



CONNING

the Competition

A Nationwide Survey of
Certificate of Need Laws

By Jaimie Cavanaugh
Caroline Grace Brothers
Adam Griffin
Richard Hoover
Melissa LoPresti
John Wrench

August 2020



INSTITUTE
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EXECUTIVE SUMMARY

A certificate of need (CON) is a government-mandated permission slip to start or expand a business. Think of a CON like an expensive admission ticket to access an exclusive club. You can be sure that those who are lucky enough to get in do their best to keep others out.

CON programs were conceived with the goal of controlling healthcare costs and increasing access to care. But they have been proven to do the opposite. States with CON laws have higher healthcare costs and fewer medical services per capita. The overwhelming evidence, including the unwavering opinion of the federal government for more than three decades, has been that CON laws are a policy failure. The solution, then, is obvious. States should repeal CON laws.

A dozen states, including California, Texas and Pennsylvania, have done just that. Non-CON states account for nearly 40% of the nation's population and have recognized that CON laws are a

government-mandated barrier to healthcare.

Unfortunately, 39 jurisdictions maintain CON laws that harm patients and providers. Providers need flexibility, especially in an unpredictable industry like healthcare. For example, in early 2020, when COVID-19 infections began sweeping the nation, 25 jurisdictions quickly suspended CON requirements to allow healthcare facilities to respond quickly. The pandemic exposed the preexisting flaws with CON laws.

This report does not seek to join the ample authority showing that the experiment with CON laws has failed. Instead, it is a comprehensive guide to the state of CON laws today. This report contains an overview of each jurisdiction that maintains a CON program. Sometimes, the best evidence of a policy's pitfalls is simply seeing the policy laid out in plain terms. The report also contains a first-of-its-kind account of how each jurisdiction modified its CON policies in response to COVID-19, if at all.

Key Findings

Closely reviewing the nation's 39 CON jurisdictions reveals an incoherent doctrine. There is no rhyme or reason to what services require a CON. This strongly suggests that CONs are driven less by the government's perception of what will improve patient health and more by lobbying efforts of powerful insider groups within each state.

- 1
 - » Nevada only has one facility CON, which it applies to hospitals in rural areas. Alabama, Florida, Kentucky, Oregon and Washington, on the other hand, only require CONs in urban areas. In those states, the laws contain explicit exceptions that allow rural providers to operate without CONs.
 - » In New York, skilled nursing facilities must get a CON to add beds designated specifically for AIDS patients. Yet Connecticut maintains a specific exception for nursing home beds restricted for use by AIDS patients. Those beds do not require a CON. Missouri goes a step further and allows full nursing homes dedicated to the care of AIDS patients to open without a CON.
 - » Many states require facilities to obtain a CON to offer cardiac or cardiovascular surgeries, but not other types of surgeries. Hawaii is the only state to require a CON for neurosurgery.
 - » Most states regulate hospice care and/or hospice facilities, but Connecticut and Maine maintain exceptions for hospices so that they are not covered by CONs.

CONs are not limited to facilities with large capital investments as originally imagined. CONs were first envisioned as a tool to prevent two hospitals from opening around the block from each other. Unfortunately, today, CONs are required for hundreds of minute, inexpensive and often mundane activities. Requiring a CON for high-demand services like primary care offices or imaging equipment is unnecessary and harms patients by decreasing access to needed services. Additionally, requiring CONs for a patchwork of inexpensive or highly specific projects forces providers to spend valuable time and money seeking CONs for relatively inexpensive things, such as:

- 2
 - » Adding or removing a single hospital bed;
 - » Opening a home health agency;
 - » Converting an existing hospital bed to a different use (e.g., psychiatric bed to intensive care unit bed);
 - » Adding ventilator services to a facility;
 - » Performing a small or necessary renovation.

3

Moratoria are more dangerous than CONs. Twelve states maintain moratoria, which typically prohibit specific facilities from opening or adding beds. If CONs make increasing healthcare facilities and services more difficult, moratoria make it impossible and they should be repealed or allowed to expire.

4

CONs that apply solely to new technology undercut the justification that government must prevent duplication of services. Connecticut, for example, maintains a CON for “equipment utilizing technology not previously used in the state.” Iowa does the same. It cannot be, as originally argued, that CON laws decrease costly duplication of services because, where a CON is required for brand-new technology, there is no duplication of service.

5

Some states may use CON laws as a tool to slow the growth of nursing homes and long-term care facilities. Florida, Indiana and Ohio’s CON programs exclusively regulate such facilities. The tendency of all states to heavily regulate nursing homes, intermediate care homes and long-term care homes could be due to concerns about controlling rising indigent care costs as the population ages.

CON application procedures are too expensive and take too long:

- » **CON application fees vary greatly across states.** CON applications cost \$200 in Louisiana but cost up to \$300,000 in the District of Columbia. In Florida, the minimum application fee is \$10,000. Hawaii charges a percentage of a proposed project cost with no maximum. New Jersey charges a flat fee plus a percentage of a proposed project with no maximum.
- » **On average, agencies take two to four months to review applications, but the process often takes longer.** Worse, the process can be delayed if competitors intervene. In Arizona, the application process lasts 450 days.
- » **Some states restrict how often they review CON applications.** For example, Indiana only reviews CON applications once annually. Ohio reviews most CON applications on an ongoing basis, except applications to relocate long-term care beds to a county with fewer long-term care beds than needed—those are only reviewed once every four years. Missouri requires CON applications to be filed at least 71 days before the CON committee meets or else the application will not be reviewed until the following meeting.
- » **In 34 of 39 jurisdictions, competitors may object to CON applications.** When a competitor objects, it often triggers the equivalent of a full-blown trial requiring the applicant to hire an attorney and a team of consultants and experts to introduce evidence that the proposed project is “needed.”

CON programs advantage established players. Multi-million-dollar hospital conglomerates have attorneys who can wade through the web of CON requirements and who know how to use CON procedures as a weapon to stifle competition. New providers are the ones who suffer. Some start the application process only to give up when a competitor picks a fight. Others give up without even applying in the first place. Patients deserve better.

Ending CON programs, or at the very least, reducing CON requirements is the obvious response. Repealing CON programs in their entirety, repealing the majority of CON requirements or reducing the procedural burdens associated with the CON application process are the right solutions. Doing so will give patients access to more healthcare choices and will allow providers to prioritize patients over paperwork.

INTRODUCTION

A certificate of need (CON) is a government permission slip that is required to enter certain industries.

Imagine you came up with the perfect hamburger recipe and wanted to start a new restaurant. But before you could, you had to prove that your town “needed” a new hamburger restaurant. And to prove this, you had to show that your restaurant would not take away customers from any of the existing fast food chains in town—even though, of course, the whole reason you want to start your restaurant is to provide customers with something different and better.

Now imagine the application to open costs thousands of dollars. On top of that, the only way to prove there is a “need” for a new hamburger restaurant is to engage in full-blown litigation against the existing chains that have plenty of money to oppose your application. Do you risk it and apply? Or do you give up and go into a different business? And even if you’re lucky and get a CON, a year later if an appliance breaks in your kitchen, you may find yourself going through the same process just to buy a replacement.

This is how CONs function in the healthcare market. Predictably, restricting the supply of healthcare facilities and services harms patients and would-be providers. CONs reduce access to medical services, raise healthcare costs and stifle innovation. The only winners are existing providers who benefit from decreased competition.

This report paints a broad picture of the complex and varied nature of CON laws in the healthcare industry. It is one thing to hear that CON laws fail to increase access to healthcare, reduce costs or increase quality of care,¹ but it is quite another to see, compiled and standardized, the full maze of red tape that providers must wade through simply to open new facilities or offer new services. And CON laws do not ensure quality or safety—

other laws and regulations exist for that purpose.

Today, 35 states and the District of Columbia maintain CON laws. Another three states enforce quasi-CON requirements. That means 39 jurisdictions purposely restrict the growth of healthcare facilities and services. Across these jurisdictions, entrepreneurs and medical providers are required to apply for and receive a government permission slip before taking hundreds of actions—from big-ticket expenditures such as opening a surgery center, to small items such as changing a room from single occupancy to double occupancy. In West Virginia, a hospital must go through the entire CON process just to add ventilator services.

Consider this example from Kentucky.² Louisville is

home to a Nepali-speaking population that numbers in the thousands. In 2018, Nepali immigrants and entrepreneurs Dipendra Tiwari and Kishor Sapkota noticed their commu-

nity had a need for Nepali-speaking home healthcare services. So they decided they would open a home health agency to fill that need.

Unfortunately for Dipendra and Kishor, the Kentucky Cabinet for Health and Family Services uses a crude, “one-size-fits-all” formula to determine whether a county needs additional home health agencies—a formula that *required* the Cabinet to deny their CON application. Still, a \$2 billion healthcare conglomerate stormed in and further objected to the application to ensure it would not have a new competitor. Unsurprisingly, the Cabinet denied the application. As a result, Dipendra and Kishor cannot start their business and their community is left without home health aides that speak their language.

What happened in Kentucky is all too common. Thirty-four jurisdictions allow competitors to intervene in the application process to object to applications. Hospitals and existing healthcare providers know that

39 jurisdictions purposely restrict the growth of healthcare facilities and services.

1 Maureen K. Ohlhausen and Gregory P. Luib, *Brother, may I?: the challenge of competitor control over market entry*, 11–17 *Journal of Antitrust Enforcement* (Sept. 17, 2015), https://www.ftc.gov/system/files/documents/public_statements/801861/150917brothermayi.pdf.
2 See <https://ij.org/case/kentucky-con/>.



CON programs give them a competitive advantage by allowing them to block competitors from ever offering new services. That's why they fight to keep CON laws on the books.

Unfortunately, patients are the ones who suffer most. Per capita, patients in CON states have access to fewer hospitals, hospital beds, dialysis clinics, ambulatory surgical centers, medical imaging centers and hospice facilities.³ Thus, as lawmakers, healthcare advocates or individuals concerned with their own healthcare options consider how to increase access to needed medical services, repealing CON laws should be their top priority.

CON Laws in Practice

Across the country, CON laws apply to over 100 types of facilities, healthcare services and equipment. In most cases, submitting a CON application begins with filling out a lengthy application. Applications can be tens or hundreds of pages long. Often an applicant must hire an expert to prove there is a "need" for a new medical service.

These applications are costly. Flat application fees range from \$100 dollars in Arizona up to \$250,000 in Maine. In Hawaii, applicants pay a percentage of the proposed project cost with no statutory maximum. In New Jersey, applicants pay a flat fee plus a percentage of the proposed project cost with no maximum. In those states, the more expensive the project, the more expensive the application.

Cost is not the only burden—applicants must also deal with delays that can stretch out for months or years. For example, many states review CON applications within two to four months, but the application process in Arizona lasts 450 days—the longest in the country.

In other states, the reviewing agency considers applications infrequently. Indiana, for example, reviews

CON applications only once annually. Virginia reviews applications twice annually. And that's nothing compared to Ohio's review of applications to relocate long-term care beds to a county with fewer long-term care beds than needed—that review is only conducted once every four years.

To make matters worse, 34 of the 39 jurisdictions with CON programs allow an applicant's would-be competitors to object to CON applications. In many instances, this means a direct competitor can intervene in the application process to argue that the state should deny the application. In Minnesota, applicants must specify in their initial applications whether their direct competitors support or oppose their project.

In most states that allow objections, direct competitors are allowed to present testimony as to why a new service is not needed or why an application should be denied. This often amounts to full-blown litigation and leads to further costs and delays. Once a competitor intervenes in the application process, an applicant usually needs to hire an attorney to counter the intervenors' arguments. If the applicant cannot afford to hire an attorney, he or she may have to abandon the application altogether.

Even if an applicant succeeds in getting a CON, more troubles can arise. In states like Mississippi and Oklahoma, for example, competitors can appeal a CON decision, forcing the applicant to face more hearings and delays. It's no surprise that some medical entrepreneurs see how few CONs are actually granted each year and give up on their dreams without applying at all.

The process, it seems, is not built to prioritize the needs of patients or encourage innovation in healthcare. Instead, the process protects incumbents and creates a massive web of red tape for entrepreneurs.

3 Matthew D. Mitchell, Elise Amez-Droz and Anna K. Parson, *Phasing Out Certificate-of-Need Laws: A Menu of Options*, 2 MERCATUS CENTER (Feb. 2020) (citation omitted), <https://www.mercatus.org/publications/healthcare/phasing-out-certificate-need-laws>.

Origin of CON Laws

Basic economic theory predicts that supply is inversely correlated with cost. That is, if you increase the availability of a good or service, prices fall. If you restrict the supply of a service, prices rise. CON laws, then, attempt to contradict this basic logic. They restrict the supply of healthcare facilities and services in hope of controlling costs and increasing access to care.

The original theory behind CON laws—which has since been debunked—says that, in the healthcare arena, supply drives demand.⁴ The flawed thinking was that reducing the supply of healthcare would reduce overall healthcare expenditures. In 1964, New York enacted the nation's first statewide CON law.⁵

Hospitals quickly realized that they benefitted from the reduced competition. To protect its members' financial interests, the American Hospital Association (AHA) began lobbying to convince other states to enact CON laws.⁶ The AHA's campaign was successful. By 1978, 36 states had done so.⁷

Congress took notice of the growing popularity of CON laws and, in 1974, enacted the National Health Planning and Resources Development Act (NHPDA) to reduce federal healthcare spending.⁸ The Act explicitly required states to enact CON laws to receive certain federal reimbursements. Unsurprisingly, by 1978, 42 states and the District of Columbia had CON laws.⁹ At one point, every state except Louisiana had a CON law.

CON laws were intended to lower healthcare costs, prevent the unnecessary duplication of services and increase access to quality care.¹⁰ But the experiment with CON laws failed.¹¹ To its credit, Congress eventually realized that CON laws did not achieve their purported goals.

In 1986, Congress repealed NHPDA because it “failed to control healthcare costs and was insensitive to com-

munity needs.”¹² Since that time, in a rare admission of a policy failure, the federal government has continued to disavow CON laws.¹³

Current Regulatory Landscape

Since the 1980s, 15 states have successfully repealed their CON programs. Although Arizona, Minnesota and Wisconsin are among the 15 states that repealed their CON programs, they maintain quasi-CON programs today. Thus, a dozen states, containing 40% of the population,¹⁴ have no CON laws at all.

Patients in the remaining states continue to suffer because of outdated CON laws. They pay more for medical services,¹⁵ and per capita, patients in CON states have access to fewer hospitals, hospital beds, dialysis clinics, ambulatory surgical centers, medical imaging centers and hospice facilities.¹⁶

Instead of rushing to repeal CON laws, many states have done the opposite, allowing CON programs to expand for decades—often at the bidding of hospitals and other incumbents. This haphazard growth has led to inconsistent, outdated or contradictory CON provisions.

States implement CON requirements inconsistently. In Nevada, only hospitals in rural areas need CONs to open. Just the opposite, Alabama, Florida, Kentucky, Oregon and Washington apply their CON requirements in urban areas while exempting rural areas. Likewise, most states require CONs for hospice services or facilities, but Connecticut and Maine do not. These types of examples, which abound throughout the state profiles, strongly suggest that CONs are driven less by the government's perception of what will improve patient health and more by lobbying efforts of powerful insider groups within each state.

In other instances, CON requirements are outdated and sometimes use downright offensive language. The tables

4 Suzanne L. Zelenka, *Controversy in Health Care: A Hard Look at North Carolina's Certificate of Need Laws*, 20 N.C. J.L. & Tech. On. 333, 341 n.29 (May 2019).

5 Patrick John McGinley, *Beyond Health Care Reform: Reconsidering Certificate of Need Laws in A 'Managed Competition' System*, 23 Fla. St. U. L. Rev. 141, 147 (1995) (noting, however, that the basic policy can be traced back as far as the Great Depression, when communities began considering need before building new hospitals).

6 McGinley, *supra* note 5, at 147.

7 McGinley, *supra* note 5, at 147.

8 Pub. L. No. 93-641, 88 Stat. 2225 (1975) (codified at 42 U.S.C. § 300k-300n-6 (1982)), *amended by* Health Planning and Resources Development Amendments of 1979, Pub. L. No. 96-79, §§ 1-129, 93 Stat. 592 (codified at 42 U.S.C. §§ 300k-300t (1976 & Supp. V 1981)), *repealed by* Pub. L. No. 99-660, § 701, 100 Stat. 3743, 3799 (1986)).

9 McGinley, *supra* note 5, at 147–49.

10 See McGinley, *supra* note 5, at 147–57.

11 See McGinley, *supra* note 5, at 167–74; Ohlhausen and Luib *supra* note 1, at 11–14.; Mitchell *supra* note 3, at 2.

12 McGinley, *supra* note 5, at 157; see U.S. Dep't of Health & Human Servs., U.S. Dep't of Treasury, U.S. Dep't of Labor, *Reforming America's Healthcare System Through Choice and Competition*, 50 n.170 (Dec. 3, 2018), <https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf> (recommending repeal or significant reduction of CON laws).

