments on Health Planning / CON Reform

Dear Mr. Parker:

On behalf of Lorien Health Services, I enclose our Comments concerning proposed health planning and CON Program reforms, as requested by Chairman Moffit's letter dated November 21, 2017. As you will note, our Comments are presented in the form of Responses to the MHCC document entitled "Comment Guidance – Nursing Home MHCC CON Study, 2017-18".

Thank you for this opportunity to present our views in this important undertaking.

Very truly yours,



LOUIS G. GRIMMEL, SR, CEO  
Lorien Health Services

LGG/ds  
Encl.

cc: Ben Steffen, Executive Director, MHCC  
Kevin McDonald, Chief, CON

## **Scope of CON Regulation**

### **COMMENT GUIDANCE - NURSING HOME MHCC CON STUDY, 2017-18**

Please consider your answers in the context of Maryland's commitment to achieve the goals of the Triple Aim<sup>1</sup> and its aspiration to bring health care spending under a total cost of care model beginning in 2019. Please provide a brief explanation of the basis for your position(s) in each area of inquiry beginning with the overarching question regarding continuation of nursing home CON regulation. All responses will be part of the Maryland Health Care Commission's public record for the CON Workgroup.

## **Need for CON Regulation**

Which of these options best fits your view of nursing home CON regulation?

- CON regulation of nursing home capital projects should be eliminated. *Note: If you chose this option, many of the questions listed below will be moot, given that their context is one in which CON regulation would continue to exist. However, please respond to Questions 12 to 13.*
- CON regulation of nursing home capital projects should be reformed.
- CON regulation of nursing home capital projects should, in general, be maintained in its current form.

## **ISSUES / PROBLEMS**

### **The Impact of CON Regulation on Nursing Home Competition and Innovation**

- 1. In your view, would the public and the health care delivery system benefit from more competition among nursing homes?**

Response: The current CON process provides an appropriate level of regulation of the supply and distribution of Nursing Facilities. It does not unduly stifle competition or innovation. Nursing Facilities already actively compete for residents and provide innovative services which reflect the demands of their customer base. Please refer to the responses to Questions 14 and 15, below.

- 2. Does CON regulation impose substantial barriers to market entry for new nursing homes or new nursing home services? If so, what changes in CON regulation should be implemented to enhance competition that would benefit the public?**

Response: CON regulation does not impose substantial barriers to new nursing home services because the comprehensive care licensure category is broad enough to authorize all potential nursing home services. While the process does impose

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<sup>1</sup>The Institute for Healthcare Improvement's "Triple Aim" is a framework that describes an approach to optimizing health system performance. It is IHI's belief that new designs must be developed to simultaneously pursue three dimensions: (1) Improving the patient experience of care (including quality and satisfaction); (2) Improving the health

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of populations, and; (3) Reducing the per capita cost of health care.

impediments to the unfettered entry of new facilities, it acts as an efficient means of preventing the oversupply of beds / facilities and ensuring that sufficient resources are available to meet public need in a way which furthers important public policy objectives.

#### **3. How does CON regulation stifle innovation in the delivery of nursing home services under the current Maryland regulatory scheme?**

Response: See response to Question 2, above. See also response to Question 14, below. In addition, the imposition of the Medicaid MOU condition frustrates innovative undertakings because it forces facilities to maintain high Medicaid utilization despite the lack of evidence that Medicaid beneficiaries have an access problem in Maryland.

*Generally, Maryland Health Care Commission approval is required to establish or relocate a nursing home, expand bed capacity at a nursing home, or undertake capital projects that exceed a specified expenditure threshold. For a more detailed understanding of the scope of CON and exemption from CON review requirements, you may wish to review COMAR 10.24.01.02 - .04, which can be accessed at:*

[http://www.dsd.state.md.us/comar/SubtitleSearch.aspx?search=10.24.01.\\*](http://www.dsd.state.md.us/comar/SubtitleSearch.aspx?search=10.24.01.*)

4. Should the scope of CON regulation be changed? No.
- A. Are there nursing home projects that require approval by the Maryland Health Care Commission that should be deregulated?

Response: Yes. Under the HSCRC's All-Payer Model Progression Plan (Global Payments System), Hospitals and Nursing Facilities are encouraged to work closer together with the goal of reducing hospital admissions and re-admissions while improving patient outcomes at lower total system costs. Further, under CMS regulatory initiatives, Nursing Homes will face federal reimbursement deductions when such reductions are not achieved. Therefore, Nursing Homes should be exempted from having to obtain a CON in order to provide home health services to their post discharge patients. Nursing Facilities were allowed to offer such services in the past. By allowing facilities to again offer such post – discharge services to their discharged patients, Nursing Facilities will be able to improve quality of care and continuity of care, while maintaining control of patient care for an appropriate period of time. Since Nursing Facilities are being held accountable, they must have greater control over follow – up care.

- B. Are there nursing home projects that do not require approval by the Maryland Health Care Commission that should be added to the scope of CON regulation?  
Response: No.

