

Tackling the CON Process in *Eight* Easy Steps

By Darin Jay Hill, MBA and Catherine Nichol, RN

Certificate of need (CON) requirements are tricky, time-consuming, and expensive no matter how you look at them. And despite thousands of dollars and hours of work, efforts to obtain CON approval are unfortunately not always successful. But that doesn't have to be the case. The best experts will tell you that understanding the basics of the CON process and following a few simple steps greatly increases the likelihood that you'll receive the ruling you want.

Outlined below are the eight most important rules to remember when navigating the CON process. Keep these in mind the next time you're filling out a CON application and you'll be ahead of the rest.

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1. Start with a good understanding of CON history

In 1946, the Hill-Burton Program was enacted by Congress to provide matching grants for the construction of hospitals in needy areas. Billions in federal funding were contributed in the years following. In an effort to appropriately manage this funding, Congress required states to assess and prove their need before receiving any federal assistance.

The first CON program was established in the early 1960s by the state of New York. The state surpassed Hill-Burton mandates by requiring approval from a state agency before beginning construction of a new hospital. From this point forward, CON programs continued to grow from legislation introduced by the federal government. This legislation was designed to help the CON process:

- Restrain skyrocketing healthcare costs
- Prevent the duplication of health resources
- Achieve equal access to quality healthcare at a reasonable cost

By 1980, every state except Louisiana had enacted CON legislation. In 1987, the federal Planning Act was repealed by Congress; however, states still had the option to continue

regulating healthcare facilities with CON requirements as they saw fit.

Although the CON process continues today, the rationale supporting CONs has disappeared due to changes over time in the medical marketplace. Today, 37 states have some form of CON process, with 27 of those states requiring a CON for surgery centers.

2. Recognize that the CON process is very political

According to Melvin Deese, MD, current president of the Georgia Association of ASCs, "The CON process was originally instituted to limit excessive care under the old cost-plus-reimbursement system. Given that no payer is now using that approach, the CON system hurts the ability of healthcare systems to evolve and compete freely on quality and cost." In addition, a white paper by the Federated Ambulatory Surgery Association (FASA), titled "Physician-Led Ambulatory Surgical Centers Vital to Meeting the Surgical Needs of Tomorrow," states that despite criticism and obstruction from hospitals, surgery centers have helped the Medicare program realize significant cost savings. The report goes on to say that "in the years since Medicare began covering ASC services in 1982, ASCs have saved the program billions of dollars" thanks in part to improved efficiencies, advanced technology and lower co-payments.

The Department of Justice (DOJ) and Federal Trade Commission (FTC) released a joint report last year, "Improving Health Care: A Healthy Dose of Competition," that categorically stated that CON laws were highly detrimental to the competitiveness (and ultimately cost and quality) of healthcare in the United States. The report went on to say that by creating barriers to entry in the healthcare marketplace, CON laws "delay the introduction and acceptance of innovative alternatives to costly treatment methods," resulting in high treatment costs.

3. Know your state's rules

Every state has different rules of engagement, many of which have recently changed. For example, many states prohibit contact with the CON board once an application has been submitted, while other states allow for exemptions from the CON process altogether. These exemptions can be critical to avoiding additional bureaucracy and cost. For example, Georgia has a single-specialty,

same-physician ASC exemption known as a Letter of Non-Reviewability (LNR), and Maryland has an exemption for ASCs that have less than two ORs.

The best way to avoid possible problems is to get a copy upfront of your state's CON rules. Another good way to learn about what works and doesn't in your state is to sit in on a hearing and get your hands on copies of previous applications that the state has approved and denied. Doing so will provide you with insight as to what your state's reviewers find important. The American Health Planning Association has a Web site that links to each state's CON regulations. To find out more information about your state, go to www.ahpanet.org/websites.html.