13 See, e.g., U.S. Dep't of Health and Human Servs., U.S. Dep't of the Treasury, & U.S. Dep't of Labor, *Reforming America's Healthcare System Through Choice and Competition*, 50–59 (Dec. 3, 2018); Fed. Trade Comm'n & Dep't of Justice, *Improving Health Care: A Dose of Competition*, ch. 8 at 1–6 (July 2004), <https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf>.

14 Mitchell, *supra* note 3, at 2.

15 Ohlhausen and Luib, *supra* note 1, at 15.

16 Mitchell, *supra* note 3, at 2 (citation omitted).

within the report simply reproduce terms as used in state law and regulation, but this should give lawmakers another reason to reconsider CON laws.

Some state profiles reveal contradictory CON laws. In North Carolina, a statute requires a CON for air ambulances. N.C. Gen. Stat. § 131E-176(16)(f1)(1). Further research, however, reveals that in 2013, the North Carolina Department of Health and Human Services repealed the coordinating regulation. The Department has confirmed that it no longer requires a CON for air ambulances.¹⁷ But simply reading the state's statutes would not make that clear.

Many states maintain dozens of exceptions. In those states, it is easy to see how various lobbying efforts achieved carve-outs for certain facilities while being careful to leave the overarching structure of the CON program in place.

On top of the myriad individual CON requirements that apply to every type of medical equipment or procedure, some states apply CON requirements to any healthcare project that exceeds a specific expenditure limit. This can happen in two ways. Sometimes a CON requirement is not triggered unless an applicant will spend above the minimum expenditure. For example, none of Alaska's 40 CON requirements are triggered unless an applicant's project will cost more than \$1.5 million. This approach allows existing providers some freedom to expand where necessary without having to get permission each time.

Other states, however, use expenditure minimums as "catch-all" CONs. For example, Kentucky requires CONs for 16 specific types of facilities. In addition, Kentucky maintains a catch-all facility CON for facilities that will cost more than \$3.3 million, as updated annually. This means a CON is required for *any* project over that amount, even if it is not one of the 16 facilities already contemplated by the CON program. It is hard to see how this requirement benefits patients. It is easy to see how it benefits existing facilities.

CON Laws and COVID-19

In early 2020, the rapid spread of COVID-19 created an unprecedented demand for healthcare services. At the time of publication, more than 2.5 million COVID-19 infections had been reported in the U.S., resulting in over 150,000 deaths.¹⁸

This report does not pretend to offer a solution for the pandemic. The pandemic has, however, exposed the preexisting problems with CON laws. In fact, as of May 15, 2020, 25 jurisdictions had suspended or loosened CON requirements.¹⁹ Thus, two-thirds of CON jurisdictions promptly recognized that healthcare providers required greater flexibility to respond to the pandemic.

The states' responses were varied. Some, like Georgia and Tennessee, broadly suspended CON requirements for the duration of the state of emergency. Others, like the District of Columbia, claimed to be processing emergency CON applications to allow existing facilities to expand, though this process was never announced publicly. Thus, providers may not have known the District was processing temporary CON applications and the public has no way of knowing how many temporary applications were granted.

Included in these 25 states are those with existing emergency CON regulations. Emergency regulations allow providers to apply for temporary CONs in specific situations. Yet providers should not be burdened with paperwork and application fees during emergencies.

Tennessee had the most practical response. It broadly waived CON requirements and clearly explained that it had done so. This allowed providers to expand capacity without being subjected to additional regulatory burdens.

Now, states should make their temporary CON law waivers permanent. The burdens associated with CON laws—higher healthcare costs, diminished quality and decreased access—exist both during and outside a pandemic. States that want to provide better healthcare options for their citizens and be better prepared for future emergencies must seriously consider repealing CON laws.

17 See also *Med-Trans Corp. v. Benton*, 591 F. Supp. 2d 812, 812 (E.D.N.C. 2008).

18 Centers for Disease Control and Prevention, *United States COVID-19 Cases and Deaths By State*, <https://www.cdc.gov/covid-data-tracker/#cases> (last viewed July 30, 2020.)

19 Each state profile describes whether that jurisdiction waived or loosened its CON requirements in response to COVID-19. This data was collected as of May 15, 2020. Therefore, any states that took initial action to waive or loosen CON requirements after May 15, 2020 will not have their actions included in this report.

HOW TO READ THIS REPORT

It was the intent of the authors to provide a comprehensive picture of the remaining healthcare CON regimes. It is one thing to study the near-universal consensus of government officials, academics and lawmakers concluding CON laws have failed to produce any positive outcomes. It is another thing entirely to read, line by line, the existing CON requirements around the country.

Alternatively, the report is just as useful for those who want to learn about their home state and compare its CON program to a neighboring state. Each state profile can be read alone, as a straightforward snapshot of how a state's CON program functions.

Each profile: (1) introduces the state; (2) explains whether the state suspended its CON laws in response to COVID-19 by May 15, 2020; and (3) describes the state's application process, including how long the application process takes and how much it costs. This information allows for uniform comparisons across these areas.

Next, each state page has an identical Types of CONs table. Again, to allow for broad comparisons, this table classifies CONs into six broad categories—hospital beds, beds outside hospitals, equipment, facilities/buildings, services and emergency medical transport. Eight states maintain CONs across all six broad categories. Eighteen of the 39 CON jurisdictions maintain CONs across five categories. Because there is a high degree of variation within each category, the table also clarifies how many types of CONs a state requires within each category.

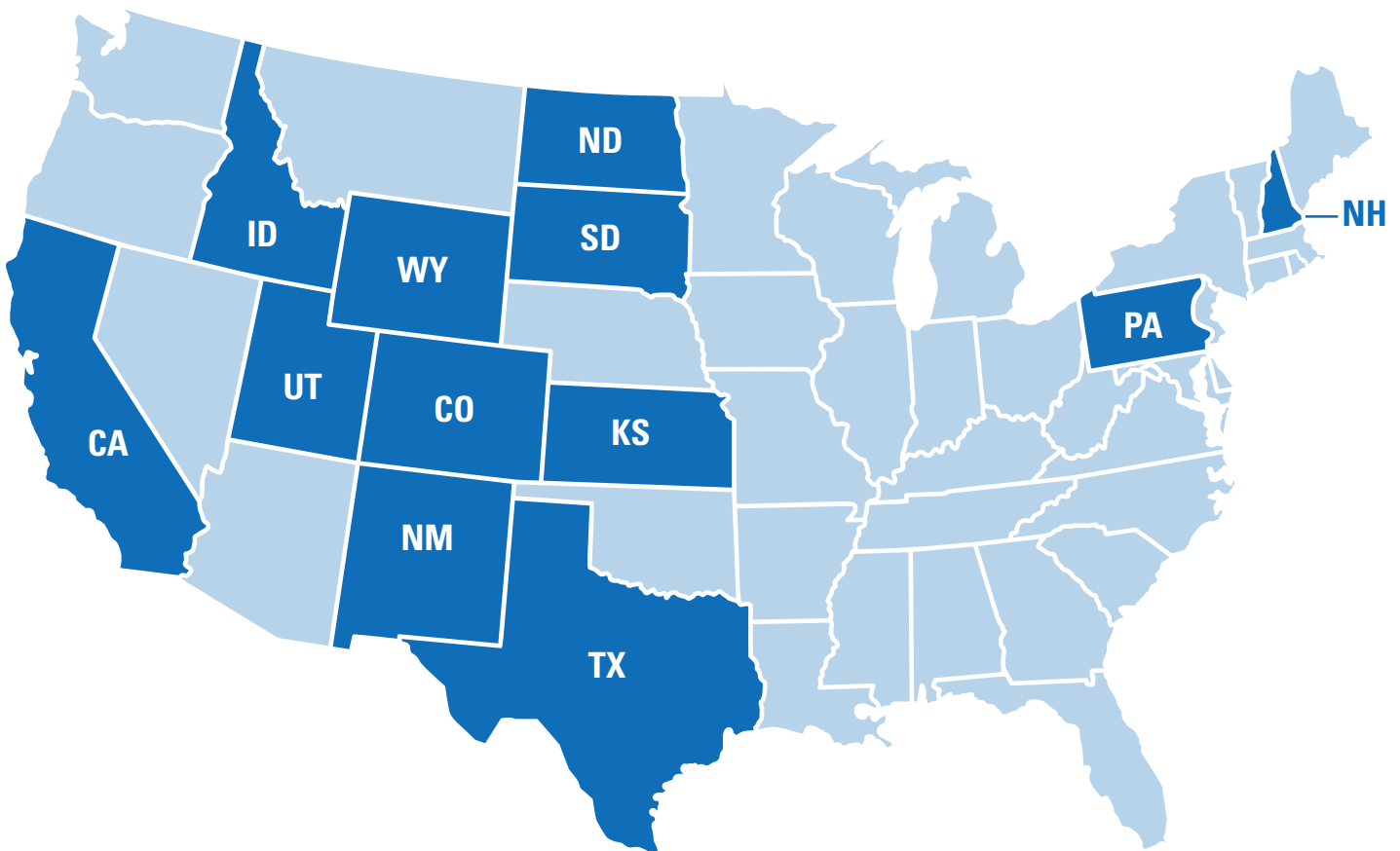
1. **Hospital beds.** Hospitals are required to get CONs for many types of beds, such as swing beds, hospice beds, psychiatric beds or neonatal intensive care beds (sometimes called bassinets). In some states, CONs are required for adding beds at specialty hospitals like a tuberculosis care hospital, but not general care hospitals or a state-run hospital. Thirty-two states maintain at least one CON in this category.
2. **Beds outside hospitals.** This category includes CONs for adding beds in nursing homes, intermediate care facilities or ambulatory surgical centers. Many states take a piecemeal approach to this category, picking and choosing which facilities require CONs and which do not. Thirty-six states maintain at least one CON in this category.
3. **Equipment.** This category includes devices and machines such as imaging scanners or radiation therapy equipment. This is a common place to find minimum expenditure requirements. Twenty-seven states maintain at least one CON in this category where a CON is required for any type of equipment that costs over a predetermined amount.
4. **Facilities/buildings.** This category includes freestanding buildings like dialysis centers, hospice centers or mental health facilities. Even remodeling a facility sometimes requires a CON. Like the equipment category, facilities and buildings are sometimes subject to catch-all CONs that apply whenever a provider will spend more than a predetermined amount on a project. Thirty-six states maintain at least one CON in this category.
5. **Services.** This category includes the most varied types of CONs, ranging from specialties like open heart surgery and organ transplants to primary care and pediatric services. Even established providers must continue to get CONs to offer their patients new services. Thirty-one states maintain at least one CON in this category.
6. **Emergency Medical Transportation.** This category applies to ground and air ambulances and is the least utilized CON category. Overall, 10 states maintain at least one emergency medical transport CON.

A note about moratoria. Twelve states maintain moratoria. Moratoria are more dangerous than CONs—they completely prohibit new facilities or services. Although most CON processes allow for the possibility that new facilities could open if certain conditions are met, moratoria do not even allow an applicant to prove a need exists. Moratoria apply most commonly to specific facilities or specific types of beds.

The last piece of information given for each state is the CON Exceptions table. This table lists all the state's exceptions to its CON laws. Some states have only a few enumerated exceptions, while other states, like Kentucky and New Jersey, maintain dozens of exceptions. States with a high number of exceptions should consider whether broadly repealing CON laws would be an easier way to regulate the healthcare industry.

