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FINAL REPORT OF THE SENATE STUDY COMMITTEE ON CERTIFICATE OF NEED REFORM (SR 1063)

Committee Members

Senator Ben Watson, Chair
District 1

Senator Dean Burke
District 11

Senator Steve Henson
District 41

Senator Lester Jackson
District 2

Senator Renee Unterman
District 45

Senator Bill Cowsert, Ex-Officio
District 46

Mr. John Culbreath

Mr. David Tatum

Dr. Paul Harton

Mr. Frank Ulibari

Mr. Alan Kent

Mr. Doug Welch

Dr. Jeff Oyler

Mr. Lynn Westmoreland

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STUDY COMMITTEE FOCUS, CREATION, & DUTIES

The Senate Study Committee on Certificate of Need Reform (the “Committee”) was created with the passage of Senate Resolution 1063, sponsored by Senator Ben Watson of the 1st during the 2018 Legislative Session.¹ SR 1063 acknowledges that Georgia’s Certificate of Need (CON) laws have remained static despite significant changes in the delivery and cost of health care. Further, hospitals, doctors, and other providers must work together to meet the challenge of delivering services with better outcomes at a lower cost. Finally, SR 1063 acknowledges that Georgia needs additional healthcare facilities to meet the needs of patients, particularly in mental health, surgery, and emergency settings.

The Committee was charged with undertaking a study of CON reform policies that will preserve the ability of hospitals to continue to provide open access to all patients in a community. Per SR 1063, such policies or reforms should be aligned to support the survival and growth of rural hospitals, many of which face an ongoing financial crisis, especially in Georgia’s rural communities.

The following Senate members were appointed by the Lt. Governor to serve on the Committee: Ben Watson of the 1st; Dean Burke of the 11th; Steve Henson of the 41st; Lester Jackson of the 2nd; Renee Unterman of the 45th; Bill Cowsert of the 46th (Ex-Officio).

In addition, the following citizen members were appointed to serve on the Committee: Mr. John Culbreath; Dr. Paul Harton; Mr. Alan Kent; Dr. Jeff Oyler; Mr. David Tatum; Mr. Frank Ulibari; Mr. Doug Welch; and Mr. Lynn Westmoreland.

Senator Watson served as Chair of the Committee, which held two meetings on the following dates and locations:

- Meeting 1 – Monday, October 1, 2018 at Mercer University, Macon, Georgia
- Meeting 2 – Friday, December 14, 2018 in Room 450 of the State Capitol, Atlanta, Georgia.

The following legislative staff members were assigned to this Committee: Ms. Ines Owes of the Senate Press Office; Mr. Elton Davis of the Senate Budget and Evaluation Office; Ms. Elizabeth Holcomb of the Senate Research Office; Ms. Betsy Howerton of the Office of Legislative Counsel; and Ms. Phyllis Williams, Committee Secretary for the Senate Committee on Veterans, Military, and Homeland Security and Legislative Assistant to Senator Watson.

¹ <http://www.legis.ga.gov/Legislation/en-US/display/20172018/SR/1063>

BACKGROUND

Certificate of Need (CON) programs were mandated by the federal government in 1974 in an effort to manage health care facility costs and facilitate coordinated planning of new services. Georgia's CON program was established by the General Assembly in 1979 and is currently administered the Office of Health Planning at the Department of Community Health. Like other states that maintain to achieve three goals: (1) to measure and define need, (2) to control costs, and (3) to guarantee access to health care services. However, in 1987, the federal mandate was repealed along with the associated federal funding. As of August 2018, thirty-four states and the District of Columbia maintain a CON program, thirteen states have abolished their CON program, and three states retain a variation of the CON program.

The following states have statutorily abolished the CON program:

