

MPCAC

MARYLAND PATIENT CARE AND ACCESS COALITION

December 11, 2018

VIA ELECTRONIC MAIL

Mr. Robert E. Moffit, PhD
Mr. Andrew N. Pollak, MD
Chairman & Vice-Chairman
Maryland Health Care Commission
4160 Patterson Avenue
Baltimore, Maryland 21215

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Re: CON Modernization Task Force—Comments on December 11 Final Report

Dear Chairman Moffit and Vice-Chairman Pollak:

On behalf of the Maryland Patient Care and Access Coalition (MPCAC), I am writing to share MPCAC's thoughts on the Final Report dated December 11, 2018 that the CON Modernization Task Force has submitted to MHCC for the Commission's consideration. For nearly 15 years, MPCAC has been the voice of independent physician specialty practices in the State of Maryland that deliver integrated, high quality, cost-efficient care to patients in the medical office and ambulatory surgery facility (ASF) setting. With more than 300 physicians drawn from the fields of gastroenterology, orthopaedic surgery, urology, pathology, radiation oncology and anesthesiology, MPCAC's member medical practices treat more than 500,000 Marylanders each year in over 1,000,000 patient encounters. In addition, and of greatest relevance here, the physicians in MPCAC's member practices perform tens of thousands of procedures in ASFs and endoscopy centers each year.

Over the last year, MPCAC has been engaged on the topic of Certificate of Need (CON) reform, submitting comments to MHCC and to the Task Force on the impact that CON has on ASFs. We acknowledge and appreciate the work of the Task Force and MHCC staff, but we believe the Final Report represents a significant missed opportunity to put forward bold proposals that would modernize CON as applied to ASFs.

In their June 25, 2017 letter to MHCC Executive Director Ben Steffen, Chairpersons Middleton and Pendergrass noted that the All-Payer Model "[c]alls for dramatic changes in health care delivery and spending, and the CON program must also recognize these changes." The kind of "dramatic changes" needed to promote quality care, drive innovation and enhance competition cannot happen by modifying CON around the edges. Based on the Commission's early discussions, we had hoped that the Task Force would consider seriously the elimination of CON as applied to ASFs or, at the very least, exemption of ASFs with four or fewer operating rooms from CON regulation. Instead, the Task Force is recommending the smallest possible incremental step—an exemption from CON for ASFs with two operating rooms—while

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December 11, 2018
Page 2

proposing that hospitals be given even further leeway to open ASFs in competition with free-standing ASFs. We do not believe these are the types of bold proposals sought by Chairpersons Middleton and Pendergrass nor contemplated by the Commission.

MPCAC shares MHCC's commitment to modernizing the State's CON regulatory program that has been in effect for more than 40 years. As we have shared with the Task Force and with MHCC in prior comment letters, MPCAC believes that any effort to modernize the State's CON program should include significant reform of CON regulation as applied to ASFs. The Task Force's recommendations with respect to ASFs do not go far enough in modernizing an inherently anti-competitive regulatory regime that inhibits the shifting of high quality care to a lower cost care delivery setting. We urge the Commission to recommend to the General Assembly a bolder vision for CON reform as applied to ASFs than is contemplated in the Task Force's Final Report. In that regard, I am enclosing a short document that we ask the Commission to consider as part of its ongoing efforts to modernize CON as applied to ASFs.

Please feel free to contact me at ngrosso@cfaortho.com or (443) 520-5770 if MPCAC can be of assistance to the Commission as it continues its work on CON reform, particularly as applied to ASFs.

Sincerely,



Nicholas P. Grosso, M.D.
Chairman of the Board & President, MPCAC

Enclosure

cc: Randolph Sergent, Chair, MHCC CON Modernization Task Force
Ben Steffen, Executive Director, MHCC
Paul Parker, Director, MHCC Center for Health Care Facilities Planning & Development
Joe Bryce, Manis Canning & Associates
All MHCC Commissioners (via Ben Steffen)

MPCAC

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MHCC CON Modernization *Ambulatory Surgery Facilities (ASFs)*

Overview:

The opportunity to reform Maryland's CON program is a critically important issue, as the Chairs of the Senate Finance Committee and the House Health and Government Operations Committee recognized in their initial request to MHCC to develop recommendations for "modernizing" the State's 40-year-old CON program. A true modernization of the State's CON program presents an opportunity to align the State's regulatory scheme with the ongoing transitional shift in the delivery of health care. To facilitate this shift most effectively, we are convinced that any revamp of the State's CON program must have a clear focus on the removal of barriers hindering the delivery of high quality health care in cost-effective and accessible settings such as ASFs.