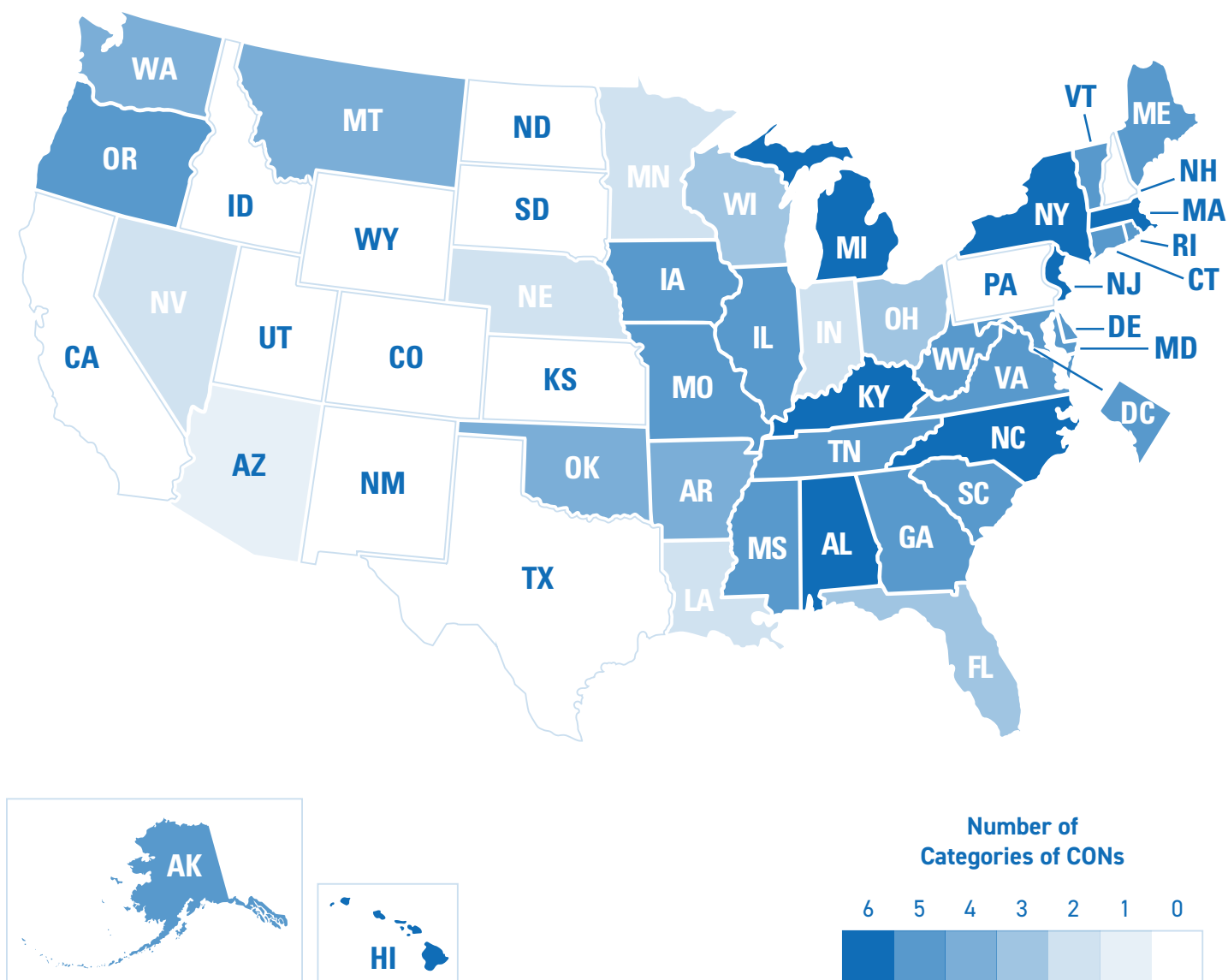
SUMMARY MAPS

States Without CON Laws

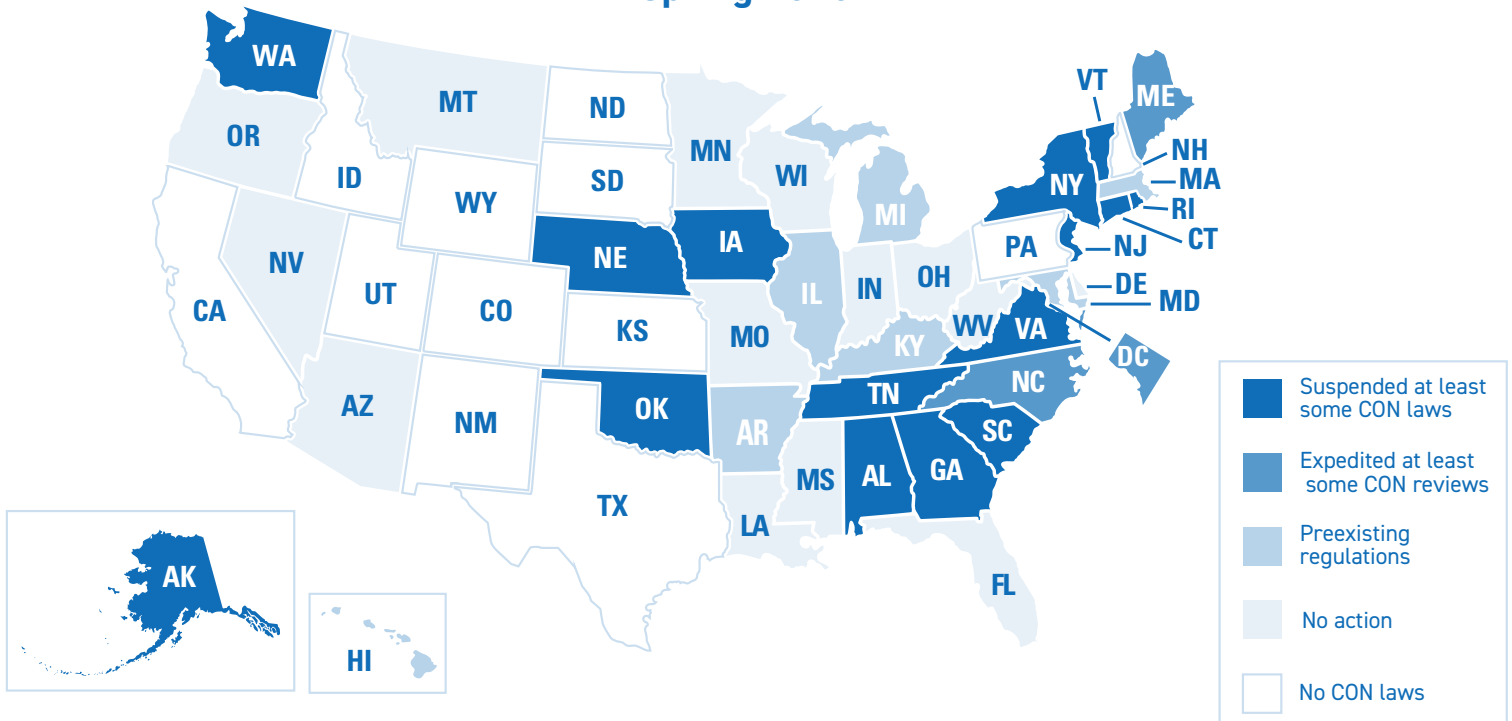


SUMMARY MAPS

States That Regulate Healthcare Access in the Most Categories

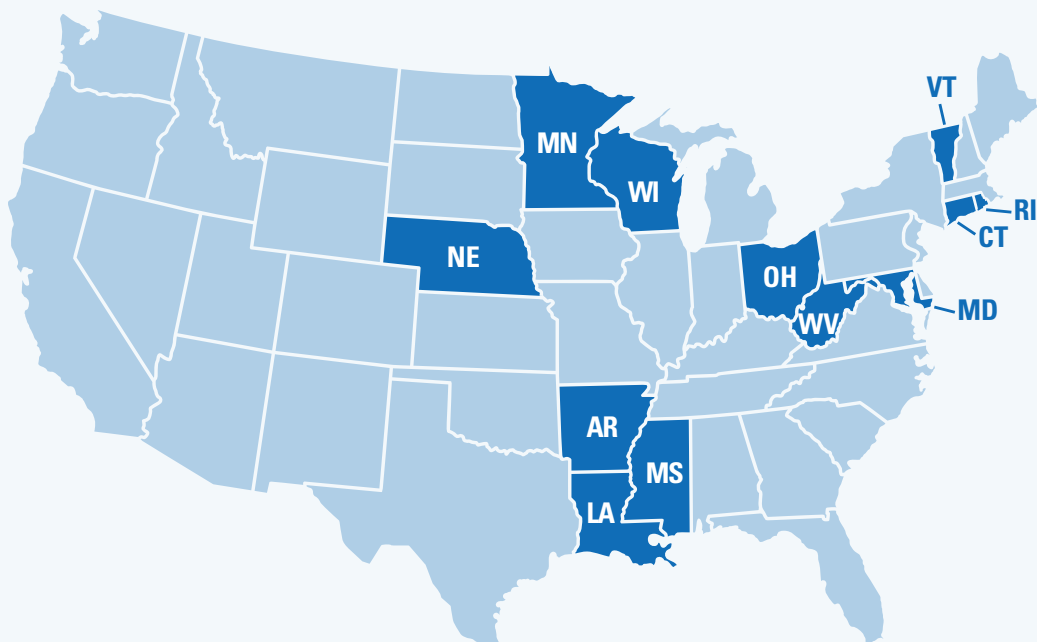


COVID-19 Responses in Spring 2020



Moratoria are more dangerous than CONs because they are a flat ban on new facilities or services. In comparison, CON programs may allow for new facilities or services if certain (often demanding) conditions are met, but the same is not true for moratoria. That is why moratoria should be repealed or allowed to expire.

States With Moratoria



ALABAMA

Alabama is one of eight states to require CONs across all six broad categories—hospital beds, beds outside hospitals, equipment, facilities, services and emergency medical transport.

Alabama maintains 47 individual CON requirements, 19 of which apply to facilities and buildings. The state also maintains a catch-all CON. That is, if no specific CON applies, the catch-all CON requires healthcare facilities to obtain a CON if they intend to spend \$4 million or more for any reason. Ala. Code § 22-21-263(a)(2). In Alabama, a public hearing is required for all CON applications before the CON Review Board will issue a decision. Ala. Admin. Code r. 410-1-7-.17.

Alabama's COVID-19 Response

On April 2, 2020, Governor Ivey issued a proclamation requiring relevant state agencies to “promulgate emergency rules to provide for temporary waivers to the Certificate of Need process to permit new services, facilities, and other resources needed for the treatment of patients affected by the appearance of COVID-19, or to free up bed and treatment space at existing healthcare facilities to permit such needed treatment.” [Proclamation](#) at 3–4 (Apr. 2, 2020).²⁰ In response, the State Health Planning and Development Agency (SHPDA) promulgated an [emergency rule](#)²¹ declaring an existing need for new or expanded services, beds, facilities and equipment and waiving ordinary CON requirements through August 5, 2020. *See* COVID-19 State of Emergency, Ala. Admin. Code r. 410-2-5-.09-E (Apr. 7, 2020). This assumption of need allowed facilities to expand services or increase beds without first applying for a CON. Healthcare facilities were required, however, to notify SHPDA about any changes made pursuant to the emergency rule, and changes in service were required to cease within 60 days of the end of the state of emergency. As of May 15, 2020, Alabama had received notices that 38 facilities had expanded their facilities or services in response to COVID-19. *See* State Health Planning & Development Agency, [Temporary Waiver of Certificate of Need Requirements During State of Emergency](#).²²

Application Process

In Alabama, the CON application process typically takes 90 days. Ala. Admin. Code r. 410-1-7-.09. The Certificate of Need Review Board is required to hold a public hearing for CON applications at least 80 days, but not more than 90 days, after an application is complete. Ala. Admin. Code r. 410-1-7-.17(1)(a). Applications can be submitted at any time. The fee for a CON application ranges from \$3,500 to \$12,000. Ala. Admin. Code r. 410-1-7-.06(1)(b). Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied at the public hearing. Ala. Admin. Code r. 410-1-7-.13, -.17.

Types of CONs in Alabama

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	6	0	Any amount	Suspended
Beds Outside Hospitals	Yes	10	0	Any amount	Suspended
Equipment	Yes	2	0	\$2 million+	Suspended
Facilities/Buildings	Yes	19	0	Any amount	Suspended
Services	Yes	8	0	\$0 – \$4 million+	Suspended
Emergency Medical Transport	Yes	2	0	Any amount	Suspended

²⁰ Available at <https://ij.org/wp-content/uploads/2020/06/Ala.-Proc.pdf>.

²¹ Available at <https://ij.org/wp-content/uploads/2020/06/Alabama-Emergency-Rule.pdf>.

²² Available at <http://shpda.alabama.gov/Announcements/certificateofneed/COVIDWaiver/COVIDWaiver.aspx>.

Alabama CONs in Detail

Category	Types of CONs	Ala. Admin. Code r.
Hospital Beds	1. Addition of any type of beds.	410-1-4-.01(1)(c)(1)
	2. Relocation of beds between facilities.	410-1-4-.01(1)(c)(2)
	Reallocation of all of the following types of beds:	410-1-4-.01(1)(c)(3)
	1. General medical surgical beds.	410-1-4-.01(1)(c)(3)(i)
	2. Inpatient psychiatric beds.	410-1-4-.01(1)(c)(3)(ii)
	3. Inpatient/residential alcohol and drug abuse beds.	410-1-4-.01(1)(c)(3)(iii)
	4. Swing beds.	410-1-4-.01(1)(c)(3)(v)
Beds Outside Hospitals	1. Addition of any type of beds.	410-1-4-.01(1)(c)(1)
	2. Relocation of beds between facilities.	410-1-4-.01(1)(c)(2)
	Reallocation of the following types of beds:	410-1-4-.01(1)(c)(3)
	3. General medical surgical beds.	410-1-4-.01(1)(c)(3)(i)
	4. Inpatient psychiatric beds.	410-1-4-.01(1)(c)(3)(ii)
	5. Inpatient/residential alcohol and drug abuse beds.	410-1-4-.01(1)(c)(3)(iii)
	6. Inpatient rehabilitation beds.	410-1-4-.01(1)(c)(3)(iv)
	7. Skilled nursing care beds.	410-1-4-.01(1)(c)(3)(v)
	8. Intermediate care beds.	
	9. Transitional care beds.	
	10. Swing beds.	
Equipment	1. Capital expenditures in excess of \$2 million for major medical equipment that will be used to provide health services to persons admitted to a health care facility.	Ala. Code § 22-21-263(a)(2); see also Ala. Admin. Code r. 410-1-4-.01(1)(e)(1)
	2. New technology.	410-2-3-.08

Alabama CONs in Detail

Category	Types of CONs	Ala. Admin. Code r.
Facilities/Buildings	1. Generalized hospitals.	410-1-2-.05(1)
	2. Tuberculosis hospitals.	
	3. Psychiatric hospitals.	
	4. Long-term care hospitals.	
	5. Laboratories.	
	6. Outpatient clinics.	
	7. Skilled nursing facilities.	
	8. Intermediate care facilities.	
	9. Skilled care units in veterans' nursing homes and veterans' homes, operated by the Department of Veterans Affairs.	
	10. Intermediate care units in veterans' nursing homes and veterans' homes, operated by the Department of Veterans Affairs.	
	11. Rehabilitation centers.	
	12. Public health centers.	
	13. Surgical centers not requiring hospitalization.	
	14. Kidney disease treatment centers.	
	15. Community mental health centers.	
	16. Alcohol and drug abuse facilities.	
	17. Facilities for the developmentally disabled.	
	18. Hospice providers.	
	19. Health maintenance organizations.	
Services	1. Home health agencies.	410-1-2-.05(1)
	2. Any health services proposed to be offered through a health care facility not offered on a regular basis within the previous 12-month period.	Ala. Code § 22-21-263(a)(4); Ala. Admin. Code r. 410-1-4-.01(1)(d)
	3. Any capital expenditure in excess of \$4 million on behalf of a health care facility.	Ala. Code § 22-21-263(a)(2); <i>see also</i> Ala. Admin. Code r. 410-1-4-.01(1)(b)(3)
	4. Cardiac catheterization.	410-2-3-.03(1)
	5. Open heart surgery.	410-2-3-.03(2)
	6. Megavoltage radiation therapy.	410-2-3-.04(5)
	7. End stage renal disease services.	410-2-3-.05
	8. Organ transplants.	410-2-3-.09
Emergency Medical Transport	1. Fixed wing air ambulance.	410-2-3-.11(1)(a)
	2. Rotary wing air ambulance.	410-2-3-.11(1)(b)

Alabama CON Exceptions

No CON Required For:	Ala. Admin. Code r.
1. Private office of any duly licensed physician, dentist, chiropractor or podiatrist, whether for individual or group practice and regardless of ownership.	410-1-2-.05(2)(a)
2. Christian science sanatoriums.	410-1-2-.05(2)(b)
3. Veterans nursing homes or veterans' homes operated by the Dep't of Veteran Affairs, not in excess of 150 beds, to be built in Bay Minette, Alabama. 4. Veterans' nursing homes or veterans' homes operated by the Dep't of Veteran Affairs, not in excess of 150 beds, to be built in Huntsville, Alabama, for which federal funds under federal law are being considered by the U.S. Department of Veterans' Affairs prior to March 18, 1993.	410-1-2-.05(2)(c)
5. Increase in bed capacity at licensed skilled or intermediate care nursing facility if: (a) the increase does not exceed ten percent (10%) of the total nursing home beds of the applying facility, rounded to the nearest whole number, or ten beds, whichever is greater; and (b) the average rate of occupancy of the applying facility is ninety-five percent (95%) or greater during the 24-month period ending on June 30th of the year immediately preceding the application for exemption; and (c) the aggregate average rate of occupancy for all other skilled and intermediate care nursing home facilities situated in the same county as the applicant is ninety-five percent (95%) or greater during the 24-month period ending on June 30th of the year immediately preceding the application for exemption; and (d) the increase does not require capital expenditures exceeding the capital spending thresholds prescribed in 22-21-263(a)(2), or result in the addition of a new health service or result in the conversion of beds; and (e) the facility has not been granted an increase in beds under this exemption within the 24-month period immediately preceding the application; and (f) the applying facility is not an intermediate care facility designated ICF-MR by the State Board of Health and operated by the Department of Mental Health; and (g) the Executive Director of the State Agency approves the exemption after receipt of the proper application.	410-1-5A-.01(1)(a)-(g)
6. The replacement of equipment if: (a) such replacement does not change the purpose, use or application of the equipment; (b) the existing equipment is taken out of service; (c) the replacement equipment does not enable the health care facility to expand its health services; (d) the replacement equipment does not enable the health care facility to provide any health services not previously provided on a regular basis; and (e) the Executive Director approves the exemption after receipt of the proper application as indicated in 410-1-5-.02.	410-1-5-.01(1)(a)-(e)
7. Any newly-offered health service—other than those for long-term care—provided by acute care hospitals classified as “rural” by the U.S. Bureau of Census.	Ala. Code § 22-21-263(a)(4)
8. Acute care hospitals with less than 105 beds located over 20 miles from the nearest acute health care facility located within Alabama.	Ala. Code § 22-21-263(a)(4)

ALASKA

Alaska requires CONs within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. Alaska is the only state that maintains a standard minimum expenditure of \$1.5 million across all of its CONs, except its equipment CONs, meaning none of its other CON requirements are triggered until: (1) an individual or facility propose a project or service covered by a CON and (2) the project or service will cost more than \$1.5 million. Alaska Stat. § 18.07.031(a), (d). CON application fees in Alaska can cost as much as \$75,000.

Alaska's COVID-19 Response

On April 14, 2020, Governor Dunleavy issued an order allowing hospitals to temporarily increase bed capacity without a CON to respond to COVID-19. See [Amendment 3](#) (Apr. 14, 2020)²³ to COVID-19 Disaster [Order No. 2](#) (Mar. 31, 2020). The Governor's temporary CON suspension expired on May 12, 2020.

Application Process

In Alaska, the CON application process usually takes 60–180 days. Alaska Stat. § 18.07.045. Applications can be submitted at any time. The fee for a CON application ranges from \$2,500 to \$75,000. 7 Alaska Admin. Code § 07.079. Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. 7 Alaska Admin. Code § 07.082.

Types of CONs in Alaska

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	8	0	\$1.5 million+	Suspended
Beds Outside Hospitals	Yes	6	0	\$1.5 million+	-
Equipment	Yes	3	0	Any amount	-
Facilities/ Buildings	Yes	15	0	\$1.5 million+	-
Services	Yes	22	0	\$1.5 million+	-
Emergency Medical Transport	No	-	-	-	-

²³ Available at <https://ij.org/wp-content/uploads/2020/06/Alaska-Amd.-3.pdf>.