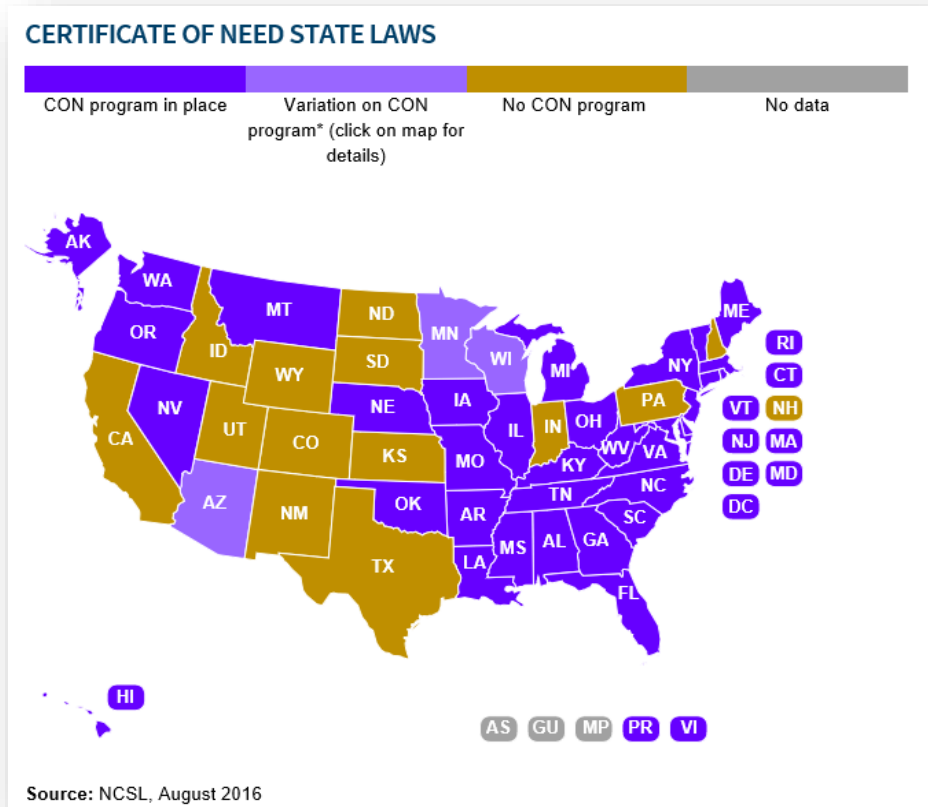
- California (1969-1987)
- Colorado (1973-1987)
- Idaho (1980-1983)
- Indiana (1980-1996; 1997-1999)
- Kansas (1972-1985)
- New Hampshire (1979-2016)
- New Mexico (1978-1983)
- North Dakota (1971-1995)
- Pennsylvania (1979-1996)
- South Dakota (1972-1988)
- Texas (1975-1985)
- Utah (1979-1984)
- Wyoming (1977-1989)

Three states retain a variation of the CON program. Although these states do not have a formal CON program, they retain certain aspects that support the underlying theory. The states are as follows:

- Arizona
 - Although Arizona ended their CON program in 1984, the state maintains an approval program for ambulance services and ambulances.²
- Minnesota
 - Since 2004, Minnesota has required proposals for new hospital construction or bed expansion to submit to an approval process known as “public interest review”. The state also requires Intermediate Care Facilities for the Developmentally Disabled (ICF/DD) to undergo a local system needs planning (LSNP) process administered by county authorities. The state also allows for exceptions to the moratorium on nursing homes via a process known as “Request for Information for Exceptions to the Moratorium on the Licensure and Certification of New Nursing Home Beds in Hardship Areas.”³
- Wisconsin
 - Wisconsin does not have a formal CON program, but it does have an approval process for nursing homes and a ‘Certificate of Public Advantage’ program for cooperative provider agreements.

² http://www.ncsl.org/documents/health/CON_State_List.pdf#page=49

³ *Id.*



Recent Repeals

Since 2000, New Hampshire and Wisconsin have been the only states to repeal their CON programs.

New Hampshire

When New Hampshire repealed their CON laws, many questioned whether there would be a boom in health care facility expansion. New Hampshire combated this with retaining a construction cap on new medical facilities that the state Department of Health and Human Services would oversee rather than the Certificate of Need board.⁴ Also, the bill required licensing for cardiac catheterization laboratory services, coronary artery bypass graft surgery, and megavoltage radiation therapy. Further, the bill required all inpatient facilities maintain emergency rooms and treat all comers.⁵

One big concern with repeal of CON laws is the closure of hospitals. The New Hampshire Hospital Association (NHHA) confirmed that New Hampshire has 26 acute hospitals and since the repeal of New Hampshire’s CON law there have been no hospital closures. Further, they confirmed that no hospitals have closed in the state since 1986. I inquired about the recent closure of some Labor

⁴ <http://www.nhbr.com/June-24-2016/State-pulls-plug-on-NH-Certificate-of-Need-board/>

⁵ N.H. Rev. State §151:2-e.

and Delivery services around the state, but NHHA reported that these closures were unrelated to the CON repeal and they closed due to being fiscally unviable.