### **The Project Review Process**

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5. What aspects of the project review process are most in need of reform? What are the primary choke-points in the process?

Response: The Docketing and Completeness Review process should be streamlined and simplified. They are also the primary choke points of the review process. Commission Staff seems to approach Completeness Review on an ad hoc basis. Completeness Review was originally intended simply to ensure that applications addressed all applicable review criteria and standards. As such, it was a “quantitative” review, as opposed to a “qualitative” review. However, in practice Completeness Review has become much more expansive and frequently involves Staff asking for additional substantive information beyond that requested by the review criteria. This results in delays and added expense in the review process since the statutory review time limitations run from the date of docketing and not the date the application was filed. Adhering to the intended quantitative review would not deprive Staff of any information it might deem helpful, since such information can be requested as part of an “Additional Information” request during the course of the review (i.e. after the Application is docketed) as authorized by COMAR 10.24.01.08C(2). Finally, the regulations should be amended to impose a time limit on Staff’s determination of “Completeness” following an Applicant’s submission of the requested information.

6. Should the ability of competing nursing homes or other types of providers to formally oppose and appeal decisions on projects be more limited?

Response: No. It is critical that existing facilities which may be negatively impacted by Commission approvals of new facilities or expansions of existing facilities have standing to participate in CON reviews and to appeal adverse decisions. CON Staff are not sufficiently aware of Nursing Facility operational matters or the potential impact of new providers or expansions on manpower and utilization. Full participation in reviews by competing providers ensures that critical information is considered by the reviewer and that legal rights are protected.

Are there existing categories of exemption review (see COMAR 10.24.01.04) that should be eliminated?

Response: No.

Should further consolidation of health care facilities be encouraged by maintaining exemption review for merged asset systems?

Response: Yes.

7. Are project completion timelines, i.e., performance requirements for implementing and completing capital projects, realistic and appropriate? (See COMAR 10.24.01.12.)

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Response: No. Construction of new Nursing Facilities involves lengthy land use and development approvals. Finding suitable sites near public transportation routes which neither warehouse seniors nor unacceptably encroach upon residential communities has become increasingly difficult. Local development approvals take time and can be adversely impacted by heavy volumes of other development proposals. New Nursing Facility projects should have 48 month performance requirements with the continued availability of 6 month extensions of each performance requirement. In addition, the regulations should be amended to explicitly state that the filing of administrative or judicial appeals of all zoning, permitting and other local approvals required in a project's development process should trigger an automatic stay of applicable performance requirements. Currently, such stays have been granted by the Executive Director upon the applicant's request.

## The State Health Plan for Facilities and Services

8. In general, do State Health Plan regulations for nursing home facilities and services provide adequate and appropriate guidance for the Commission's decision-making?

Response: Yes.

What are the chief strengths of these regulations and what do you perceive to be the chief weaknesses?

Response: As a general matter, the review criteria provide a good basis for CON decision making. However, the analysis of building designs and specifications is not necessary in the CON process since Staff do not have expertise in building design issues. Further, design requirements are governed by applicable regulations of the Office of Health Care Quality (see COMAR 10.07.02).

9. Do State Health Plan regulations focus attention on the most important aspects of nursing home projects? Please provide specific recommendations if you believe that the current regulations miss the mark.

Response: Yes. However, the SHP bed need methodology should be updated and revised to reflect the declining need for additional nursing beds in view of the growth of assisted living and community-based alternatives including in-home services.

10. Are the typical ways in which MHCC obtains and uses industry and public input in State Health Plan development adequate and appropriate?

Response: Yes. If you believe that changes should be made in the development

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process for State Health Plan regulations, please provide specific recommendations.

**General Review Criteria for all Project Reviews**

*COMAR 10.24.01.08G{3}(b)-(f)) contains five general criteria for review of all CON projects, in addition to the specific standards established in the State Health Plan: {1} Need; {2} Availability of More Cost-Effective Alternatives; (3) Viability; (4) Impact; and {5} the Applicant's Compliance with Terms and Conditions of Previously Awarded Certificates of Need.*

11. Are these general criteria adequate and appropriate? Should other criteria be used? Should any of these criteria be eliminated or modified in some way?

Response: The 5<sup>th</sup> criterion should no longer be interpreted or applied so as to require Applicants to provide 20 years' worth of records concerning compliance with prior CONs. Many providers do not maintain CON records for lengthy periods of time. Commission Staff does, however maintain records of prior project approvals and Quarterly Reports. Moreover, as part of the Commission's 1<sup>st</sup> Use Approval process, Staff reviews all applicable project conditions and certifies that projects have indeed been constructed in accordance with all conditions imposed. Further, Staff has determined that any approved request for an extension of performance requirements, as authorized by the regulations and granted per the Executive Director's discretion, is a "black mark" against an Applicant. This practice should be discontinued since the CON regulations do not authorize this "sanction". Further, such an interpretation amounts to an 'after the fact' repudiation of the Executive Director's exercise of discretion to grant 6 months extensions under clearly applicable regulations. Finally, such a policy is poor public policy since it penalizes an applicant for extensions granted for circumstances completely beyond its control in prior projects, as determined by the Executive Director.