Alaska CONs in Detail

Category	Types of CONs	Alaska Stat.
Hospital Beds A CON is required if a change in the following types of bed is made that costs more than \$1.5 million. Alaska Stat. § 18.07.031(a), (d)	Alteration of the bed capacity of: 1. Private hospital. 2. Municipal hospital. 3. State hospital. 4. Federal hospital. 5. Psychiatric hospital.	§ 18.07.111(8)
	6. Tuberculosis hospital.	§§ 18.07.031(a)(2), 18.07.111(8)
	7. Acute care hospital.	7 Alaska Admin. Code § 07.900(19)(B)(i)
	8. Critical access hospital.	7 Alaska Admin. Code § 07.900(19)(B)(iii)
Beds Outside Hospitals A CON is required if a change in the following types of bed is made that costs more than \$1.5 million. Alaska Stat. § 18.07.031(a), (d)	Alteration of the bed capacity of a: 1. Independent diagnostic testing facility. 2. Residential psychiatric treatment center. 3. Skilled nursing facility. 4. Kidney disease treatment center (including freestanding hemodialysis units). 5. Intermediate care facility. 6. Ambulatory surgical facility.	§ 18.07.111(8)
Equipment	1. Positron emission tomography.	Alaska CON Standards and Methodology, VII, B (Dec. 9, 2005) ²⁴
	2. Computed tomography.	Alaska CON Standards and Methodology, VII, C
	3. Magnetic resonance imaging.	Alaska CON Standards and Methodology, VII, A

24 Available at <https://ij.org/wp-content/uploads/2020/07/AK-CON-2005.pdf>.

Alaska CONs in Detail

Category	Types of CONs	Alaska Stat.
Facilities/Buildings A CON is required if the construction of a facility will cost more than \$1.5 million. Alaska Stat. § 18.07.031(a), (d)	1. Private hospital. 2. Municipal hospital. 3. State hospital. 4. Federal hospital. 5. Psychiatric hospital.	§ 18.07.111(8)
	6. Independent diagnostic testing facility. 7. Residential psychiatric treatment center. 8. Tuberculosis hospital. 9. Skilled nursing facility. 10. Kidney disease treatment center (including freestanding hemodialysis units). 11. Intermediate care facility. 12. Ambulatory surgical facility.	§§ 18.07.031(a)(1), 18.07.111(8)
	13. Conversion of a building or part of a building to a nursing home, regardless of cost.	See § 18.07.031(b)
	14. Construction of an acute care hospital.	§ 18.07.031(a)(1); 7 Alaska Admin Code § 07.900(19)(B)(i)
	15. Construction of a critical access hospital.	§ 18.07.031(a)(1); 7 Alaska Admin. Code § 07.900(19)(B)(iii)
Services A CON is required if the following facilities add services that cost more than \$1.5 million. Alaska Stat. § 18.07.031(a), (d)	Addition of a category of health services provided by a: 1. Private hospital. 2. Municipal hospital. 3. State hospital. 4. Federal hospital.	§§ 18.07.031(a)(3), 18.07.111(8)
	5. Kidney dialysis program. 6. Radiotherapy. 7. Burn unit. 8. Neonatal intensive care services.	§ 18.07.111(1)
	9. Laboratory services offered by a hospital.	Alaska CON Standards and Methodology, III, A.
	10. Cardiac catheterization.	Alaska CON Standards and Methodology, VII, D.
	11. Mobile diagnostic testing facility.	See 7. Alaska Admin. Code § 07.900(23)
	12. Open-heart surgery.	Alaska CON Standards and Methodology, VIII, B
	13. Addition of a category of health services provided by an acute care hospital.	§ 18.07.031(a)(3); 7 Alaska Admin. Code § 07.900(19)(B)(i)

Alaska CONs in Detail

Category	Types of CONs	Alaska Stat.
	14. Addition of a category of health services provided by a critical access hospital.	§ 18.07.031(a)(3); 7 Alaska Admin. Code § 07.900(19)(B)(iii)
	15. Addition of a category of health services provided by a psychiatric hospital.	§ 18.07.031(a)(3); 7 Alaska Admin. Code § 07.900(19)(B)(ix)
	16. Addition of a category of health services provided by an independent diagnostic testing facility.	§§ 18.07.031(a)(3), 18.07.111(8)
Services A CON is required if the following facilities add services that cost more than \$1.5 million. Alaska Stat. § 18.07.031(a), (d).	Addition of a category of health services provided by a: 17. Residential psychiatric treatment center. 18. Addition of a category of health services provided by a tuberculosis hospital. 19. Addition of a category of health services provided by a skilled nursing facility. 20. Addition of a category of health services provided by a kidney disease treatment center (including freestanding hemodialysis units). 21. Addition of a category of health services provided by an intermediate care facility. 22. Addition of a category of health services provided by an ambulatory surgical facility.	§§ 18.07.031(a)(3), 18.07.111(8)
Emergency Medical Transport	No CONs in this category.	

Alaska CON Exceptions

No CON Required For:	Alaska Stat.
1. The Alaska Pioneers' Home and the Alaska Veterans' Home administered by the Department of Health and Social Services under AS 47.55.	§ 18.07.111(8)(A)
2. The offices of private physicians or dentists whether in individual or group practice.	§ 18.07.111(8)(B); 7 Alaska Admin. Code § 07.001(b)
3. The operator of an ambulatory surgical facility may relocate to a new site in the same community as long as the bed capacity and number of categories of health services provided at the new site stay the same.	§ 18.07.031(c)
4. The operator of an ambulatory surgical facility may make an expenditure of any amount in order to relocate to a new site in the same community as long as the bed capacity and number of categories of health services provided at the new site stays the same.	§ 18.07.031(c)

ARIZONA

Arizona repealed its CON program—but it now has a “certificate of necessity” program that applies only to ground ambulances.

For this reason, some have deemed Arizona a “quasi-CON” state. Despite the fact that Arizona maintains only one certificate of necessity requirement, the application process is the longest in the nation, lasting 450 days. Ariz. Admin. Code § R9-25-1201(A), Tbl. 12.1. During the 450-day application process, every existing ground ambulance service provider in the affected region must be notified and given the opportunity to object to the application. See Ariz. Rev. Stat. § 36-2234.

Arizona’s COVID-19 Response

As of May 15, 2020, Arizona had not suspended its certificate of necessity requirement in response to COVID-19.

Application Process

In Arizona, the certificate of necessity application process takes 450 days. Ariz. Admin. Code § R9-25-1201(A), Tbl. 12.1. Applications can be submitted at any time. The filing fee is \$100 for the application and an additional \$200 per ambulance. Ariz. Rev. Stat. § 36-2240(1), (3). Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. Ariz. Rev. Stat. §§ 36-2234(B); 41-1092.03 et seq.

Type of Certificates in Arizona

	Certificate of Necessity	Numbers of Certificates	Moratoria	Certificate required for expenditure of:	Temporary COVID-19 response:
Hospital Beds	No	-	-	-	-
Beds Outside Hospitals	No	-	-	-	-
Equipment	No	-	-	-	-
Facilities/Buildings	No	-	-	-	-
Services	No	-	-	-	-
Emergency Medical Transport	Yes	1	0	Any amount	-

Arizona Certificates in Detail

Category	Types of Certificate	Ariz. Rev. Stat.
Hospital Beds	No CONs in this category.	
Beds Outside Hospitals	No CONs in this category.	
Equipment	No CONs in this category.	
Facilities/Buildings	No CONs in this category.	
Services	No CONs in this category.	
Emergency Medical Transport	1. Ground ambulance.	§ 36-2233(B)

Arizona Certificate Exceptions

No Certificate Required For:	Ariz. Rev. Stat.
1. Vehicles used for the emergency transportation of persons injured at industrial site.	§ 36-2217(A)(1)
2. Persons engaged in and vehicles used for air transportation of sick or injured people in a noncritical or nonemergency situation.	§ 36-2217(A)(2)
3. Medical evacuation equipment used and owned by Department of Public Safety.	§ 36-2217(A)(3)
4. Vehicles provided or contracted for emergency medical services by a political subdivision if vehicles primarily used for scene stabilization.	§ 36-2217(A)(4)
5. Ambulances from other states responding to an emergency in Arizona or transporting a patient to a location within this state.	§ 36-2217(A)(5)
6. Stretcher vans.	§ 36-2217(A)(6)
7. Ambulances operating under temporary authority.	§ 36-2233(D)(2)

CON laws also create barriers for existing providers who simply wish to continue or expand their services.

In addition to creating barriers to entry for new providers, CON laws also create barriers for existing providers who simply wish to continue or expand their services. In Arizona, an initial certificate of necessity is only valid for 12 months. Ariz. Rev. Stat. § 36-2235(A). After that, an operator must renew its certificate by showing that it continues to meet all certificate of necessity requirements. Ariz. Rev. Stat. § 36-2235(B). A renewal certificate is valid for three years.

Existing certificate holders in Arizona are also required to ask permission for adjustments

in service, such as changing their service area or adding a new service. See Ariz. Admin. Code § R9-25-905 (A). For example, in 2018, an ambulance service that provided advanced life support services applied to amend its certificate of necessity to add basic life support services. Even though the application was from an existing provider and contained 38 pages of documentation, including a letter of support from a competing ambulance service, it still took over a year of consideration before the expansion was approved.

ARKANSAS

Arkansas maintains a CON program, which it calls a “permit-of-approval” (POA) program, within four broad categories—hospital beds, beds outside hospitals, facilities and services. POAs function the same as CONs.

Arkansas also maintains four moratoria on: (1) adding beds at residential care facilities; (2) adding beds at psychiatric residential treatment facilities; (3) opening new residential care facilities with more than 16 beds; and (4) opening intermediate care facilities for the mentally disabled. The state’s POA program sometimes treats similar facilities very differently. For example, opening a new assisted living or hospice facility requires a POA, but opening a new nursing home does not. A POA is required, however, to renovate a nursing home, but only when the renovations will cost more than \$1 million. Assisted living and hospice facilities have no similar POA requirement for renovations.

Arkansas’s COVID-19 Response

As of May 15, 2020, Arkansas had not suspended any POA requirements in response to COVID-19. The Department of Health, however, clarified that existing regulations allow hospitals to increase bed capacity in response to an emergency. Arkansas also maintains a rule allowing hospice facilities to temporarily expand during an emergency. *See Ark. Health Servs. Permit Agency, Permit of Approval Rulebook*, 31 (Dec. 2012).²⁵

Application Process

In Arkansas, the POA application process takes approximately 90 days. Ark. Code R. § 20-8-104(c). Applications can be submitted at any time but are reviewed in four cycles per year. The fee for a POA application is \$3,000. *Permit of Approval Rulebook* at 13–14. Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. Ark. Code R. § 20-8-106(d), (e).

Types of POAs in Arkansas

	POA?	Number of POAs	Moratoria	POA applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	2	0	Any amount	Preexisting regulation implemented
Beds Outside Hospitals	Yes	7	2	Any amount	Preexisting regulation implemented
Equipment	No	-	-	-	-
Facilities/Buildings	Yes	3	2	\$0 – \$1 million	-
Services	Yes	8	0	-	-
Emergency Medical Transport	No	-	-	-	-

²⁵ Available at https://www.healthy.arkansas.gov/images/uploads/pdf/Rulebook_December_2012.pdf.

Arkansas POAs in Detail

Category	Moratoria/Types of POAs	Ark. Code R.
Hospital Beds	1. Adding new beds or expanding existing long-term bed capacity.	§ 20-8-107(a)
	2. Converting acute care beds to long-term care beds or allowing their license classification to be changed to long-term care beds.	§§ 20-8-107(a), 20-8-106(b)(1)(B)
Beds Outside Hospitals	1. Moratorium on adding new beds or expanding capacity of residential care facilities.	§ 20-8-107(d)
	2. Moratorium on beds for Psychiatric Residential Treatment Facilities.	Permit of Approval Rulebook at 42
	Adding new beds or expanding existing long-term bed capacity at a: 3. Residential care facility. 4. Nursing home. 5. Assisted living facility. 6. Post-acute head injury retraining facility and residential care facility. 7. Any other facility which provides long-term medical or personal care.	§§ 20-8-107(a), 20-8-101(6)(A), 20-10-101(10)(A)
	8. Adding new beds or expanding existing long-term bed capacity at a home health services agency.	§§ 20-8-107(a), 20-8-101(6)(A), 20-10-801(6)
	9. Adding new beds or expanding existing long-term bed capacity at hospice facilities and hospice agencies.	§ 20-8-107(a)(1)
Equipment	No CONs in this category.	

Arkansas POAs in Detail

Category	Moratoria/Types of POAs	Ark. Code R.
Facilities/Buildings	1. Moratorium on new or replacement residential care facilities, with exceptions for facilities with 16 beds or fewer.	§ 20-8-106(a)(3)(B), (C)
	2. Moratorium on intermediate care facilities for the mentally retarded.	Permit of Approval Rulebook at 46
	1. Nursing home alteration or renovation having an associated capital expenditure of more than \$1 million.	§ 20-8-106(b)(1)(A)
	2. Assisted living facilities.	§§ 20-10-1709(a), 20-10-101(10)(A)
	3. Hospice facilities.	§ 20-7-117(c)(1)
Services	1. Adding new or expanding existing home health services offered by a hospital.	§ 20-8-107(a)
	2. Adding new or expanding existing home health services offered by a nursing home.	§§ 20-8-107(a), 20-8-101(6)(A), 20-10-101(10)(A)
	3. Adding new or expanding existing home health services offered by a residential care facility.	
	4. Adding new or expanding existing home health services offered by an assisted living facility.	
	5. Adding new or expanding existing home health services offered by a post-acute head injury retraining facility and residential care facility.	
	6. Adding new or expanding existing home health services offered by any other facility which provides long-term medical or personal care.	§§ 20-8-107(a), 20-8-101(6)(A), 20-10-801(6)
	7. Adding new or expanding existing home health services offered by home healthcare services agency.	
	8. Hospice services.	§ 20-7-117(c)(1)
Emergency Medical Transport	No CONs in this category.	

Arkansas POA Exceptions

No POA Required For:	Ark. Code R.
1. A hospital, except when adding long-term care beds or converting acute beds to long-term care beds or to add or expand home health services pursuant to a letter of intent filed with the Department of Health.	§ 20-8-101(6)(B)(i)
2. Projects proposed for the construction, expansion or alteration by or on the behalf of a nursing home, which have an associated capital expenditure of less than \$1 million and do not add long term care beds or home health services.	§ 20-8-106(b)(1)(A)
3. Religious facilities.	§ 20-8-101(6)(B)(viii)
4. Outpatient surgery centers and imaging centers.	§ 20-8-101(6)(B)(iii)
5. Freestanding radiation therapy centers.	§ 20-8-101(6)(B)(v)
6. Residences for four or fewer individuals with developmental disabilities who receive support and services from nonprofit providers currently licensed by the Division of Developmental Disabilities Services.	§ 20-8-101(6)(B)(vii)
7. Expansion, not to exceed 15 beds, of the 25-bed nonprofit intermediate care facility for individuals with developmental disabilities that provides transitional rehabilitation for pediatric patients.	§ 20-8-101(6)(B)(vi)
8. Offices of private physicians and surgeons.	§ 20-8-101(6)(B)(ii)
9. Post-acute head injury retraining and residential care facilities or establishments operated by the U.S. government or any agency thereof.	§ 20-8-101(6)(B)(iv)
10. Any bed or facility used to provide care to delinquent juveniles committed into the care of the Division of Youth Services.	§§ 20-8-101(6)(B)(ix), 20-8-113(6)
11. Facilities offering head injury retraining and rehabilitation.	§ 20-10-103(a)

CONNECTICUT

Connecticut requires 19 CONs within five broad healthcare categories—hospital beds, beds outside hospitals, equipment, facilities and services. In addition to Connecticut's 19 specific CON requirements, the state maintains 26 specific exceptions including exceptions for home health agencies, Conn. Gen. Stat. § 19a-638(b)(6), and free clinics, § 19a-638(b)(11). Unlike many states, Connecticut adds confusion by allowing two separate agencies to process CON applications depending on the type of CON—the Office of Health Strategy (OHS) and the Department of Social Services.

Connecticut's COVID-19 Response

On March 14, 2020, Governor Lamont issued Executive Order No. 7B, which authorized OHS to waive CON provisions and enable healthcare facilities in response to COVID-19. [Exec. Order 7B](#) (Mar. 14, 2020).²⁶ Thereafter, OHS issued four guidance documents allowing hospitals to temporarily increase bed capacity without obtaining CONs. OHS, [Guidance Docs. 20-001 to -003b](#) (Mar. 2020).²⁷ OHS further allowed all healthcare providers to apply for a temporary waiver of any CON requirement if necessary to respond to or manage the pandemic.

Application Process

In Connecticut, the CON application process takes anywhere from 60 days to over a year depending on the type of project. *See* Conn. Gen. Stat. § 19a-639a, § 17b-353. Applications can be submitted at any time. The fee for a CON application is \$500. Conn. Gen. Stat. § 19a-639a(a). Competitors may request a hearing, at which they can add evidence and present arguments as to why an application should be denied. Conn. Gen. Stat. § 19a-639a(e); *see generally* Conn. Agencies Regs. § 19a-639a-1 to -6.

Types of CONs in Connecticut

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	1	0	Any amount	Suspended
Beds Outside Hospitals	Yes	1	1	Any amount	Expedited Review
Equipment	Yes	6	0	Any amount	Expedited Review
Facilities/Buildings	Yes	10	0	Any amount	Expedited Review
Services	Yes	1	0	Any amount	Expedited Review
Emergency Medical Transport	No	-	-	-	-

²⁶ Available at <https://ij.org/wp-content/uploads/2020/06/Conn.-7B.pdf>.

²⁷ Available at <https://ij.org/wp-content/uploads/2020/06/OHS-1-3b.pdf>.

Connecticut CONs in Detail

Type of CON	Moratoria/Types of CONs	Conn. Gen. Stat.
Hospital Beds	1. Increase in licensed bed capacity.	§ 19a-638(a)(12)
Beds Outside Hospitals	1. Moratorium on adding new nursing home beds.	§ 17b-354(a)
	1. Increase in bed capacity at health care facility.	§ 19a-638(a)(12)
Equipment	1. Computed tomography scanners. 2. Magnetic resonance imaging scanners. 3. Positron emission tomography scanners. 4. Positron emission tomography-computed tomography scanners.	§ 19a-638(a)(10)
	5. Nonhospital based linear accelerators.	§ 19a-638(a)(11)
	6. Equipment utilizing technology not previously used in the state.	§ 19a-638(a)(13)
Facilities/Buildings	1. Increase in two or more operating rooms within any three-year period by short-term acute care general hospital. 2. Increase of two or more operating rooms within any three-year period by outpatient surgical facility.	§ 19a-638(a)(14)
	Establishment or transfer of ownership of: 3. Hospitals. 4. Specialty Hospitals. 5. Central service facilities. 6. Mental health facilities. 7. Substance abuse treatment facilities.	§§ 19a-638(a)(1), (2), 19a-630(10)
	8. Transfer of ownership of large group practice.	§ 19a-638(a)(3)
	9. Establishment of freestanding emergency department.	§ 19a-638(a)(4)
	10. Establishment of outpatient surgical facility.	§ 19a-638(a)(6)
Services	1. Cardiac services.	§ 19a-638(a)(9)
Emergency Medical Transport	No CONs in this category.	