4. Work with an experienced professional

An attorney or consultant who knows the inner workings of the CON system can be an invaluable guide to you as you work through the process. However, make sure you do your homework and only engage those professionals with a proven track record and solid reputation. Just as a good representative can dramatically increase your chances for success, a representative with a less-than-stellar reputation can hurt you.

A physician group that decided not to use a consultant submitted an application for a spine/pain ASC, failing to include the word "pain" in its public notice. Despite the fact that their application clearly outlined the group's intent to perform pain procedures, the CON was granted only for spine procedures. The moral of the story? Even though the group's application was uncontested, failure to include the word "pain" meant that the pain portion of their application was denied. The CON process is highly detailed and very tricky. Save yourself the time and trouble by working with an expert to do things right the first time.

5. Understand that the CON process is definitely not cheap

Applying for CON approval can be very expensive. General costs associated with the application process include the following:

- Filing fees: Depending on the state, fees can range from \$2,000 to \$15,000 and up.
- CON consultant fees: A CON consultant is a local who is knowledgeable about the state in which the application is being filed. This is the person who will ultimately complete the application for submission. Amounts

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vary by state but expect to spend between \$10,000 and \$35,000 depending on the complexity of your project and the state in which your facility is located.

- **Attorney fees:** You will typically need to involve two or three law firms in the application process; one to represent you in the CON hearing, one to help you secure your center's property and execute the lease option, and one to help you formalize the partnership/LLC. Since you are trying to form a legitimate organization, remember that you have to have a location for your center in preparation for the filing of your CON documents. Rates vary by state, but examples include \$18,912 for legal fees in Tennessee and \$41,777 for fees in Michigan.
- **Property:** You typically must have a piece of real estate secured whether in a physician's office or a freestanding building. When a lease option is required, expect to make a hefty deposit (\$12,500 or more in some cases).
- **Architectural renderings:** In addition to land, you must have preliminary drawings of your proposed center along with a detailed budget. Examples include \$9,368 spent on drawings in Michigan and \$2,180 on drawings in Tennessee.
- **Other expenses:** Don't forget to include expenses associated with travel and lodging, staff time, resources, and meetings.

So what does it all mean? Be prepared for the CON process to cost more than you expect. Don't be surprised if your total bill starts at \$60,000, and be prepared for it to exceed \$100,000. And, if your application gets appealed, expect fees to quickly move to a higher tier.

6. Focus on the benefits to the state, not to you

You can count on your application being denied if you talk too much about how your project is going to help you. "Too many applicants focus on the benefits they will receive," says Ed Day, an expert CON consultant in Nashville. "To increase your chances of success, focus on the benefits your project will bring to the community. Issues like access, quality, and need are of paramount importance to the CON board."

Dawn Carter, president of Health Planning Source in Chapel Hill, N.C., confirms this idea. "Understand the competitive impact of your project on other existing programs in your service area," she says. "In particular,

make sure you clearly understand how your project fits into the state health plan (if your state has one)."

7. Polish your application

Understand that your application (and any subsequent filings) is a direct reflection on you and your project. According to Steve Cowherd, an experienced CON attorney with Jeffers and Ireland in Fairfield, Conn., "Your application needs to be polished. The CON reviewers look for projects that are well thought out, professionally presented, and that address the key issues in a logical manner."

Many states have an extensive application process that involves a letter of intent followed by a waiting period, filing fees, and submission of the application. This is then followed by another waiting period, and the posting of notices and/or hearings. Be forewarned that waiting periods can range anywhere from four to six months or longer depending on the processes in place in that state.

8. Take a deep breath and go for it!

Many valuable projects never get applied for because people think the CON process is going to be too difficult and too costly. While it's true that the CON process is both, don't rule the option out too soon. Even if you know a colleague who was turned down for a CON, it doesn't mean that getting state permission will be impossible. Day offers the following advice: "Look at the success rate of similar projects to get an idea about the potential acceptability of your proposed idea." In summary, the CON process is no doubt difficult, costly and time consuming, but if you prepare yourself by following a few basic guidelines, it doesn't have to be impossible. □

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