

A Primer on Virginia's Certificate of Public Need Process

Virginia's health planning process utilizes a Certificate of Public Need (COPN) program, also referred to as a Certificate of Need, as a regulatory mechanism to control the development of particular health services and facilities.

Under Virginia Code §§ 32.1-102.1 and 32.1-102.3, a COPN is required to:

- establish a medical care facility, including an ambulatory surgery center;
- add beds or operating rooms to an existing medical care facility;
- convert medical beds to rehab beds;
- convert psychiatric beds to non-psychiatric beds;
- relocate beds from an existing facility to another (with certain exceptions);
- introduce a new nursing home service into an existing medical care facility;
- introduce a specialty clinical service such as cardiac catheterization; CT scanning; stereotactic radiosurgery; lithotripsy; MRI; MSI; medical rehabilitation; neonatal special care; obstetrical; open heart surgery; PET; psychiatric; organ or tissue transplant service; radiation therapy; stereotactic radiotherapy; proton beam therapy; nuclear medicine imaging (except for the purpose of nuclear cardiac imaging); and substance abuse treatments;
- add medical equipment to provide a service specified above, such as CT, MRI, MSI and PET scanners (although the replacement of existing equipment does not require a COPN); and

- make capital expenditures of \$15 million or more by or on behalf of a medical care facility other than a general hospital (capital expenditures of \$5 million or more by a general hospital and capital expenditures between \$5 and \$15 million by a medical care facility other than a general hospital do not require a COPN, but must be registered with the Commissioner of Health).

Facility owners or sponsors that commence a COPN-required project without approval are subject to penalties and will be denied a license for the project.

As it is not unusual for there to be a close call on whether a project requires a COPN, it is important to consult advisors with specific experience in Virginia's COPN process. Additionally, it is helpful to meet directly with the Virginia Department of Health's Division of Certificate of Public Need (DCOPN) to discuss a potential application. In some cases where the COPN criteria for determining need would indicate that an application would be unsuccessful, the potential needs of the applicant and the location involved may otherwise justify the application.

The Planning Stage

In practical terms, planning should begin six to 12 months prior to the application submittal as a significant amount of information needs to be gathered. Key information includes:

- copies of financial statements for the last several years;
- a breakdown of the type of payors involved, such as commercial, Medicare, Medicaid, self-pay and indigent care;



- information on project cost and finance arrangements;
- an analysis of the project's impact on the applicant's financial situation;
- identification of community supporters and opposition parties;
- utilization data of similar services that already exist in the community; and
- an analysis of the project's anticipated impact on utilization of similar services that already exist in the community.

Application Timing

Assuming that a COPN is required, application timing must also be considered. COPN applications are considered in a structured batching process, and the application type determines when the review cycle commences. There are six review cycles per year, each of which commences every six months. Parties have two opportunities per year to apply; if a window is missed, the project faces a delay of at least six months.

The Review Process

The review process begins with a letter of intent, which is followed with the application itself. The application is reviewed by DCOPN staff during a "Completeness Review." Assuming that the application is complete, a public hearing is then held. If the region in which the project is located has a local health planning agency, the public hearing will be conducted by the local health planning agency, which also conducts a review of the application and issues recommendations to the Division of Certificate of Public Need. If there is no local health planning agency—which is the case in most of Virginia—the public hearing is conducted by DCOPN.

Following the public hearing, DCOPN will review any recommendation from the local health planning agency and issue its recommendation to the Commissioner of Health. If the recommendation is to deny the COPN, then an informal fact finding conference (IFFC) will be conducted. In the absence of a negative recommendation from DCOPN, an IFFC will only be conducted if it is requested by the applicant or if a party who opposes the application can demonstrate standing to request the IFFC. Assuming that there is no IFFC, the entire process from letter of intent to the decision of the Commissioner of Health should take approximately six months. The Commissioner's decision may be appealed to Circuit Court by the applicant or another party deemed to have an interest in the application.

Review Criteria

Virginia Code § 32.1-102.3 sets forth the criteria the Commissioner of Health is required to use to determine if a COPN should be granted. There are eight different criteria, not all of which apply to each application.

One important aspect of the review criteria is the "extent to which the application is consistent with the State Medical Facilities Plan (SMFP)," which is located at 12 VAC 5-230-10 through 12 VAC 5-230-1000. These regulations outline detailed criteria for various types of services that fall under the COPN review process. Although the SMFP is quite detailed, it does not always have specific criteria for every type of application. Ambulatory surgery centers, for example, are licensed in Virginia as an outpatient hospital and do not have specific criteria in the SMFP, although there is criteria for surgery services in general.

Simply relying on the SMFP, however, or the criteria for determining a need set forth in the Virginia Code, may lead to an incorrect assumption that an application will be denied. There are many factors that come into play in the review process. Each applicant and application should be viewed independently, even if the proposed service or facility modification is similar to another application.

Experience Counts

Missing a deadline or failing to include important information in the application process can unnecessarily torpedo an application that might otherwise have been approved if the parties were familiar with the process. Advisors and legal counsel familiar with Virginia's COPN program can provide experienced insights and suggest ways to position an application for success.

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