Connecticut CON Exceptions

No CON Required For:	Conn. Gen. Stat.
1. Health care facility owned/operated by the federal government.	§ 19a-638(b)(1)
2. Establishment of offices by a licensed private practitioner.	§ 19a-638(b)(2)
3. Health care facility operated by a religious group that relies exclusively on prayer for healing.	§ 19a-638(b)(3)
4. Residential care homes.	§ 19a-638(b)(4)
5. Assisted living agencies.	§ 19a-638(b)(5)
6. Home health agencies.	§ 19a-638(b)(6)
7. Hospice services.	§ 19a-638(b)(7)
8. Outpatient rehabilitation facilities.	§ 19a-638(b)(8)
9. Outpatient chronic dialysis services.	§ 19a-638(b)(9)
10. Transplant services.	§ 19a-638(b)(10)
11. Free clinics.	§ 19a-638(b)(11)
12. School-based health centers.	§ 19a-638(b)(12)
13. A program licensed or funded by the Dep't of Children and Families, except psychiatric residential treatment facilities.	§ 19a-638(b)(13)
14. Nonprofit facilities, institutions or providers that provide service on behalf of a state agency or department.	§ 19a-638(b)(14)
15. Nonprofit facilities operated by an educational institute for its students or faculty.	§ 19a-638(b)(15)
16. Municipal outpatient clinics.	§ 19a-638(b)(16)
17. Residential facilities for individuals with intellectual disabilities.	§ 19a-638(b)(17)
18. Replacing existing imaging equipment.	§ 19a-638(b)(18)

Connecticut CON Exceptions

No CON Required For:	Conn. Gen. Stat.
19. Cone-beam dental imaging equipment used exclusively by dentists.	§ 19a-638(b)(19)
20. Partial or total elimination of certain services provided by an outpatient surgical facility.	§ 19a-638(b)(20)
21. Termination of services for which the Dep't of Public Health has requested the facility relinquish its license.	§ 19a-638(b)(21)
22. Acquisition of equipment used exclusively for scientific research not conducted on humans.	§ 19a-638(b)(22)
23. Nursing home beds restricted for use by AIDS patients. 24. Nursing home beds restricted for use by patients requiring neurological rehabilitation. 25. Nursing home beds associated with a continuing care facility. 26. Medicaid certified beds relocated from one licensed nursing facility to another licensed nursing facility to meet a priority need identified in a strategic plan.	§ 17b-354(a)

DELAWARE

Delaware maintains a CON program, which it calls a certificate of public review (CPR) program, within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. CPRs function the same as CONs. One of Delaware’s 24 CPR requirements is a catch-all CPR. That is, if no specific CPR applies, healthcare facilities must obtain a CPR if they intend to make an expenditure above \$5.8 million for any reason. 16 Del. C. § 9304(a)(2). Instead of promulgating regulations, Delaware maintains its CPR program through guiding principles and mathematical need calculations as found in its Health Resources Management Plan. *See* Del. Health Resources Bd., Certificate of Public Review *Health Resources Mgmt. Plan* (Sept. 11, 2017).²⁸

Delaware’s COVID-19 Response

As of May 15, 2020, Delaware had not suspended any CPR requirements in response to COVID-19.

Application Process

In Delaware, the CPR application process takes a minimum of four months, but it often takes much longer. 16 Del. C. § 9305. Applications can be submitted at any time and review is based on mathematical need calculations as described in the Health Resources Management Plan. *See* CPR *Health Resources Mgmt. Plan* at 15. The fee for a CPR application ranges from \$100 to \$10,000. 16 Del. C. § 9305 (1), (10). Competitors can intervene in the application process by requesting a public hearing where they can offer evidence or argument as to why an application should be denied. 16 Del. C. § 9305 (6)-(8).

Types of CPRs in Delaware

	CPR?	Numbers of CPRs	Moratoria	CPR applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	2	0	Any amount	-
Beds Outside Hospitals	Yes	6	0	Any amount	-
Equipment	Yes	4	0	Any amount	-
Facilities/Buildings	Yes	8	0	Any amount	-
Services	Yes	4	0	\$5.8 million+	-
Emergency Medical Transport	No	-	-	-	-

28 Available at <https://ij.org/wp-content/uploads/2020/06/DE-CRP-Plan-2017.pdf>.

Delaware CPRs in Detail

Category	Types of CPRs	16 Del. C.
Hospital Beds CPR required to increase bed capacity by more than 10 beds or more than 10% of total licensed bed capacity, whichever is less, over a 2-year period. 16 Del. C § 9304(a)(3)	1. Hospitals. 2. Freestanding acute inpatient rehabilitation hospital.	§ 9302(4)
Beds Outside Hospitals CPR required to increase bed capacity by more than 10 beds or more than 10% of total licensed bed capacity, whichever is less, over a 2-year period. 16 Del. C § 9304(a)(3)	1. Nursing home beds. 2. Freestanding birthing center beds. 3. Freestanding surgical centers. 4. Freestanding emergency centers. 5. Continual care community beds. 6. Nontraditional, long-term care facility beds.	§ 9302(4)
Equipment	1. Computed tomography. 2. Magnetic resonance imaging. 3. Positron emission tomography.	CPR Health Resources Mgmt. Plan at 4-42
	4. The acquisition of any other major medical equipment.	§§ 9304(a)(4), 9302(6)
Facilities/Buildings	1. Hospital. 2. Nursing home. 3. Freestanding birthing center. 4. Freestanding surgical center. 5. Freestanding acute inpatient rehabilitation hospital. 6. Freestanding emergency center. 7. Continual care community. 8. Nontraditional, long-term care facility.	§§ 9304(a)(1), 9302(4)
Services	1. Cardiac catheterization. 2. Megavoltage radiation therapy. 3. Lithotripsy.	CPR Health Resources Mgmt. Plan at 41
	4. Any expenditure by or on behalf of a health-care facility in excess of \$5.8 million.	§ 9304(a)(2)
Emergency Medical Transport	No CPRs in this category.	

Delaware CPR Exceptions

No CPR Required For:	CPR Del. C.
1. Establishment or amendments to health care facilities owned and operated by the federal government.	§ 9302(4); see CPR Health Resources Mgmt. Plan at 7
2. Establishment of offices by a licensed private practitioner.	
3. Establishment of or amendments to dispensary or first aid stations located within a business or industrial establishment maintained solely for the use of employees, provided that the facility does not contain inpatient beds.	
4. The establishment of or amendments to any first aid station or dispensary or infirmary offering non-acute services exclusively for use by students and employees of a school or university or by inmates and employees of a prison, provided that services delivered therein are not the substantial equivalent of hospital services in the same area or community.	
5. A capital expenditure for purposes of constructing, developing or otherwise establishing a medical office building shall not be subject to review under this chapter.	



DISTRICT OF COLUMBIA

The District of Columbia maintains CONs within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. The District maintains 71 specific CON requirements, more than half of which apply to services. D.C. and New Jersey are the only jurisdictions to require CONs for emergency medical services. D.C. Mun. Regs. tit. 22-B, § 4100.2(n). During the COVID-19 pandemic, the Department of Health (DOH) says it granted temporary CON applications. DOH, however, never publicly announced that healthcare providers or facilities could apply for temporary CONs to respond to the pandemic.

The District of Columbia's COVID-19 Response

On March 11, 2020, Mayor Bowser declared a public emergency and a public health emergency. *See* Mayor's Orders 2020-045, -046 (Mar. 11, 2020). DOH claims that after Mayor Bowser issued these orders it began granting temporary CONs to allow healthcare facilities to increase capacity during the pandemic. *See* Letter from LaQuandra S. Nesbitt, Director, D.C. Dep't of Health, to Darpana Sheth, Senior Attorney & Brooke Fallon, Associate Director, Institute for Justice (May 1, 2020).²⁹ DOH never made its temporary policy public and it is unclear how many CONs DOH granted or how long those CONs stayed in effect.

Application Process

In the District of Columbia, the CON application process typically takes about six months. D.C. Health, *How to Obtain a Certificate of Need*.³⁰ Applications that are completed by the 10th day of any month are reviewed on or after the 20th day of the same month, and the application type determines in which month the application must be submitted. *See* D.C. Mun. Regs. tit. 22-B, § 4300. The fee for a CON application is 3% of the proposed capital expenditure or \$5,000, whichever is greater, with a maximum fee of \$300,000. D.C. Code § 44-420(a); *see also* D.C. Mun. Regs. tit. 22-B, § 4013.3. Public hearings are not required, but competitors may intervene during the application process by requesting a hearing, at which competitors can offer evidence or argument as to why an application should be denied. D.C. Mun. Regs. tit. 22-B, § 4302.

Types of CONs in the District of Columbia

	CON?	Number of CONs	Moratoria	CON Applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	7	0	Any amount	Expedited Review
Beds Outside Hospitals	Yes	10	0	Any amount	Expedited Review
Equipment	Yes	3	0	\$0 – \$3.5 million	-
Facilities/Buildings	Yes	9	0	Any amount	Expedited Review
Services	Yes	42	0	Any amount	-
Emergency Medical Transport	No	-	-	-	-

²⁹ Available at <https://ij.org/wp-content/uploads/2020/06/DC-Response2020.05.01.pdf>.

³⁰ Available at <https://dchealth.dc.gov/service/how-obtain-certificate-need>.

District of Columbia CONs in Detail

Category	Types of CONs	Citation
Hospital Beds Hospitals must obtain a CON to add 10 beds or to increase beds by 10% or more (whichever is smaller) within a two-year period. D.C. Code § 44-401(15)(A)(iv)	1. Private general hospital beds.	D.C. Code §§ 44-401(15)(A)(iv), 44-401(10) (defining “health care facility”)
	2. Other specialty hospital beds.	
	3. Medical-surgical beds.	D.C. Mun. Regs. tit. 22-B, § 4104.2(a), (k)
	4. Coronary care beds.	D.C. Mun. Regs. tit. 22-B, § 4104.2(b)
	5. Obstetrics-gynecology beds.	D.C. Mun. Regs. tit. 22-B, § 4104.2(c), (d)
	6. Nursery and neonatal intermediate care beds.	D.C. Mun. Regs. tit. 22-B, § 4104.2(e)
	7. Neonatal intensive care beds.	D.C. Mun. Regs. tit. 22-B, § 4104.2(f)
Beds Outside Hospitals These facilities must obtain a CON to add 10 beds or to increase beds by 10% or more (whichever is smaller) within a two-year period. D.C. Code § 44-401(15)(A)(iv)	1. Rehabilitation facility beds.	D.C. Code §§ 44-401(15)(A)(iv), 44-401(10); D.C. Mun. Regs. tit. 22-B, § 4104.2(i)
	2. Skilled nursing facility beds.	D.C. Code §§ 44-401(15)(A)(iv), 44-401(10); D.C. Mun. Regs. tit. 22-B, §§ 4104.2(l), 4104.2(n)
	3. Intermediate care facility beds.	D.C. Code §§ 44-401(15)(A)(iv), 44-401(10); D.C. Mun. Regs. tit. 22-B, § 4104.2(m), (n)
	4. Ambulatory care center or clinic beds.	D.C. Code §§ 44-401(15)(A)(iv), 44-401(10); D.C. Mun. Regs. tit. 22-B, § 4104.2(a), (k)
	5. Ambulatory surgical facility beds.	D.C. Code §§ 44-401(15)(A)(iv), 44-401(10)
	6. Kidney disease treatment center beds.	D.C. Code §§ 44-401(15)(A)(iv), 44-401(10)
	7. Obstetrics-gynecology beds.	D.C. Mun. Regs. tit. 22-B, § 4104.2(c), (d)
	8. Alcoholism and chemical dependency beds.	D.C. Mun. Regs. tit. 22-B, § 4104.2(h)
	9. Rehabilitation beds.	D.C. Mun. Regs. tit. 22-B, § 4104.2(i)
	10. Extended acute long-term care beds.	D.C. Mun. Regs. tit. 22-B, § 4104.2(j)

Only D.C. and New Jersey require CONs for emergency medical services.

District of Columbia CONs in Detail

Category	Types of CONs	Citation
Equipment	1. For hospitals, equipment used for the provision of medical or other health services and has a fair market value in excess of \$3.5 million.	D.C. Code § 44-401(14)(A)(i)
	2. For non-hospitals, equipment used for the provision of medical or other health services and has a fair market value in excess of \$2 million.	D.C. Code § 44-401(14)(A)(ii)
	3. A single piece of diagnostic or therapeutic equipment and has a fair market value in excess of \$350,000.	D.C. Code § 44-401(14)(A)(iii)
Facilities/Buildings	1. Rehabilitation facility. 2. Skilled nursing facility. 3. Intermediate care facility. 4. Ambulatory care center or clinic. 5. Ambulatory surgical facility. 6. Kidney disease treatment center. 7. Freestanding hemodialysis facility. 8. Diagnostic health care facility. 9. Hospice, or other comparable health care facility which has an annual operating budget of at least \$500,000.	D.C. Code § 44-401(10)
Services	1. Diagnostic medical or clinical related service. 2. Curative medical or clinical related service. 3. Rehabilitative medical or clinical related service. 4. Inpatient mental health services.	D.C. Code § 44-401(12)
	5. Home health care services.	D.C. Code § 44-401(12); D.C. Mun. Regs. tit. 22-B, § 4100.2(q)
	6. Hospice care services.	D.C. Code § 44-401(12); D.C. Mun. Regs. tit. 22-B, § 4100.2(r)
	7. Medically supervised day care services.	D.C. Code § 44-401(12)
	8. Renal dialysis services.	D.C. Code § 44-401(12); D.C. Mun. Regs. tit. 22-B, § 4100.2(gg)
	9. Acute medical services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(a)

District of Columbia CONs in Detail

Category	Types of CONs	Citation
Services	10. Cardiac catheterization services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(b)
	11. Cardiac surgery services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(c)
	12. Coronary care services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(d)
	13. Computed tomography services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(e)
	14. Neonatal intensive care services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(f)
	15. Newborn services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(g)
	16. Obstetric services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(h)
	17. Pediatric services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(i)
	18. Pediatric cardiac surgery services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(j)
	19. Physical medicine and rehab services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(k)
	20. Psychiatric care services, short-term.	D.C. Mun. Regs. tit. 22-B, § 4100.2(l)
	21. Psychiatric care services, long-term.	D.C. Mun. Regs. tit. 22-B, § 4100.2(m)
	22. Emergency medical services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(n)
	23. Physical therapy services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(o)
	24. Occupational therapy services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(p)
	25. Diagnostic radiology and ultrasound services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(s)
	26. Radiation therapy services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(t)
	27. Burn services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(u)
	28. Ambulatory surgery services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(v)
	29. Primary care centers' services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(w)
	30. Alcoholism-chemical dependency services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(x)
	31. Acute long-term services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(y)
	32. Skilled nursing services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(z)
	33. Acute dialysis services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(aa)
	34. Outpatient staff-assisted in-facility chronic maintenance hemodialysis services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(bb)
	35. Outpatient self-care in-facility chronic maintenance hemodialysis services, including training.	D.C. Mun. Regs. tit. 22-B, § 4100.2(cc)
	36. Outpatient self-care in-facility intermittent peritoneal dialysis services, including training.	D.C. Mun. Regs. tit. 22-B, § 4100.2(dd)
	37. Training for home intermittent peritoneal dialysis.	D.C. Mun. Regs. tit. 22-B, § 4100.2(ee)

District of Columbia CONs in Detail

Category	Types of CONs	Citation
Services	38. Training and follow-up services for continuous ambulatory peritoneal dialysis.	D.C. Mun. Regs. tit. 22-B, § 4100.2(ff)
	39. Renal transplantation services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(hh)
	40. New technology.	D.C. Mun. Regs. tit. 22-B, § 4100.2(ii)
	41. Transplant services.	D.C. Mun. Regs. tit. 22-B, § 4100.2(jj)
	42. Open heart surgery.	D.C. Mun. Regs. tit. 22-B, § 4100.2(kk)
Emergency Medical Transport	No CONs in this category.	