**CHANGES / SOLUTIONS**

Alternatives to CON Regulation for Capital Project

- 12 If you believe that CON regulation of nursing home capital projects should be eliminated, what, if any, regulatory framework should govern nursing home capital projects? N/A
- 13 Are there important benefits served by CON regulation that could be fully or adequately met with alternative regulatory mechanisms? For example, could expansion of the scope and specificity of nursing home licensure requirements administered by the Maryland Department of Health serve as an alternative

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approach to assuring that certain nursing home facilities and services are well-utilized and providing an acceptable level of care quality, with appropriate sanctions to address under-utilization or poor quality of care?

Response: No. CON regulation, as a pre-condition to licensure, is best administered by the same agency which undertakes the State's health planning function. MDH agencies such as OHCQ are already managing a substantial regulatory burden concerning operational issues of facilities already in place.

### The Impact of CON Regulation on Nursing Home Competition and Innovation

- 14 Do you recommend changes in CON regulation to increase innovation in service delivery by existing nursing homes and new market entrants? If so, please provide detailed recommendations.

Response: No changes are necessary since CON Applicants are already empowered to propose innovative proposals and programs such as combined CCFs / ALFs, telemedicine units, informational technology, Wellness Centers, onsite Cafes / Grills, etc.

- 15 Should Maryland shift its regulatory focus to regulation of nursing home merger and consolidation activity to preserve and strengthen competition for nursing home services?

Response: No change in focus is required. However, mergers and consolidation should only be approved if in the public interest. Nursing service providers already compete for customers through quality of care, services, programmatic offerings, physical plants, and reputations.

### The Impact of CON Regulation on Nursing Home Access to Care and Quality

- 16 At what stage (prior to docketing or during project review) should MHCC take into consideration an applicant's quality of care performance? How should applicants be evaluated if they are new applicants to Maryland or to the industry?

Response: Quality of care performance should be considered during the course of the CON Review so that all applicable information is considered including the unique aspects of the proposed project. Past incidences of quality of care deficiencies should **not** be used as a bar against even considering a proposed CON project which would

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occur if consideration of such incidents was employed as a docketing rule. This is particularly important to note since a proposed project may be the only reasonable way for an existing facility to correct physical plant deficiencies or other problems that prevent attracting qualified staffing resources. Quality of care and survey records are available for out of state providers who apply for CONs in Maryland. New entrants to the industry can be evaluated under existing regulations regarding their financial and resource availability to deliver quality care.

17. Should the use of a capital expenditure threshold in nursing home CON regulation be eliminated?

Response: No.

18. Should MHCC be given more flexibility in choosing which nursing home projects require approval and those that can go forward without approval, based on adopted regulations for making these decisions? For example, all projects of a certain type could require notice to the Commission that includes information related to each project's impact on spending, on the pattern of service delivery, and that is based on the proposals received in a given time period. The Commission could consider staff's recommendation not to require CON approval or, based on significant project impact, to require the nursing home to undergo CON review.

Response: No. The current CON Program is sufficient to allow the protection of the interests of all stakeholders.

19. Should a whole new process of expedited review for certain projects be created? If so, what should be the attributes of the process?

Response: No, the current process is sufficient provided the Commission Staff meets the statutory and regulatory deadlines.

### **The Project Review Process**

20. Are there specific steps that can be eliminated?

Response: Completeness Review and docketing should be streamlined by eliminating the practice of requiring submission of "additional information requests" over and above information necessary for docketing applications. Current regulations already grant Staff the ability to request additional information after docketing and during the course of the CON review

21. Should post-CON approval processes be changed to accommodate easier project modifications?

Response: Yes. As long as total bed complements, proposed services, and the location



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remain the same; and nursing Unit sizes, total square footage, and Medicare / Medicaid rates remain substantially the same, post approval modifications should be allowed if proper notice is given to the MHCC.

**22 Should the regulatory process be overhauled to permit more types of projects to undergo a more abbreviated form of review?**

Response: No. The CON process as it pertains to Nursing Facility reviews is currently sufficient, provided the Commission adheres to the statutory and regulatory deadlines.

**23 If so, please identify the exemptions and describe alternative approaches that could be considered . N/A**

**24 Would greater use of technology, including the submission of automated and form-**

**25 based applications, improve the application submission process?**

Response: Yes. Form-based Applications should be able to be completed online and submitted electronically. Currently, Staff requires Applications to be submitted electronically in both Word and PDF formats, along with multiple hard copies.

**Duplication of Responsibilities by MHCC and MOH**

**26 Are there areas of regulatory duplication in nursing home regulation that can be streamlined between MHCC and MDH?**

Response: Yes. The CON process should eliminate the requirement of detailed drawings and specifications and consideration of technical building / design requirements regulated by OHCQ, local health departments, and the State Fire Marshal.

See also, response to Question 8, above.

**Thank you for your responses.**