Texas

Texas repealed its CON program in 1985. Following repeal, nursing homes within the state increased and psychiatric hospitals increased, from 48 to 86 within the first year of the repeal.⁶ In comparing states with and without CON laws, the number of Medicare-Certified Ambulatory Surgery Centers in Georgia is 339, whereas Texas has 366.⁷

Georgia's CON Program, 2008 Reforms, and Legislative Initiatives

In an effort to improve upon Georgia's CON program, the Commission on the Efficacy of the CON Program in Georgia was established in 2005, and its final report to the Georgia General Assembly and Governor Sonny Perdue was published on December 29, 2006. During the 2008 Legislative Session, major reforms to the statute were enacted with the passage of Senate Bill 433—some of which are highlighted here. The bill increased the thresholds for capital improvements and allowed hospitals that maintain near full occupancy rates to increase bed capacity by ten beds or by 10 percent, whichever is greater, without a CON.

Senate Bill also 433 outlined CON requirements for destination cancer hospitals, such as Cancer Treatment Centers of America, and modified the CON appeal process. The bill exempted certain non-medical expenditures, such as parking decks, medical office buildings, and computer systems from CON requirements. Prior to the 2008 reforms, Georgia's CON law contained an exemption for physician-owned single-specialty ambulatory surgical centers (ASCs) with capital expenditures which did not exceed \$1,700,00. Senate Bill 433 increased the capital expenditure limit for physician-owned single specialty ASCs to \$2,500,000, indexed annually. It also created an exemption for single specialty ASCs if it is the only ASC in the county owned by the group practice and has less than two operating rooms. Single specialty ASCs that are exempt from CON requirements are required to obtain a Letter of Non-reviewability (LNR) from DCH's Office of Health Planning and are commonly referred to as "LNR single-specialty ASCs." A CON is required, however, for any expansion of such facilities.

Currently, projects that require a CON in Georgia include:

- New hospitals, including general, acute-care and specialty hospitals;
- New or expanding Nursing Homes and Home health agencies;
- All multi-specialty and certain single-specialty Ambulatory Surgery Centers;
- Providers of Radiation Therapy, Positron Emission Tomography, Open Heart Surgery, and Neonatal Services;
- Major medical equipment purchases or leases (e.g. MRI, CT Scanners) that exceed the equipment threshold;
- Major hospital renovations or other capital activities by any health care facility that exceed the capital expenditure threshold; and
- Before a health care facility can offer a health care service, which was not provided on a regular basis during the previous 12-month period, or add additional beds.

In addition to the 2008 reforms, Georgia's CON program was studied by the 2013 Senate Study Committee on Independent Physicians in Georgia created by SR 340.⁸ Those testifying before the Committee included hospitals, as well as independent physicians from multi-specialty groups.

⁶ <http://leg.wa.gov/jlarc/AuditAndStudyReports/Documents/99-1.pdf>

⁷ <https://www.ascassociation.org/advancingurgicalcare/asc/numberofascspstate>

⁸ <http://www.legis.ga.gov/Legislation/en-US/display/20132014/SR/340>

The independent physicians stated that they are unable to compete and remain a less costly alternative to hospital-controlled physician services, urging the Committee that Georgia's CON requirements should be loosened for independent physician groups. In its recommendations, the Committee expressed concern over the ability to independently evaluate the effects of the implementation of the Affordable Care Act on January 1, 2014. While the Committee recommended that no action regarding Georgia's CON program be taken at that time, it recognized that there may be some issues for the Senate's attention in the future. Several bills aiming to repeal or reform CON were introduced in the House and Senate the following sessions but failed to reach final passage.

SUMMARY OF MEETINGS

Over the course of this interim study, the Committee received testimony and public comment from stakeholders and policy experts regarding the costs and benefits of Georgia's current CON laws, and how they may be modified to facilitate the delivery of more cost-effective, quality care to more citizens of Georgia.

Meeting 1

The Committee convened for the first time at Mercer University in Macon, Georgia on October 1, 2018. Chairman Watson welcomed the Committee and provided brief introductory remarks emphasizing the importance of putting the patient first when discussing this contentious issue. A history of CON in Georgia was provided by Mr. David Tatum, Chief Public Policy Officer, Government Affairs at Children's Healthcare of Atlanta. The Committee also received an update on the status of the Georgia Hospital Association's CON Working Group from Mr. Ethan James, Executive Vice President for GHA. Before adjourning, each Committee member provided brief statements explaining their interest in serving on this interim body and goals for this study.