District of Columbia CON Exceptions

No CON Required For:	D.C. Code
1. Upgrading, maintaining or improving of facility deficiencies that may be in violation of federal and D.C. fire, building or safety codes.	§ 44-407(b)(1)
2. The correction of deficiencies identified by private national accrediting associations and D.C. government licensing agencies.	§ 44-407(b)(2)
3. Nonpatient care projects requiring the obligation of a capital expenditure of less than \$8 million.	§ 44-407(b)(3)
4. The acquisition of the same or similar medical equipment to replace, upgrade or expand the capacity of the equipment for which a certificate of need has been granted, if the replaced equipment is removed from service.	§ 44-407(b)(4)
5. The acquisition of major medical equipment to be used solely for research, new institutional health services to be offered solely for research, or the obligation of a capital expenditure to be made solely for research.	§ 44-407(b)(5)
6. Developing a new institutional health service to accommodate a resident to be transferred from D.C. Village.	§ 44-407(b)(7)
7. The voluntary permanent reduction in the number in licensed bed capacity where a request for exemption is made 60 days before the reduction and the SHPDA finds that the reduction in bed capacity would not be inconsistent with the HSP.	§ 44-407(b)(8)
8. For a period of one year commencing on December 18, 2001, any increase in the licensed psychiatric bed capacity by a private general hospital, psychiatric hospital, other specialty hospital or rehabilitation facility holding a certificate of need to operate psychiatric beds.	§ 44-407(b)(9)
9. The acquisition of major medical equipment or establishment of new institutional health services determined by DOH to be necessary for a declared public health purpose or deemed necessary by DOH to provide health care services under contract to or grant from a District of Columbia or federal agency.	§ 44-407(b)(10)
10. District of Columbia public, chartered and private schools for any health care service offered or developed for students with special needs in compliance with any federal or D.C. legal requirements.	§ 44-407(b)(11)
11. The acquisition before October 1, 2003 of any single piece of diagnostic or therapeutic equipment which was acquired by lease, purchase, donation or other comparable arrangement by or on behalf of a physician, a group of physicians, a private group practice of diagnostic radiology or radiation therapy or a diagnostic health care facility, or the replacement of such equipment.	§ 44-407(b)(12)
12. Any increase in the licensed psychiatric bed capacity by a private general hospital, psychiatric hospital or other specialty or rehabilitation hospital.	§ 44-407(b)(13)
13. The acquisition of equipment for, and the construction of, a full-service, community hospital by the District on the St. Elizabeth's Hospital Campus with 200 licensed beds.	§ 44-407(b)(18)
14. The acquisition of equipment for, and the construction of, a skilled nursing facility in Ward 7 or 8 with up to 125 licensed beds that shall be constructed to accommodate the safe transition of patients who require skilled nursing from United Medical Center.	§ 44-407(b)(19)
15. The operation of a nonprofit specializing in vision screening and providing free diagnostic services and eyewear to school children and youth in the District of Columbia.	§ 44-407(b)(20)

FLORIDA

Florida requires CONs within three broad categories—beds outside hospitals, facilities and services. In 2019, Florida passed sweeping CON law reforms and eliminated many of its CON requirements. See sidebar on p. 40. Post-reform, Florida maintains 11 CON requirements. The minimum CON application fee in Florida is \$10,000—the highest minimum standard application fee in the country.

Florida's COVID-19 Response

As of May 15, 2020, Florida had not suspended any CON requirements in response to COVID-19.

Application Process

In Florida, the CON application process takes at least 60 days after an application is deemed complete, although the process often takes much longer. Fla. Stat. § 408.039(4)(b); Fla. Admin Code r. 59C-1.010. Applications can be submitted biannually. The fee for an application ranges from \$10,000 to \$50,000. Fla. Stat. §§ 408.038, -.039; Fla. Admin Code r. 59C-1.008(3). Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. Fla. Stat. § 408.039(5)(c), (6).

Types of CONs in Florida

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	No	0	0	-	-
Beds Outside Hospitals	Yes	2	0	Any amount	-
Equipment	No	-	-	-	-
Facilities/Buildings	Yes	5	0	Any amount	-
Services	Yes	4	0	Any amount	-
Emergency Medical Transport	No	-	-	-	-

Florida CONs in Detail

Category	Types of CONs	Citation
Hospital Beds	No CONs in this category.	
Beds Outside Hospitals	- The addition of beds in intermediate care facilities for the developmentally disabled by new construction or alteration. - The addition of beds in community nursing homes by new construction or alteration.	Fla. Stat. § 408.036(1)(a) [^]
Equipment	No CONs in this category.	

Florida CONs in Detail

Category	Types of CONs	Citation
Facilities/Buildings	1. New construction or establishment of additional hospitals.	Fla. Stat. §§ 408.036(1)(b), 408.032(8) ^a
	2. New construction or establishment of additional skilled nursing facilities.	
	3. New construction or establishment of additional intermediate care facilities for the developmentally disabled.	
	4. The conversion from one type of health care facility to another.	Fla. Stat. § 408.036(1)(c) ^a
	5. The establishment of a hospice or hospice inpatient facility.	Fla. Stat. § 408.036(1)(d) ^a
Services	1. The establishment of inpatient tertiary health services by a hospital. 2. The establishment of inpatient tertiary health services by a skilled nursing facility. 3. The establishment of inpatient tertiary health services by a hospice. 4. The establishment of inpatient tertiary health services by a intermediate care facility for the developmentally disabled.	Fla. Admin. Code r. 59C-1.004(f)
Emergency Medical Transport	No CONs in this category.	

^a in effect through June 30, 2021.

On June 26, 2019, Governor DeSantis ushered in large-scale CON reform in Florida by signing HB 21.^a

The bill immediately eliminated CON requirements for general hospitals, complex rehabilitation beds and tertiary hospital services, including neonatal intensive care services and organ transplant centers.

Additionally, the bill will sunset other CON requirements on July 1, 2021. The CONs that will be phased out are largely aimed at spe-

cialty facilities and providers, such as hospitals aimed at particular age groups or services aimed at treating patients with "specific categories" of illnesses or disorders. Florida's reforms, however, leave CON requirements in place for nursing homes, skilled nursing facilities, hospice programs and intermediate care facilities.

^a Available at <https://ij.org/wp-content/uploads/2020/06/HB-21.pdf>.

Florida CON Exceptions

No CON Required For:	Citation
1. The construction of or establishment of a general hospital when the proposed project site is located on the same site as or within one mile of the existing health care facility if the number of beds in each licensed bed category will not increase.	Fla. Stat. § 408.036(1)(b)^
2. The construction of or establishment of a replacement health care facility when the proposed project site is located on the same site as or within one mile of the existing health care facility if the number of beds in each licensed bed category will not increase.	
3. The conversion of a specialty hospital to a general hospital is not subject to review.	Fla. Stat. § 408.036(1)(c)^
4. A facility relying solely on spiritual means through prayer for healing is not included as a health care facility.	Fla. Stat. § 408.032(8)
5. Hospice services or swing beds in a rural hospital in a number that does not exceed one-half of its licensed beds, or for a hospice program established by an entity that shares a controlling interest with a not-for-profit retirement community that offers independent living, assisted living and skilled nursing services provided in a facility on the same premises and designated by the agency as a teaching nursing home for a minimum of five years. Only one hospice program per teaching nursing home may be established under the exemption in this paragraph, and such program shall be limited to serving patients residing in communities located within the not-for-profit retirement community, including home and community-based service providers.	Fla. Stat. § 408.036(3)(a)^; Fla. Admin. Code r. 59C-1.005
6. The conversion of licensed acute care hospital beds to Medicare and Medicaid certified skilled nursing beds in a rural hospital so long as the conversion of the beds does not involve the construction of new facilities.	Fla. Stat. § 408.036(3)(b)^; Fla. Admin. Code r. 59C-1.005
7. The addition of nursing home beds at a skilled nursing facility that is part of a retirement community that provides a variety of residential settings and supportive services and that has been incorporated and operated in Florida for at least 65 years on or before July 1, 1994. All nursing home beds must not be available to the public but must be for the exclusive use of the community residents.	Fla. Stat. § 408.036(3)(c)^; Fla. Admin. Code r. 59C-1.005
8. An inmate health care facility built by or for the exclusive use of the Florida Department of Corrections.	Fla. Stat. § 408.036(3)(d)^; Fla. Admin. Code r. 59C-1.005
9. The addition of nursing home beds in a number not exceeding 30 total beds or 25 percent of the number of beds licensed in the facility, whichever is less.	Fla. Stat. § 408.036(3)(e)^; Fla. Admin. Code r. 59C-1.005
10. State veterans' nursing homes operated by or on behalf of the Florida Department of Veterans' Affairs.	Fla. Stat. § 408.036(3)(f)^; Fla. Admin. Code r. 59C-1.005
11. Combination within one nursing home facility of the beds or services authorized by two or more CONs issued in the same planning subdistrict.	Fla. Stat. § 408.036(3)(g)^; Fla. Admin. Code r. 59C-1.005
12. Division into two or more nursing home facilities of beds or services authorized by one CON issued in the same planning subdistrict.	Fla. Stat. § 408.036(3)(h)^; Fla. Admin. Code r. 59C-1.005

Florida CON Exceptions

No CON Required For:	Citation
13. The addition of nursing home beds in a number not exceeding 10 total beds or 10% of the number of beds licensed in the facility being expanded, whichever is greater; or, for the addition of nursing home beds at a facility that has been designated as a Gold Seal nursing home in a number not exceeding 20 total beds or 10% of the number of licensed beds in the facility being expanded, whichever is greater.	Fla. Stat. § 408.036(3)(i) [^] ; Fla. Admin. Code r. 59C-1.005
14. Replacement of a licensed nursing home on the same site, or within five miles of the same site if within the same subdistrict, if the number of licensed beds does not increase except as otherwise permitted by this section.	Fla. Stat. § 408.036(3)(j) [^] ; Fla. Admin. Code r. 59C-1.005
15. Consolidation or combination of licensed nursing homes or transfer of beds between licensed nursing homes within the same planning district, by nursing homes with any shared controlled interest within that planning district, if there is no increase in the planning district total number of nursing home beds and the site of the relocation is not more than 30 miles from the original location.	Fla. Stat. § 408.036(3)(k) [^] ; Fla. Admin. Code r. 59C-1.005
16. Beds in state mental health treatment facilities and state mental health forensic facilities.	Fla. Stat. § 408.036(3)(l) [^] ; Fla. Admin. Code r. 59C-1.005
17. The renewal of a license for a healthcare provider or facility where the applicant failed to submit a renewal applicant within the past 21 days and where the previous license expired after January 1, 2015 and where applicant meets all other requirements listed in this section.	Fla. Stat. § 408.036(3)(n) [^] ; Fla. Admin. Code r. 59C-1.005

[^] in effect through June 30, 2021

GEORGIA

Georgia requires CONs within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. Within these five categories, Georgia maintains 50 specific CON requirements and an additional 31 exceptions. One of Georgia’s 50 CON requirements is a catch-all CON for healthcare facilities. That is, if no other specific CON applies, the catch-all CON requires healthcare facilities to obtain a CON for any expenditure above \$10 million. Ga. Code § 31-6-40(a)(2).

Georgia’s COVID-19 Response

On March 20, 2020, Governor Kemp suspended Georgia’s CON requirements to “permit capable facilities to expand capacity, offer services or make expenditures necessary to assist with the needs of this Public Health State of Emergency.” *Exec. Order No. 03.20.20.02* (Mar. 20, 2020).³¹

Application Process

In Georgia, once an application is deemed complete, the Department of Community Health must complete review and issue a decision within 120 days. Ga. Code § 31-6-43(d)(1). Applications can be submitted at any time—except applications for skilled nursing facilities, intermediate care facilities and home health agencies, which can be submitted only when the Department determines there is an unmet need. Ga. Code § 31-6-40.1(b). The application fee ranges from \$1,000 to \$50,000. Ga. Comp. R. & Regs. 111-2-2.06(4)(a). Many, but not all, competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. Ga. Code § 31-6-43(d)(2)(A), (B); Ga. Comp. R. & Regs. 111-2-2.07(1)(h).

Types of CONs in Georgia

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	2	0	Any amount	Suspended
Beds Outside Hospitals	Yes	8	0	Any amount	Suspended
Equipment	Yes	5	0	Any amount	Suspended
Facilities/Buildings	Yes	14	0	Any amount	Suspended
Services	Yes	22	0	\$ 0 – \$10 million	Suspended
Emergency Medical Transport	No	-	-	-	-

³¹ Available at <https://ij.org/wp-content/uploads/2020/06/GA-Exec-Order.pdf>.

Georgia CONs in Detail

Category	Types of CONs	Ga. Code
Hospital Beds Any increase in bed capacity in the following facilities. Ga. Code § 31-6-40(a)(4)	1. Hospital. 2. Destination cancer hospitals.	§ 31-6-2(17)
Beds Outside Hospitals Any increase in bed capacity in the following facilities. Ga. Code § 31-6-40(a)(4)	1. Special care units, including but not limited to podiatric facilities. 2. Skilled nursing facilities. 3. Intermediate care facilities. 4. Personal care homes. 5. Ambulatory surgical facilities. 6. Obstetrical facilities. 7. Freestanding emergency departments or facilities not located on a hospital's primary campus. 8. Diagnostic, treatment or rehabilitation centers.	§§ 31-6-40(a)(4), 31-6-2(17)
Equipment	1. Diagnostic equipment. 2. Therapeutic equipment.	§ 31-6-40(a)(3)
	The following equipment costing more than \$2.99 million, as updated annually: 3. Computed tomography scanning. 4. Magnetic resonance imaging. 5. Positron emission tomography scanning.	§§ 31-6-2(15), 31-6-40(c)(2); Update of CON Threshold (June 26, 2020) ³²
Facilities/Buildings The construction, development or other establishment of a new, expanded or relocated facility. Ga. Code § 31-6-40(a)(1).	1. Hospital. 2. Destination cancer hospital. 3. Special care unit, including but not limited to podiatric facilities. 4. Skilled nursing facility. 5. Intermediate care facility. 6. Personal care home. 7. Ambulatory surgical facility. 8. Obstetrical facility. 9. Freestanding emergency department or facility not located on a hospital's primary campus. 10. Health maintenance organization. 11. Diagnostic, treatment or rehabilitation center.	§ 31-6-2(17)
	12. Any conversion or upgrading of any general acute care hospital to a specialty hospital. 13. A facility converted from a type of facility not covered by this chapter to any of the types of health care facilities which are covered by this chapter.	§ 31-6-40(a)(6)
	14. The conversion of a destination cancer hospital to a general cancer hospital.	§§ 31-6-40(8), 31-6-40.3

32 Available at <https://ij.org/wp-content/uploads/2020/07/GA-2020-threshold.pdf>.

Georgia CONs in Detail

Category	Types of CONs	Ga. Code
Services	1. Imaging services. 2. Biliary lithotripsy. 3. Surgery. 4. Intensive care. 5. Coronary care. 6. Pediatrics. 7. Gynecology. 8. Obstetrics. 9. General medical care. 10. Medical-surgical care. 11. Inpatient nursing care. 12. Cardiac catheterization. 13. Open heart surgery. 14. Inpatient rehabilitation. 15. Alcohol or drug abuse services. 16. Mental Health services. 17. Any of the previous services not offered within the prior 12-month period, if offered at the following facilities: » Hospitals. » Destination cancer hospitals. » Special care units, including but not limited to podiatric facilities. » Skilled nursing facilities. » Intermediate care facilities. » Personal care homes. » Ambulatory surgical or obstetrical facilities. » Freestanding emergency departments or facilities not located on a hospital's primary campus. » Health maintenance organizations. » Home health agencies. » Diagnostic, treatment or rehabilitation centers.	§§ 31-6-2(8), 31-6-40(a)(5), 31-6-2(17)
	The following services if offered in or through a diagnostic, treatment or rehabilitation center and if they were not offered on a regular basis in or through that center within the previous 12 months: 18. Radiation therapy. 19. Biliary lithotripsy. 20. Surgery in an operating room, including but not limited to ambulatory surgery. 21. Cardiac catheterization. 22. Any expenditure above \$10 million, as adjusted annually, for new health care services.	§§ 31-6-40(a)(7), 31-6-40(a)(7)(A)-(D), 31-6-40(a)(2)
Emergency Medical Transport	No CONs in this category.	

