

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013**

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HOUSE BILL 83

Short Title: Enact CON Committee Recommendations. (Public)

Sponsors: Representatives Torbett, Glazier, Collins, and Boles (Primary Sponsors).

For a complete list of Sponsors, refer to the North Carolina General Assembly Web Site.

Referred to: Health and Human Services, if favorable, Regulatory Reform, if favorable, Appropriations.

February 11, 2013

A BILL TO BE ENTITLED

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

20 The General Assembly of North Carolina enacts:

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

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

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

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

33 "(14e) "Kidney disease treatment center" means a facility that is certified as an
34 end-stage renal disease facility by the Centers for Medicare and Medicaid



1 Services, Department of Health and Human Services, pursuant to 42 C.F.R.
2 § ~~405-494.~~"

3 **SECTION 3.** G.S. 131E-176(14o) reads as rewritten:

4 "(14o) "Major medical equipment" means a single unit or single system of
5 components with related functions which is used to provide medical and
6 other health services and which costs more than ~~seven hundred fifty~~
7 ~~thousand dollars (\$750,000).~~ one million five hundred thousand dollars
8 (\$1,500,000). In determining whether the major medical equipment costs
9 more than ~~seven hundred fifty thousand dollars (\$750,000),~~ one million five
10 hundred thousand dollars (\$1,500,000), the costs of the equipment, studies,
11 surveys, designs, plans, working drawings, specifications, construction,
12 installation, and other activities essential to acquiring and making
13 operational the major medical equipment shall be included. The capital
14 expenditure for the equipment shall be deemed to be the fair market value of
15 the equipment or the cost of the equipment, whichever is greater. Major
16 medical equipment does not include replacement equipment as defined in
17 this section."

18 **SECTION 4.** G.S. 131E-176(16)b. reads as rewritten:

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

20 ...

21 b. Except as otherwise provided in G.S. 131E-184(e), the obligation by
22 any person of a capital expenditure exceeding ~~two~~four million dollars
23 ~~(\$2,000,000)~~(\$4,000,000) to develop or expand a health service or a
24 health service facility, or which relates to the provision of a health
25 service. The cost of any studies, surveys, designs, plans, working
26 drawings, specifications, and other activities, including staff effort
27 and consulting and other services, essential to the acquisition,
28 improvement, expansion, or replacement of any plant or equipment
29 with respect to which an expenditure is made shall be included in
30 determining if the expenditure exceeds ~~two~~four million dollars
31 ~~(\$2,000,000).~~(\$4,000,000).

32"

33 **SECTION 5.** G.S. 131E-176(22a) reads as rewritten:

34 "(22a) "Replacement equipment" means equipment that ~~costs less than two million~~
35 ~~dollars (\$2,000,000) and is purchased for the sole purpose of replacing~~
36 ~~comparable medical equipment currently in use which will be sold or~~
37 ~~otherwise disposed of when replaced. In determining whether the~~
38 ~~replacement equipment costs less than two million dollars (\$2,000,000), the~~
39 ~~costs of equipment, studies, surveys, designs, plans, working drawings,~~
40 ~~specifications, construction, installation, and other activities essential to~~
41 ~~acquiring and making operational the replacement equipment shall be~~
42 ~~included. The capital expenditure for the equipment shall be deemed to be~~
43 ~~the fair market value of the equipment or the cost of the equipment,~~
44 ~~whichever is greater."~~

45 **SECTION 6.** G.S. 131E-184(e) reads as rewritten:

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

49 (1) The proposed capital expenditure would:

50 a. Be used solely for the purpose of renovating, replacing on the same
51 site, or expanding an existing:

1. Nursing home facility,
 2. Adult care home facility, or
 3. Intermediate care facility for the mentally retarded; and
- b. Not result in a change in bed capacity, as defined in G.S. 131E-176(5), or the addition of a health service facility or any other new institutional health service other than that allowed in G.S. 131E-176(16)b.

