



## SUMMARY

# A REVIEW OF THE S.C. DEPT. OF HEALTH AND ENVIRONMENTAL CONTROL CERTIFICATE OF NEED PROGRAM



FEBRUARY 2022

## IMPACT OF CON PROGRAM

Members of the S.C. General Assembly requested that we conduct an audit of the S.C. Department of Health and Environmental Control (DHEC) Certificate of Need (CON) program.

### OBJECTIVES

- Examine potential areas for reform of the certificate of need program.
- Review the certificate of need process.
- Review the role of staff in administering the certificate of need program.
- Review COVID-19 pandemic related issue pertaining to the certificate of need program.
- Review the role providers play in the certificate of need process.

### BACKGROUND

South Carolina established its CON program, administered by DHEC, in 1971 with the passage of the State Certification of Need and Health Facility Licensure Act which requires healthcare providers to apply for and obtain a CON before beginning a range of projects that may include:

- Construction or establishment of healthcare facilities.
- Changes to or expansions in services offered at healthcare facilities.
- Capital expenditures or acquisitions of medical equipment over a certain cost threshold.

### OVERALL IMPACT OF CON LAWS ON HEALTHCARE

Measures of access to routine and emergent health care are average in South Carolina, compared to other states nationally. Routine health care access is on par with or close to top-performing states, while emergent health care access lags further behind. Evidence on CON laws' impact on healthcare is generally mixed and often not conclusive. CON laws may improve key outcomes for certain healthcare services and markets but worsen other specific services and markets.

### NECESSITY OF CON LAWS ON LOW-COST FACILITIES AND SERVICES

DHEC's CON program intends to promote cost containment, yet there are some low-cost facilities and services, such as home health agencies and substance abuse treatment programs, that are required to obtain CON approval. CON laws may not be necessary for home health agencies due to the overwhelming number of home health applications received, the applications have a notably lower cost than any other application type, there are established licensure mechanisms to ensure healthcare quality of home health agencies, and South Carolina has the 8<sup>th</sup> lowest rate of home health agencies per 100,000 people in the nation. CON laws may not be necessary for substance abuse treatment programs because CON laws are associated with a decrease in the substance abuse facilities within a state, and accessibility is particularly important for these types of services.

### THRESHOLDS FOR EQUIPMENT AND CAPITAL EXPENDITURES

CONs are required for capital projects exceeding \$2 million and new equipment exceeding \$600,000. These thresholds are outdated and should be increased. Increasing these thresholds will reduce the workload for the CON program.

### COVID-19 RESPONSE

The Governor issued an executive order in 2020 which relaxed certain CON requirements due to the COVID-19 pandemic. However, DHEC did not track the number of waiver requests pursuant to the executive order and did not properly respond to one of the waiver requests.

## CON APPLICATION CRITERIA

### QUALITY STANDARDS USED BY CON STAFF

One of the stated purposes of the CON program is to ensure that high-quality services are provided in health facilities in South Carolina. The State Health Plan (SHP) contains qualitative standards that DHEC uses to assess the quality of services provided by a CON applicant. However, the SHP contains few quantitative metrics to gauge quality, and DHEC generally does not use quantitative metrics to gauge the quality of services provided by a CON applicant.

### DUPLICATION OF HEALTHCARE FACILITIES OR SERVICES

We found multiple instances where DHEC approved CONs for new facilities that would provide duplicative services to an existing facility. However, these decisions are often appealed to the Administrative Law Court.

## FOR MORE INFORMATION

Our full report, including comments from relevant agencies, is published on our website. Copies can also be obtained by contacting our office.

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## EVALUATION OF CON PROJECT COSTS

DHEC staff evaluate the cost of a CON project from the time of application through the project's completion. Upon review of DHEC's evaluation methods, we found that the determination of what is a "reasonable cost" is subjective, which is underscored by the fact that there were substantial differences in the approved cost amount for projects of the same facility and service type. Additionally, while most projects' total costs were at or below the amounts approved when the CONs were issued, the total project cost reported to DHEC likely does not account for the total amount spent by providers in obtaining and ultimately completing CON-approved projects.

## PRIORITIZING COMPETING GOALS

DHEC uses project review criteria listed in the SHP to prioritize the statutory goals of the CON program; however, DHEC staff have discretion to add additional review criteria not listed for each project, service, or equipment in the SHP. In addition, DHEC staff can reorder the importance of the criteria when reviewing a CON application.

## CON PROGRAM PROCESS

### LENGTH OF CON APPLICATION PROCESS

Applications that were submitted between January 2018 and September 2021 took, on average, 168 days from DHEC's receipt of the application to a CON decision. Applications that were appealed to the Administrative Law Court took another 405 days, on average, to receive a decision.

### OPPORTUNITY COST OF CON-RELATED LITIGATION

Litigation can delay contested projects for years, and in at least one case delayed the construction of a hospital in a rapidly growing area for over a decade. The agency's annual budget for CON-related litigation is modest, but litigation can be extremely costly *for providers*.

### OVERALL IMPACT OF INCUMBENT PROVIDERS ON CON PROGRAM

An incumbent provider can be involved in various points of DHEC's CON process within the disposition of an application and the opportunity to appeal a department decision. In South Carolina, most CON applications accepted for filing do not face opposition, competing applications, or legal challenges. DHEC officials explained that the length of the appeals timeline is one of the biggest complaints the CON program receives, and the majority of legal challenges stem from existing providers appealing an approved CON.

### CON PROCESS DETERRING APPLICANTS FOR FACILITIES AND SERVICES

South Carolina's current CON program deters some healthcare providers from applying to open or expand new facilities and services, or acquire new equipment, across a range of practice types and sizes. Other non-CON issues also serve as a deterrent, including non-compete agreements, restriction of hospital admitting privileges, and referral patterns.

## POST-ISSUANCE PROCEDURE

DHEC monitors progress on projects for which it issues a CON until the project is completed. The agency can revoke or void a CON if the project does not make timely progress. However, our review of internal agency documents revealed that most progress reports received by the agency for CONs it issued since 2019 were not marked as reviewed by agency staff. A CON may not be sold or transferred in any way until DHEC deems the project to be complete.

## CON TREATMENT AFTER PURCHASE/TRANSFER OF EXISTING PROVIDERS

CONs are non-transferable, so CONs that have been issued must be fulfilled prior to a change in ownership, otherwise the new owner must reapply for all CONs voided during the sale/transfer. Providers that want to permanently close or reduce beds are exempt from CON review, but still need to obtain a written determination from DHEC prior to undertaking these actions.