Georgia CON Exceptions

No CON Required For:	Ga. Code
1. Infirmaries operated by educational institutions for the sole and exclusive benefit of students, faculty members, officers or employees thereof.	§ 31-6-47(a)(1)
2. Infirmaries or facilities operated by businesses for the sole and exclusive benefit of officers or employees thereof, provided that such infirmaries or facilities make no provision for overnight stay by persons receiving their services.	§ 31-6-47(a)(2)
3. Institutions operated exclusively by the federal government or by any of its agencies.	§ 31-6-47(a)(3)
4. Offices of private physicians or dentists whether for individual or group practice.	§ 31-6-47(a)(4)
5. Religious, nonmedical health care institutions listed and certified by a national accrediting organization.	§ 31-6-47(a)(5)
6. Site acquisitions for health care facilities or preparation or development costs for such sites prior to the decision to file a CON application.	§ 31-6-47(a)(6)
7. Expenditures related to adequate preparation and development of an application for a CON.	§ 31-6-47(a)(7)
8. The commitment of funds conditioned upon the obtaining of a CON.	§ 31-6-47(a)(8)
9. Expenditures for the restructuring or acquisition of existing health care facilities by stock or asset purchase, merger, consolidation or other lawful means.	§ 31-6-47(a)(9)
10. The purchase of a closing hospital or of a hospital that has been closed for no more than 12 months by a hospital in a contiguous county to repurpose the facility as a micro-hospital.	§ 31-6-47(a)(9.1)
11. Expenditures of less than \$870,000 for any repair or replacement of equipment by a health care facility that is not owned by a group practice of physicians or a hospital and that provides diagnostic imaging services if such facility received a letter of nonreviewability from the department prior to July 1, 2008. This paragraph shall not apply to such facilities in rural counties.	§ 31-6-47(a)(10)
12. Except as provided above, expenditures for the repair of a health care facility or a facility that is exempt from the requirements of this chapter, parts thereof or services provided or equipment used therein; or the replacement of equipment, including but not limited to CT scanners, magnetic resonance imaging, positron emission tomography (PET) and positron emission tomography/computed tomography previously approved for a certificate of need.	§ 31-6-47(a)(10.1)
13. Capital expenditures required solely to eliminate or prevent safety hazards, to comply with licensing requirements of the department, or to comply with accreditation standards of a nationally recognized health care accreditation body.	§ 31-6-47(a)(11)
14. Cost overruns whose percentage of the cost of a project is equal to or less than the cumulative annual rate of increase in the composite construction index, published by the United States Bureau of the Census of the Department of Commerce, calculated from the date of approval of the project.	§ 31-6-47(a)(12)
15. Transfers from one health care facility to another such facility of major medical equipment previously approved or exempted from certificate of need review.	§ 31-6-47(a)(13)
16. New institutional health services provided by or on behalf of health maintenance organizations or related health care facilities in circumstances defined by the department pursuant to federal law.	§ 31-6-47(a)(14)
17. Increases in the bed capacity of a hospital up to ten beds or 10% of capacity, whichever is greater, in any consecutive two-year period, in a hospital that has maintained an overall occupancy rate greater than 75% for the previous 12-month period.	§ 31-6-47(a)(15)
18. Expenditures for nonclinical projects.	§ 31-6-47(a)(16)

Georgia CON Exceptions

No CON Required For:	Ga. Code
19. Life plan communities, provided that the skilled nursing component of the facility is for the exclusive use of residents of the life plan community and that a written exemption is obtained from the department; provided, however, that new sheltered nursing home beds may be used on a limited basis by persons who are not residents of the life plan community for a period up to five years after the date of issuance of the initial nursing home license, but such beds shall not be eligible for Medicaid reimbursement.	§ 31-6-47(a)(17)
20. Single specialty ambulatory surgical center that (A) (i) does not exceed \$2.5 million; or (ii) is the only single specialty ambulatory surgical center in the county owned by the group practice and has two or fewer operating rooms, so long as they get a CON to add operating rooms; (B) has a hospital affiliation agreement with a hospital in reasonable distance or has medical staff with admitting privileges with such hospital to ensure necessary backup for medical complications, the center must be able to transfer a patient to a hospital within reasonable distance; (C) (i) provides care to Medicaid beneficiaries and, if the facility provides medical care and treatment to children, to PeachCare for Kids beneficiaries and provides uncompensated indigent and charity care in an amount equal to or greater than 2% of its adjusted gross revenue; or (ii) if the center is not a participant in Medicaid or the PeachCare for Kids Program, provides uncompensated care to Medicaid beneficiaries and, if the facility provides medical care and treatment to children, to PeachCare for Kids beneficiaries, uncompensated indigent and charity care, or both in an amount equal to or greater than 4% of its adjusted gross revenue; provided, however, that single specialty ambulatory surgical centers owned by physicians in the practice of ophthalmology shall not be required to comply with this subparagraph; and (D) provides annual reports.	§ 31-6-47(a)(18)
21. Any joint venture ambulatory surgical center that: (A) has capital expenditures associated with the construction, development, or other establishment of the clinical health service which do not exceed \$5 million; (B) (i) provides care to Medicaid beneficiaries and, if the facility provides medical care and treatment to children, to PeachCare for Kids beneficiaries and provides uncompensated indigent and charity care in an amount equal to or greater than 2% of its adjusted gross revenue; or (ii) if the center is not a participant in Medicaid or the PeachCare for Kids Program, provides uncompensated care to Medicaid beneficiaries and, if the facility provides medical care and treatment to children, to PeachCare for Kids beneficiaries, uncompensated indigent and charity care, or both in an amount equal to or greater than 4% of its adjusted gross revenue; and (C) provides annual reports.	§ 31-6-47(a)(19)
22. Expansion of services by an imaging center based on a population needs methodology taking into consideration whether the population residing in the area served by the imaging center has a need for expanded services, as determined by the department in accordance with its rules and regulations, if such imaging center: (A) was in existence and operational in Georgia January 1, 2008; (B) is owned by a hospital or by a physician or a group of physicians comprising at least 80% ownership who are currently board certified in radiology; (C) provides three or more diagnostic and other imaging services; (D) accepts all patients regardless of ability to pay; and (E) provides uncompensated indigent and charity care in an amount equal to or greater than the amount of such care provided by the geographically closest general acute care hospital. However, this does not apply to an imaging center in a rural county.	§ 31-6-47(a)(20)
23. Diagnostic cardiac catheterization in a hospital setting on patients 15 years of age and older.	§ 31-6-47(a)(21)
24. Therapeutic cardiac catheterization in hospitals selected by the department prior to July 1, 2008, to participate in the Atlantic Cardiovascular Patient Outcomes Research Team (C-PORT) Study and therapeutic cardiac catheterization in hospitals that, as determined by the department on an annual basis, meet the criteria to participate in the C-PORT Study but have not been selected for participation; provided, however, that if the criteria requires a transfer agreement to another hospital, no hospital shall unreasonably deny a transfer agreement to another hospital.	§ 31-6-47(a)(22)

Georgia CON Exceptions

No CON Required For:	Ga. Code
25. Infirmaries or facilities operated by, on behalf of, or under contract with the Department of Corrections or the Department of Juvenile Justice for the sole and exclusive purpose of providing health care services in a secure environment to prisoners within a penal institution, penitentiary, prison, detention center, or other secure correctional institution, including correctional institutions operated by private entities in this state which house inmates under the Department of Corrections or the Department of Juvenile Justice.	§ 31-6-47(a)(23)
26. The relocation of any skilled nursing facility, intermediate care facility or micro-hospital within the same county, any other health care facility in a rural county within the same county, and any other health care facility in an urban county within a three-mile radius of the existing facility so long as the facility does not propose to offer any new or expanded clinical health services at the new location.	§ 31-6-47(a)(24)
27. Facilities which are devoted to the provision of treatment and rehabilitative care for periods continuing for 24 hours or longer for persons who have traumatic brain injury.	§ 31-6-47(a)(25)
28. Capital expenditures for a project otherwise requiring a CON if those expenditures are for a project to remodel, renovate, replace or any combination thereof, a medical-surgical hospital and (A) that hospital (i) Has a bed capacity of not more than 50 beds; (ii) Is located in a county in which no other medical-surgical hospital is located; (iii) Has at any time been designated as a disproportionate share hospital by the department; and (iv) Has at least 45% of its patient revenues derived from Medicare, Medicaid or any combination thereof, for the immediately preceding three years; and (B) That project: (i) Does not result in any of the following: (I) The offering of any new clinical health services; (II) Any increase in bed capacity; (III) Any redistribution of existing beds among existing clinical health services; or (IV) Any increase in capacity of existing clinical health services; (ii) Has at least 80% of its capital expenditures financed by the proceeds of a special purpose county sales and use tax imposed pursuant to Article 3 of Chapter 8 of Title 48; and (iii) Is located within a three-mile radius of and within the same county as the hospital's existing facility.	§ 31-6-47(a)(26)
29. The renovation, remodeling, refurbishment or upgrading of a health care facility, so long as the project does not result in any of the following: (A) The offering of any new or expanded clinical health services; (B) Any increase in inpatient bed capacity; (C) Any redistribution of existing beds among existing clinical health services; or (D) A capital expenditure exceeding the threshold—defined in Ga. Code § 31-6-40(a)(2)	§ 31-6-47(a)(27)
30. Other than for equipment used to provide positron emission tomography (PET) services, the acquisition of diagnostic, therapeutic, or other imaging equipment with a value of \$3 million or less, by or on behalf of: (A) A hospital; or (B) An individual private physician or single group practice of physicians exclusively for use on patients of such private physician or single group practice of physicians and such private physician or member of such single group practice of physicians is physically present at the practice location where the diagnostic or other imaging equipment is located at least 75% of the time that the equipment is in use.	§ 31-6-47(a)(28)
31. A capital expenditure of \$10 million or less by a hospital at such hospital's primary campus for: (A) The expansion or addition of the following clinical health services: operating rooms, other than dedicated outpatient operating rooms; medical-surgical services; gynecology; procedure rooms; intensive care; pharmaceutical services; pediatrics; cardiac care or other general hospital services; provided, however, that such expenditure does not include the expansion or addition of inpatient beds or the conversion of one type of inpatient bed to another type of inpatient bed; or (B) The movement of clinical health services from one location on the hospital's primary campus to another location on such hospital's primary campus.	§ 31-6-47(a)(29)

HAWAII

Hawaii is one of eight states to require CONs across all six broad categories—hospital beds, beds outside hospitals, equipment, facilities, services and emergency medical

transport. Hawaii is one of only five states to require a CON for ground ambulances. Overall, Hawaii maintains 59 independent CON requirements and 16 exceptions. Additionally, the state's CON application process is unique because three agencies have authority to review CON applications: (1) the local Subarea Councils; (2) the CON Review Panel, and (3) the Statewide Health Coordinating Council. *E.g.* Haw. Rev. Stat. § 323D-44(a); Haw. Code R. § 11-186-3.

Hawaii's COVID-19 Response

As of May 15, 2020, Hawaii had not suspended any CON requirements in response to COVID-19. Existing regulations, however, provide for an expedited application process which allow for expedited CON review during emergencies. *See* Email from Linda Chu Takayama, Chief of Staff, Office of the Governor, to John Wrench, Institute for Justice (Apr. 30, 2020).³³ Specifically, the application review period is shortened to 10 days during emergencies. *See* Haw. Code R. § 11-186-99(d). In addition, Hawaii maintains a rule allowing existing facilities to temporarily add beds without applying for a CON as long as any addition is for 90 days or less. Haw. Code R. § 11-186-7(b).

Application Process

In Hawaii, the CON application process takes up to 90 days, although the review agency has authority to extend this period. Haw. Code R. § 11-186-37. Applications can be submitted at any time. Haw. Code R. § 11-186-24. The nonrefundable fee for a CON application is \$200, plus .001% of the total cost of the project, up to \$1 million, plus .0005% of the total cost of the project in excess of \$1 million. Haw. Code R. § 11-186-25(a).

Competitors may intervene in the application process by attending public hearings. Haw. Code R. § 11-186-47. Competitors have the right to be represented by counsel at public hearings, to present oral and written arguments and evidence, and to question persons who make factual allegations regarding the application. Haw. Rev. Stat. § 323D-45(b). Competitors also have the right to request reconsideration, which includes another hearing, after a showing of good cause. Haw. Code R. § 11-186-82(a).

Types of CONs in Hawaii

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	7	0	Any amount	Preexisting regulation implemented
Beds Outside Hospitals	Yes	5	0	Any amount	Preexisting regulation implemented
Equipment	Yes	4	0	\$400,000 – \$1 million+	-
Facilities/Buildings	Yes	17	0	\$4 million+	-
Services	Yes	25	0	Any amount	-
Emergency Medical Transport	Yes	1	0	Any amount	-

33 Available at <https://ij.org/wp-content/uploads/2020/06/HI-Email-2020.04.30.pdf>.

Hawaii CONs in Detail

Category	Types of CONs	Haw. Code R.
Hospital Beds CON required to add, delete, increase, decrease or relocate any of the following types of beds. Haw. Code R. § 11-186-7(a)	1. Medical/surgical beds. 2. Obstetrics beds. 3. Pediatrics beds. 4. Neonatal intensive care beds. 5. Critical care beds. 6. Psychiatric beds. 7. Acute/long term swing beds.	§ 11-186-5(1)
Beds Outside Hospitals CON required to add, delete, increase, decrease or relocate any of the following types of beds. Haw. Code R. § 11-186-7(a)	1. Psychiatric beds. 2. Rehabilitation beds. 3. Skilled nursing care beds. 4. Intermediate care beds. 5. Special treatment care beds.	§ 11-186-5(2)
Equipment The acquisition of new or replacement equipment costing more than \$1 million or used equipment costing more than \$400,000. Haw. Rev. Stat. § 323D-43(a)(1); Haw. Code R. § 11-186-3	1. Stationary computed tomography scanner.	§ 11-186-5(3)(D)
	2. Mobile computer tomography scanner.	§ 11-186-5(3)(E)
	3. Stationary magnetic resonance imaging scanner.	§ 11-186-5(3)(J)
	4. Mobile magnetic resonance imaging scanner.	§ 11-186-5(3)(K)
Facilities/Buildings Constructing, expanding, altering, converting, developing, initiating or modifying the following facilities requires a CON if such action will cost more than \$4 million. Haw. Rev. Stat. § 323D-43(a)(1)	1. Hospitals. 2. Extended care centers. 3. Rehabilitation centers. 4. Nursing homes. 5. Skilled nursing facilities. 6. Intermediate care facilities. 7. Hospices. 8. Kidney disease treatment centers.	Haw. Code R. 11-186-3; Haw. Rev. Stats. § 323D-43(a)(1), <i>see also</i> Haw. Rev. Stat. § 323D-2

Hawaii CONs in Detail

Category	Types of CONs	Haw. Code R.
Facilities/Buildings Constructing, expanding, altering, converting, developing, initiating or modifying the following facilities requires a CON if such action will cost more than \$4 million. Haw. Rev. Stat. § 323D-43(a)(1)	9. Outpatient clinics.	Haw. Code R. 11-186-3; Haw. Rev. Stats. § 323D-43(a)(1), <i>see also</i> Haw. Rev. Stat. § 323D-2
	10. Ambulatory care centers.	
	11. Emergency care facilities.	
	12. Health maintenance organizations.	
	13. Special treatment facilities.	§ 11-186-5(2)(J)
	14. Comprehensive outpatient rehabilitation centers.	§ 11-186-5(3)(M)
	15. Burn centers.	§ 11-186-5(4)(C)
Services A CON is required to substantially modify or increase the scope or type of any of the following types of health services. Haw. Rev. Stat. § 323D-43(a)(2)	16. Any change of location of a health service.	§ 11-186-6(b)
	17. The addition or deletion of a mobile service.	§ 11-186-6(c)
	1. Medical/surgical.	§ 11-186-5(1)(A)
	2. Obstetrics.	§ 11-186-5(1)(B)
	3. Pediatrics.	§ 11-186-5(1)(C)
	4. Neonatal intensive care.	§ 11-186-5(1)(D)
	5. Critical care.	§ 11-186-5(1)(E)
	6. Psychiatric.	§ 11-186-5(1)(F)
	7. Long term psychiatric.	§ 11-186-5(2)(A)
	8. Tuberculosis.	§ 11-186-5(2)(B)
	9. Hansen's Disease.	§ 11-186-5(2)(C)
	10. Children's Orthopedics.	§ 11-186-5(2)(D)
	11. Rehabilitation.	§ 11-186-5(2)(E)
	12. Skilled nursing care.	§ 11-186-5(2)(F), (I)
	13. Intermediate care.	§ 11-186-5(2)(G), (I)
	14. Special treatment.	§ 11-186-5(2)(J)
	15. Outpatient surgery.	§ 11-186-5(3)(B)

Hawaii CONs in Detail

Category	Types of CONs	Haw. Code R.
Services	16. Diagnostic radiology.	§ 11-186-5(3)(C)
	17. Nuclear medicine.	§ 11-186-5(3)(F)
	18. Home Health agency.	§ 11-186-5(3)(G)
	19. Extracorporeal shock wave lithotripsy.	§ 11-186-5(3)(I)
	20. Chronic renal dialysis.	§ 11-186-5(4)(A)
	21. Cardiac catheterization.	§ 11-186-5(4)(B)
	22. Neurosurgery	§ 11-186-5(4)(D)
	23. Heart surgery.	§ 11-186-5(4)(E)
	24. Transplant surgery.	§ 11-186-5(4)(F)
	25. Radiation therapy.	§ 11-186-5(4)(G)
Emergency Medical Transport	1. Surface ambulances.	§ 11-186-5(3)(H)

Hawaii CON Exceptions

No CON Required For:	Haw. Rev. Stat.
1. Offices of physicians, dentists or similar practitioners in private practice except in any cases involving purchases of equipment exceeding the expenditure minimum.	§ 323D-54(1)
2. Laboratories, except in cases involving purchases of equipment exceeding the expenditure minimum.	§ 323D-54(2)
3. Dispensaries and first aid stations located within business or industrial establishments maintained solely for the use of employees.	§ 323D-54(3)
4. Dispensaries or infirmaries in correctional or educational facilities.	§ 323D-54(4)
5. Hotels, motels and rooming or boarding houses that do not regularly provide health care facilities or health care services.	§ 323D-54(5)
6. Any home or institution conducted only for faith-based groups who rely on healing by prayer or other spiritual means.	§ 323D-54(6)
7. Dental clinics.	§ 323D-54(7)
8. Nonpatient areas of care facilities such as parking garages and administrative offices.	§ 323D-54(8)
9. Bed changes that involve 10% or ten beds of existing licensed bed types, whichever is less, of a facility's total existing licensed beds within a two-year period.	§ 323D-54(9)
10. Projects wholly dedicated to meeting the state's obligations under court orders, including consent decrees, that have already determined that need for the project exists.	§ 323D-54(10)
11. Replacement of existing equipment with its modern-day equivalent.	§ 323D-54(11)
12. Primary care clinics under the relevant expenditure thresholds.	§ 323D-54(12)
13. Equipment and services related to equipment primarily invented and used for research purposes as opposed to diagnostic and therapeutic care.	§ 323D-54(13)
14. Capital expenditures required to eliminate safety hazards, comply with state licensure standards or comply with accreditation standards.	§ 323D-54(14)
15. Extended care adult residential care homes and assisted living facilities.	§ 323D-54(15)
16. Other facilities or services that the agency, through the statewide council, chooses to exempt.	§ 323D-54(16)



ILLINOIS

Illinois requires CONs within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. Of the state's 59 independent CON requirements, 33 apply to different types of services. Additionally, Illinois maintains 10 specific facility CON requirements and bolsters its robust program with three catch-all CON requirements for facilities. That is, if no specific CON applies, catch-all CONs are required if: (1) a hospital proposes a project that will cost more than \$13,743,450; (2) a long-term care facility proposes any project that will cost more than \$7,768,030; or (3) any other facility proposes any project that will cost more than \$3,585,250. *See* 77 Ill. Admin. Code § 1130.310(a)(1); 20 ILCS 3960/3.