Meeting 2

The Committee met a second and final time on December 14, 2018 in Room 450 of the State Capitol, Atlanta, Georgia. Prior to the meeting, Chairman Watson shared draft legislation with the members of the Committee and several stakeholders. After welcoming the Committee and public to Meeting 2, Chairman Watson indicated that the House Rural Development Council also worked on the issue of CON reform this interim and just recently released a report recommending a complete repeal of all CON laws. After explaining that the Senate will opt for a more middle grounded approach, Chairman Watson called on Ms. Betsy Howerton, Deputy Legislative Counsel, to present the draft legislation.

The Committee received brief commentary and feedback from the general counsels of the Georgia Hospital Association and the Georgia Alliance of Community Hospitals. After careful consideration of the issues, draft legislation, and feedback from stakeholders, the Committee moved to wrap up its interim work on this issue. In doing so, a majority of the members present agreed to move forward with efforts to refine the bill, reiterating that the draft legislation is very much a work in progress.

CONCURRING COMMENTARY BY SENATOR WATSON OF THE 1ST

The Senate Study Committee on Certificate of Need (“CON”) Reform was created by Senate Resolution 1063 during the 2018 session of the Georgia General Assembly. SR 1063 acknowledges that changes to Georgia’s CON laws have not kept pace with changes to the delivery of health care. Georgia’s current CON laws present obstacles to the delivery of affordable, accessible, and quality health care services, particularly with regard to mental health/substance abuse, surgery, and in emergency settings. Additionally, despite the existence of CON laws in Georgia, rural hospitals in the state continue to struggle financially.

The Committee held two public hearings and received testimony from stakeholders and policy experts regarding the costs and benefits of Georgia’s current CON laws, and how they may be modified to facilitate the delivery of more cost-effective, quality care to more citizens of Georgia. Testimony at both meetings emphasized the importance of using a balanced approach to improving the delivery of quality healthcare services through CON reforms so as to avoid threatening the financial viability of Georgia’s hospitals. Hospitals play a vital role in our communities and any reform proposals should be carefully weighed to ensure hospitals can continue to accomplishing their mission of providing open access to all patients.

As Chairman of this interim study, I want to thank the Committee for its diligent work on this contentious issue. In addition to the information provided in the Final Report, I submit the following findings and recommendations for the upcoming 2019 Legislative Session.

Mental Health/Substance Abuse

The State of Georgia continues to struggle with accommodating and caring for individuals afflicted with mental health, psychiatric, and substance abuse issues. A contributing factor to Georgia’s struggles with treating this segment of its population is the shortage of facilities to provide the care necessary and the barriers faced by new service providers wishing to enter the market. These barriers include CON review for any providers seeking to offer mental health, psychiatric, and substance abuse services.

***Recommendation:** Amend Georgia’s CON laws to exempt the provision of mental health, psychiatric, and substance abuse services from CON review.*

Ambulatory Surgery

Due to advances in the delivery of health care services, many procedures that once needed to be performed in a hospital setting may now be safely performed in an outpatient setting, such as an ambulatory surgery center (“ASC”). When compared to other settings, procedures performed in an ASC are accompanied with significantly lower costs and higher patient satisfaction due to the convenience that stems from an outpatient setting.

ASC are currently subject to CON review with two exceptions. The first exception to CON review for ASCs is for those entities owned and operated by a single physician or single group practice of physicians of a single specialty provided the cost of establishing the ASC does not exceed \$2.5m. The second exception is for a joint venture ASC between a hospital and a single group of physicians of a single specialty provided the cost does not exceed \$5 million.

Because obtaining a CON for an ASC is a particularly arduous process due to opposition from market incumbents, the majority of ASCs in Georgia are owned and operated by physicians of a single group practice and single specialty. The reason the ownership and operation of ASCs is so limited is because physicians of a single group practice and single specialty are able to avail themselves of the exception to CON review. The single specialty limitation, however, significantly curtails the availability of ASC services because it effectively prevents multi-specialty practice groups from owning and operating an ASC. Additionally, the financial threshold to take advantage of the single specialty exemption from CON review unnecessarily limits the size of facilities and the scope of services they are able to offer.