We sincerely thank the CON Modernization Task Force for its time and attention to this critical issue, but we believe the Task Force's Final Report does not go far enough in recommending the types of dramatic and transformative changes to the CON program that are necessary to promote access to the highest quality, cost-efficient and convenient care while eliminating artificial barriers to competition and innovation. We were encouraged by a number of key principals outlined in MHCC's Interim Report on CON Modernization back in June 2018, but believe the recommendations in the Task Force's December 11, 2018 Final Report fail to capitalize on a critical opportunity to carry out those key principles. We urge MHCC to keep those key principles at the forefront in considering the Task Force's draft Final Report and in MHCC's ongoing evaluation of the fundamental issues associated with the State's existing CON program.

Key Principals:

- ***Promoting Competition and Innovation:***
 - Industry comments that generally favor continuing CON for their particular facilities must be weighed in light of a natural tendency to protect existing interests to the potential detriment of new market entrants. *MHCC June 1, 2018 Interim Report at 5.*
 - The State must guard against the risk of maintaining CON regulation as a mechanism for protecting existing interests to the potential detriment of new market entrants to avoid stifling competition, innovation and opportunities for cost-reduction.

- ***Decreasing the Total Cost of Care:***

- CON modernization needs to be examined through the prism of the All-Payer Model and, in particular, the Total Cost of Care model. *Interim Report at 1, 6-7.* In order to stay within the Total Cost of Care guardrails, it will be important to move more demand to the least costly setting in which demand can be handled appropriately. *Interim Report at 7.*
- Academic and government studies have shown that shifting care into ASFs can result in significant cost savings when compared to similar services and procedures in other surgical care settings. Additional cost savings would also likely be achievable if barriers to creating larger, and perhaps multi-specialty, ASFs were removed to allow ASF operators to eliminate duplication of overhead and operational expenses.

- ***Protecting and Improving Quality and Safety:***

- Literature shows that, in the abstract, the overall benefit of CON regulation is debatable and does not provide strong evidence that CON reduces health care costs or improves quality. *Interim Report at 6.* Health care quality is an issue that may be best addressed through licensure regulation, rather than the one-time, front-end review offered by CON regulation....[E]nsuring quality of health care and that “bad actors” remain outside of the system are appropriate regulatory goals but using CON regulation may be a problematic and inefficient approach. *Interim Report at 7-8.*
- A robust licensure process, rather than front-end review through CON, is the appropriate mechanism for safeguarding quality care and for ensuring that health care facilities are operated soundly and under responsible ownership.
- The current regulatory scheme that provides for an ability to establish ASFs with no more than one operating room outside the scope of the CON program likely impedes quality and safety improvements that would result from larger ASFs. Efficiencies and advances in peer review oversight, quality control, and inspection and accreditation processes would be more achievable in larger ASFs.

Opportunity to Modernize the CON Program:

- We believe it is time for Maryland to replace its CON regulatory framework—at least as applied to ASFs—with an alternative approach that ensures patient access to high quality care without creating barriers to market entry. Specifically, we believe that ASFs should not be subject to CON regulation, regardless of the number of operating rooms and, instead, should be subject to the “determination of coverage” process MHCC currently uses to evaluate physician outpatient surgical centers that contain one operating room. At a minimum, we believe that CON should be liberalized so that ASFs with four or fewer operating rooms are not subject to CON review and the use of a capital expenditure threshold should be eliminated. By removing barriers to creating larger, and perhaps multi-specialty, ASFs, operational efficiencies could be obtained to decrease the total cost of care and widespread implementation of quality and safety best practices would be more achievable.