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## CON Section, May I?

*Shorts on Long Term Care September 2010*

09.02.2010

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Thinking of converting semiprivate to private rooms, or renovating an existing facility to make it more home-like and family-friendly? Considering relocating existing skilled nursing beds to an adjacent county? Planning to convert existing CCRC beds for nursing care or relocate CCNC nursing beds to a sister community in a neighboring county? Some of these projects would require a certificate of need (CON) under North Carolina's CON law, while others would not. Either way, a provider will almost always want to ask, "CON Section, may I?"

Substantial renovations, expansions or replacements of existing skilled nursing facilities and adult-care home facilities (even those in excess of \$2 million) that do not result in a change in bed capacity and that involve (1) converting semiprivate resident rooms to private rooms, (2) implementing innovative and more home-like dining and living spaces, such as cafes and kitchenettes, and/or (3) renovating other common areas to improve residents' quality of life, are specifically excluded from CON review, provided all of the conditions included in the statutory exemption are met. Even for such projects that do not require CON review, the prudent action plan begins with confirming a project's exempt or no-review status from the get-go by first consulting with your CON attorney and then checking in with the CON Section. Indeed, written notice to the CON Section is required for a nursing facility or adult care home renovation project that falls within the above-mentioned exemption in order to demonstrate that the proposed project qualifies for the exemption.

Tight lending markets, decreased reimbursement, and other factors are causing some providers to change course on projects for which they have CONs in hand but have not yet completed – which they can do provided the project continues to materially comply with the approved application and the conditions of the issued CON. Just as with new undertakings, a provider planning changes to an ongoing CON project will usually want to make sure the CON Section agrees that the revised project will continue to be consistent with the application and the CON.

An early consult with legal counsel and the CON Section regarding a project's exempt or no-review status can help you anticipate potential questions and legal challenges from the CON Section or a competitor, and shape the details of your project accordingly. Familiarity with the agency's current hot-button issues and recent developments from appellate court opinions applying the CON law are often key to developing a successful proposal. For larger undertakings or projects expected to be opposed by a competitor, you may also want to informally explore the details of the proposed project with the CON Section before seeking an official written determination. Clearly presenting a no-review, exemption, or material compliance question to the CON Section in a way that addresses possible legal as

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well as factual questions can make all the difference in terms of getting a timely, affirmative decision from the agency and undercutting or sidestepping potential legal challenges to the project. Better to deal with a question or potential legal obstacle before your project gets rolling and major expenses are incurred than to be pulled up short in the midst of development, which can result in costly delays and lost opportunities.

Our CON team has a combined 76 years of experience in helping many different types of providers, including long term care companies, navigate a wide variety of capital projects through the CON law, ranging from material compliance, exemption, or no-review requests to complex CON applications in hotly contested competitive reviews.

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