At the same time, the Committee recognizes that many types of surgery services are significant revenue centers for existing hospitals in Georgia. Hence, the committee recommends that reforms be careful and targeted to increase access and make the playing field more level, without opening the door to exponential growth of true multi-specialty ASCs in Georgia at this time. These changes would simply allow existing multi-specialty groups in Georgia to operate on a more level playing field with single specialty physicians, and would allow for a world-class destination sports surgery facility (which would not compete with existing hospital offerings) to locate and create jobs in Georgia.

For the reasons stated above, I recommend easing the restrictions placed on obtaining an exemption from CON review for ASC services as follows:

- *Amend Georgia's CON laws to allow multi-specialty group practices, subject to the current \$2.5 million threshold and the Medicaid and indigent and charity care commitment, to obtain an exemption from CON review to establish up to two ASCs, provided the ASCs only provide services in a single specialty, and are not located in a rural county in which a single hospital with less 100 inpatient beds is located.*
- *Amend Georgia's CON laws to allow an exemption from CON review for an ASC on the same site as a sports training and educational facility, provided that the ASC has no more than six operating rooms, participates in Medicaid, makes an indigent and charity care commitment of 5 percent of its adjusted gross revenue, and demonstrates a positive economic impact of \$25 million.*

Equipment Expenditures, Diagnostic Imaging & Bed Capacity

Equipment expenditures, including those for diagnostic imaging, in excess of \$1 million are currently subject to CON review. Subjecting equipment expenditures to CON review delays the availability of the latest medical technology to the citizens of Georgia, and constrains the use of such equipment in cost-effective and convenient ASCs. Again, this result is to the detriment of patients and payors alike. The public will be better served if equipment expenditures and diagnostic imaging are removed from CON review.

Additionally, a CON is required for a facility to increase its bed capacity. The only exemption to this requirement is if a facility limits the increase of its bed capacity to 10 beds or 10 percent, whichever is greater, and only if it had an occupancy rate of greater than 75 percent in the previous year. The limited exemption to the requirement of a CON to increase bed capacity hinders the ability of such facilities to meet the demand of their communities in a timely manner. I believe the above-referenced exemption is too narrow and should be expanded to enable facilities to better serve their communities.

Most hospital and physician leaders in the state realize these arbitrary thresholds simply add to the transactional costs for bringing new equipment and improved facilities to Georgia patients. Hence, removing these limits represents the broadest area of agreement in the often contentious area of CON debates. This is because they will not allow for new facilities, but will simply make it easier for existing facilities to improve.

Recommendation: Amend Georgia's CON laws to eliminate CON review for all equipment expenditures and diagnostic imaging, except positron emission tomography.

Recommendation: Amend Georgia's CON laws, relating to the exemption for increases in bed capacity, by increasing the percentage by which the bed capacity may be raised and decreasing the occupancy rate required to utilize the exemption.

Destination Cancer Hospitals

Under Georgia's current CON laws, a destination cancer hospital is subject to CON review and is limited to having a bed capacity of 50 or less, and its annual patient base must be composed of 65 percent of patients who reside outside of the State of Georgia. Furthermore, a destination cancer hospital must be located within 25 miles of a commercial airport with five or more runways. If a destination cancer hospital fails to have an annual patient base of 65 percent who reside outside the State of Georgia, it is subject to extensive fines (\$2 million for the first year of noncompliance and the fine doubles for each subsequent year of noncompliance up to \$6 million. Noncompliance for three years in any five-year period results in an additional fine of \$8 million, and subjects the destination cancer hospital to revocation of its CON).

The Committee received testimony indicating that the restrictions placed on destination cancer hospitals, particularly the requirement that at least 65 percent of its patients come from out of state, has the effect of denying Georgians the ability to choose where to receive care. Allowing a destination cancer hospital to convert to a hospital, as defined in O.C.G.A. §31-6-2, would remove this onerous restrictions on its patient base and provide Georgians with the ability to receive care in the environment of their choice.

Recommendation: Amend Georgia's CON laws to allow a destination cancer hospital to convert to a hospital and no longer be subject to the restrictions imposed upon destination cancer hospitals. A converted hospital will be subject to CON laws in the same manner and to the same extent as any other hospital.

Respectfully Submitted,

**FINAL REPORT OF THE SENATE STUDY COMMITTEE ON
CERTIFICATE OF NEED REFORM**

A handwritten signature in black ink, appearing to read "Ben Watson, MD", is written above a horizontal line.

Honorable Ben Watson, MD
Senator, District 1