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

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

SECTION 7. G.S. 131E-188 reads as rewritten:

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

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

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

- (1) An administrative law judge or a hearing officer, as appropriate, shall be assigned within 15 days after a petition is filed.
- (2) The parties shall complete discovery within 90 days after the assignment of the administrative law judge or hearing officer.
- (3) The hearing at which sworn testimony is taken and evidence is presented shall be held within 45 days after the end of the discovery period.
- (4) The administrative law judge or hearing officer shall make a final decision within 75 days after the hearing.
- (5) Repealed by Session Laws 2011-398, s. 46, as amended by Session Laws 2011-326, s. 23, effective January 1, 2012, and applicable to contested cases commenced on or after that date.

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

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

1 approval for a certificate of need and is contesting only a condition in the certificate is not
2 required to file a bond under this subsection.

3 The applicant who received approval for ~~the any~~ new institutional health service that is the
4 subject of the petition may bring an action against a bond filed under this subsection in the
5 superior court of the county where the bond was filed. Upon finding that the petition for a
6 contested case was frivolous or filed to delay the applicant, the court may award the applicant
7 part or all of the bond filed under this ~~subsection~~ subsection and shall award the applicant
8 reasonable attorney fees and costs incurred in the contested case. At the conclusion of the
9 contested case, if the court does not find that the petition for a contested case was frivolous or
10 filed to delay the applicant, the petitioner shall be entitled to the return of the bond deposited
11 with the superior court upon demonstrating to the clerk of superior court where the bond was
12 filed that the contested case hearing is concluded.

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

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

23 (1) The bond shall be secured by cash or its equivalent in an amount equal to
24 five percent (5%) of the cost of ~~the proposed new institutional health service~~
25 each approved application that is the subject of the appeal, but may not be
26 less than five thousand dollars (\$5,000) and may not exceed ~~fifty thousand~~
27 ~~dollars (\$50,000);~~ one hundred thousand dollars (\$100,000); provided that
28 the applicant who received approval of the certificate of need may petition
29 the Court of Appeals for a higher bond amount for the payment of such costs
30 and damages as may be awarded pursuant to subdivision (2) of this
31 subsection. This amount shall be determined by the Court in its ~~discretion;~~
32 ~~not to exceed three hundred thousand dollars (\$300,000).~~ discretion. A holder
33 of a certificate of need who is appealing only a condition in the certificate is
34 not required to file a bond under this subsection.

35 (2) If the Court of Appeals finds that the appeal was frivolous or filed to delay
36 the applicant, the court shall remand the case to the superior court of the
37 county where a bond was filed for the contested case hearing on the
38 certificate of need. The superior court may award the holder of the certificate
39 of need part or all of the bond. The court shall award the holder of the
40 certificate of need reasonable attorney fees and costs incurred in the appeal
41 to the Court of Appeals. If the Court of Appeals does not find that the appeal
42 was frivolous or filed to delay the applicant and does not remand the case to
43 superior court for a possible award of all or part of the bond to the holder of
44 the certificate of need, the person originally filing the bond shall be entitled
45 to a return of the bond.

46 (c) The term "affected persons" includes: the applicant; any individual residing within
47 the service area or the geographic area served or to be served by the applicant; any individual
48 who regularly uses health service facilities within that geographic area or the service area; any
49 person who provides services, similar to the services under review, to individuals residing
50 within the service area or the geographic area proposed to be served by the applicant; any
51 person who, prior to receipt by the agency of the proposal being reviewed, has provided written

1 notice to the agency of an intention to provide similar services in the future to individuals
2 residing within the service area or the geographic area to be served by the applicant; third party
3 payers who reimburse health service facilities for services in the service area in which the
4 project is proposed to be located; and any agency which establishes rates for health service
5 facilities or HMOs located in the service area in which the project is proposed to be located."

6 **SECTION 8.** G.S. 131E-176(16)l. is repealed.

7 **SECTION 9.** This act becomes effective October 1, 2013, and applies to certificate
8 of need applications, contested case petitions, and appeals filed on or after that date.