Illinois' COVID-19 Response

As of May 15, 2020, Governor Pritzker had not suspended CON requirements in response to COVID-19. The Health Facilities and Services Review Board (Board), however, indicated that an emergency rule allowing the temporary addition of beds was in effect during the COVID-19 pandemic. *See* Board, [Frequently Asked Questions and Answers for Health Care Facilities](#) (Apr. 20, 2020). Under the emergency rule, healthcare facilities can temporarily increase bed capacity to accommodate extraordinary needs due to pandemics or other disasters so long as they provide written notice to the Board within 30 days of the decision to increase capacity. *See* 77 Ill. Adm. Code § 1130.240(f)(4)(A).

Application Process

In Illinois, the CON application process takes up to 120 days. 20 ILCS 3960/6.2. Applications can be submitted at any time. The non-refundable fee for a CON application ranges from \$2,500 up to \$100,000 depending on the cost of the proposed project. 77 Ill. Admin. Code § 1130.230(h)(2)(C)-(D). Competitors can request public hearings, at which they can offer evidence and argument as to why an application should be denied. 20 ILCS 3960/6.2.

Types of CONs in Illinois

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	2	0	Any amount	Preexisting regulation implemented
Beds Outside Hospitals	Yes	13	0	Any amount	Preexisting regulation implemented
Equipment	Yes	1	0	\$0 – \$3,585,250+	-
Facilities/Buildings	Yes	10	0	Any amount	-
Services	Yes	33	0	\$0– \$3,585,250+	-
Emergency Medical Transport	No	-	-	-	-

Illinois CONs in Detail

Category	Types of CONs	Citation
Hospital Beds Increasing the total number of beds, distributing beds or relocating beds from one facility to another by more than 20 beds or 10% of the total bed capacity limit, whichever is less, over a two-year period. 20 ILCS 3960/5(c)	1. Hospital beds.	20 ILCS 3960/3(2)
	2. Hospital beds in a state-operated facility.	20 ILCS 3960/3(4)
Beds Outside Hospitals Increasing the total number of beds, distributing beds or relocating beds from one facility to another by more than 20 beds or 10% of the total bed capacity limit, whichever is less, over a two-year period. 20 ILCS 3960/5(c)	1. Beds used in ambulatory surgical treatment centers.	20 ILCS 3960/3(1)
	2. Beds used in a state-operated ambulatory surgical treatment center.	20 ILCS 3960/3(4)
	3. Beds used in long-term care nursing facilities.	20 ILCS 3960/3(3)
	4. Beds used in a state-operated nursing facility.	20 ILCS 3960/3(4)
	5. Beds used in facilities providing care for intellectual or developmental disabilities.	20 ILCS 3960/3(3.5)
	6. Beds used in facilities providing mental health rehabilitation.	20 ILCS 3960/3(3.7)
	7. Beds used in a kidney disease treatment center.	20 ILCS 3960/3(5)
	8. Beds used in state-operated kidney disease treatment centers.	20 ILCS 3960/3(4)
	9. Beds used in outpatient treatment centers that are owned or operated by an out-of-state facility.	20 ILCS 3960/3(6)
	10. Beds in any facility or room used for cardiac catheterization.	20 ILCS 3960/3(7)
	11. Beds in any facility or room used for open heart surgery.	20 ILCS 3960/3(7)
	12. Beds in any facility or room used for pediatric care.	20 ILCS 3960/3(7); see 77 Ill. Admin. Code § 1100.220
	13. Beds used in any facility or room housing equipment which is used for diagnosis or treatment and exceeds the capital expenditure minimum.	20 ILCS 3960/3(8)

Illinois CONs in Detail

Category	Types of CONs	Citation
Equipment	1. The acquisition of major medical equipment, which is equipment costing more than \$3,585,250, as updated annually.	77 Ill. Admin. Code § 1130.310(a)(7); see Memo from Board, <i>Revised CON Review Thresholds</i> (July 1, 2019) ³⁴
Facilities/Buildings	1. Any substantial change to the scope of functional operation of the facility.	77 Ill. Admin. Code §§ 1130.310(a)(2), <i>see also</i> 1130.140
	2. Hospital. 3. Ambulatory surgical treatment center. 4. Long-term care facility licensed under the Nursing Home Care Act. 5. End stage renal disease facility. 6. Birth center. 7. Freestanding emergency center. 8. Facility used for outpatient surgical procedures owned or operated by out-of-state facilities.	77 Ill. Admin. Code §§ 1130.310(a)(3), <i>see also</i> 1130.210
	9. A change of ownership of a health care facility, unless an exemption is issued.	77 Ill. Admin. Code § 1130.310(5)
	10. The discontinuation of an entire health care facility, unless an exemption has been issued.	77 Ill. Admin. Code § 1130.310(6)
Services	1. Acute mental illness treatment services. 2. Ambulatory care. 3. Cardiac catheterization. 4. Cardiovascular surgery. 5. Chronic renal dialysis. 6. Community-based residential rehabilitation. 7. Comprehensive physical rehabilitation. 8. Emergent care. 9. Extracorporeal circulation. 10. Freestanding emergency center medical services. 11. General long-term care. 12. Hospital services—schedule surgical procedures on an inpatient basis. 13. In-center hemodialysis.	77 Ill. Admin. Code §§ 1130.215(i), <i>see</i> 1100.220 (enumerating various categories of services)

³⁴ Available at <https://ij.org/wp-content/uploads/2020/06/IL-2019.07.01.pdf>.

Illinois CONs in Detail

Category	Types of CONs	Citation
Services	14. Intensive care service. 15. Kidney transplants. 16. Maternity care. 17. Medical-surgical service. 18. Neonatal intensive care service. 19. Non-hospital (outpatient) ambulatory surgery. 20. Obstetrics/gynecological care. 21. Obstetrics service. 22. Open heart surgery. 23. Pediatric catheterization. 24. Pediatric service. 25. Postsurgical recovery care center alternative health care model. 26. Selected organ transplantation service.	77 Ill. Admin. Code §§ 1130.215(i), see 1100.220 (enumerating various categories of services)
	27. Long-term care specializing in chronic mental illness. 28. Long-term care specializing in care for developmentally disabled adults. 29. Long-term care specializing in care for developmentally disabled children. 30. Subacute care. 31. Any project requiring a total capital expenditure in excess of \$13,743,450, as updated annually, at a hospital. 32. Any project requiring a total capital expenditure in excess of \$7,768,030, as updated annually, at a long term care facility. 33. Any project requiring a total capital expenditure in excess of \$3,585,250, as updated annually, at any other facility.	77 Ill. Admin. Code §§ 1130.215(i), see 1100.220 (enumerating various categories of services)
Emergency Medical Transport	No CONs in this category.	

Illinois CON Exceptions

No CON Required For:	77 Ill. Adm. Code
1. Change of ownership of an existing health care facility, not including nursing homes.	§ 1130.410(a)
2. Discontinuation of an existing health care facility or category of service, other than a health care facility maintained by the state or any nursing home maintained by a county.	§ 1130.410(b)
3. A proposed project to establish or expand service or beds at a neonatal intensive care facility.	§ 1130.410(c)



INDIANA

Indiana requires CONs within two broad categories—beds outside hospitals and

facilities. The program regulates only nursing homes. It also has the distinction of being the newest in the country. In fact, Indiana only began accepting applications on July 1, 2019. *See* Ind. Code § 16-29-7-13(a). Indiana is the only state in the nation to have only a single application cycle per year. The statute begins by listing exceptions and never explicitly lists the facilities for which CONs are required, leaving readers to infer that the defined facilities require CONs.

Indiana’s COVID-19 Response

On March 19, 2020, Governor Holcomb authorized the Commissioner of the Indiana Department of Health to “waive requirements of the nursing home certificate of need statute” as necessary to respond to COVID-19. *Exec. Order* 20-05 at 3 (Mar. 19, 2020).³⁵ As of May 15, 2020, however, Commissioner Box had not responded to the Executive Order or otherwise exercised her authority to waive CON requirements.

Application Process

In Indiana, the CON application process takes about nine months. *See* Ind. Code § 16-29-7-13(e). Applications can only be submitted once annually through July 31. Ind. Code § 16-29-7-13(b). The fee for a CON application is \$5,000. Ind. Code §§ 16-29-7-19(a); 4-22-2.³⁶ Competitors cannot intervene directly in the application process but they may submit public comments. *See* Ind. Code § 16-29-7-13(d).

Types of CONs in Indiana

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	No	-	-	-	-
Beds Outside Hospitals	Yes	2	0	Any amount	-
Equipment	No	-	-	-	-
Facilities/Buildings	Yes	2	0	Any amount	-
Services	No	-	-	-	-
Emergency Medical Transport	No	-	-	-	-

³⁵ Available at <https://ij.org/wp-content/uploads/2020/06/Ind.-Exec.-Order.pdf>.

³⁶ See also Certificate of Need in.gov/isdh/28280.htm

Indiana CONs in Detail

Category	Types of CONs	Ind. Code
Hospital Beds	No CONs in this category.	
Beds Outside Hospitals	1. A bed in a comprehensive care health facility (nursing home) that is licensed or is to be licensed under Ind. Code § 16-28-2.	§§ 16-29-7-1(a)(1)(A), 16-29-7-2(a)(1)
	2. A bed in a comprehensive care health facility (nursing home) that functions as a bed licensed under Ind. Code § 16-28-2.	§ 16-29-7-2(a)(2)
Equipment	No CONs in this category.	
Facilities/Buildings	1. Construction of a new nursing home. 2. Modification or alteration of an existing nursing home. A comprehensive care health facility requires a CON(nursing home) is a facility that provides nursing care, room, food, laundry, administration of medications, special diets, treatments <i>and</i> that may provide rehabilitative and restorative therapies under the order of an attending facilities.	§§ 16-29-7-1(a)(2), 16-29-7-3(1)-(7)
Services	No CONs in this category.	
Emergency Medical Transport	No CONs in this category.	

Indiana CON Exceptions

No CON Required For:	Ind. Code
1. A replacement facility in the same county as the original facility.	§ 16-29-7-1(a)(1)
2. A facility creating a new addition or altering the structure of the existing facility.	§ 16-29-7-1(2)(A)-(B)
3. Transferring beds to another facility in the same county.	§ 16-29-7-1(3)
4. A care bed that is: owned by a religious organization or a nonprofit owned by a religious organization, or sponsored by a fraternal organization.	§ 16-29-7-1(4)
5. A care bed that is sponsored by a fraternal organization.	§ 16-29-7-1(5)
6. Small house facility with no more than 50 beds.	§ 16-29-7-1(6)
7. A continuing care retirement community that needs additional comprehensive care beds for purposes of fulfilling a continuing care contract.	§ 16-29-7-1(7)(c)

Indiana only began accepting applications on July 1, 2019.

Iowa requires CONs within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. Iowa maintains 29 independent CON requirements and 18 separate exceptions, one of which is in the form of an attorney general opinion concluding that Iowa’s air ambulance CON provision conflicts with federal aviation law and thus is unenforceable. Despite the attorney general opinion from 2016, the air ambulance CON provision remains codified in Iowa’s statutes. Iowa also maintains a CON requirement for activities such as reducing bed capacity and eliminating a health service.

Iowa’s COVID-19 Response

On March 17, 2020, Governor Reynolds suspended the requirement that institutional health facilities obtain a CON prior to increasing bed capacity. *Proclamation of Disaster Emergency Relief* (Mar. 17, 2020).³⁷ The suspension expired April 16, 2020.

Application Process

In Iowa, the CON application review process takes between 60–90 days. Iowa Code § 135.69(1); Iowa Admin. Code §§ 641-202.7(3), (6). Applications can be submitted at any time. The fee for a CON application can range from \$600 to \$21,000. Iowa Admin. Code § 641-202.4(2). Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. Iowa Code § 135.66(4).

Types of CONs in Iowa

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	1	0	Any amount	Suspended
Beds Outside Hospitals	Yes	7	0	Any amount	Suspended
Equipment	Yes	4	0	\$1.5 million+	-
Facilities/Buildings	Yes	8	0	Any amount	-
Services	Yes	9	0	\$0 – \$1.5 million	-
Emergency Medical Transport	No	-	-	-	-

³⁷ Available at <https://ij.org/wp-content/uploads/2020/06/Iowa-Proc.pdf>.

Iowa CONs in Detail

Category	Types of CONs	Iowa Code
Hospital Beds	1. A permanent change in the bed capacity of a hospital.	§§ 135.61(18)(d),(14)(a)
Beds Outside Hospitals	CON required for a permanent change in the bed capacity of: 1. A nursing facility.	§§ 135.61(18)(d), (14)(b), (9), 135C.1(7)
	2. An intermediate care facility for persons with mental illness.	§§ 135.61(18)(d), (14)(b), (9), 135C.1(7)
	3. An intermediate care facility for persons with an intellectual disability.	§§ 135.61(18)(d), (14)(b), (9), 135C.1(7)
	4. An organized outpatient health facility.	§§ 135.61(18)(d), (14)(c)
	5. An outpatient surgical facility.	§§ 135.61(18)(d), (14)(d)
	6. A community mental health facility.	§§ 135.61(18)(d), (14)(e)
	7. A birth center.	§§ 135.61(18)(d), (14)(f)
Equipment	1. Any acquisition by or on behalf of a health care provider or a group of health care providers of any piece of replacement equipment with a value in excess of \$1.5 million.	§ 135.61(18)(g)
	2. Any acquisition by or on behalf of a health care provider or group of health care providers of any piece of equipment with a value in excess of \$1.5 million, which results in the offering or development of a health service not previously provided.	§ 135.61(18)(h)
	3. Any acquisition of any piece of replacement equipment valued in excess of \$1.5 million by: » A hospital. » A nursing facility. » An intermediate care facility for persons with mental illness. » An intermediate care facility for persons with an intellectual disability. » An organized outpatient health facility. » An outpatient surgical facility. » A community mental health facility. » A birth center.	§§ 135.61(18)(i), 135.61(14)
	4. Any acquisition of any new piece of equipment valued in excess of \$1.5 million, which results in the offering or development of a service not previously provided by any of the following: » A hospital. » A nursing facility. » An intermediate care facility for persons with mental illness. » An intermediate care facility for persons with an intellectual disability. » An organized outpatient health facility. » An outpatient surgical facility. » A community mental health facility. » A birth center.	§§ 135.61(18)(j), 135.61(14)

Iowa CONs in Detail

Category	Types of CONs	Iowa Code
Facilities/Buildings CON required for construction, development or other establishment of, or relocation of:	1. A hospital.	§§ 135.61(18)(a), (b), 135.61(14)(a)
	2. A nursing facility.	§§ 135.61(18)(a), (b), 135.61(14)(b), 135.61(9), 135C.1(7)
	3. An intermediate care facility for persons with mental illness.	§§ 135.61(18)(a), (b), 135.61(14)(b), 135.61(9), 135C.1(7)
	4. An intermediate care facility for persons with an intellectual disability.	§§ 135.61(18)(a), (b), 135.61(14)(b), 135.61(9), 135C.1(7)
	5. An organized outpatient health facility.	§§ 135.61(18)(a), (b), 135.61(14)(c)
	6. An outpatient surgical facility.	§§ 135.61(18)(a), (b), 135.61(14)(d)
	7. A community mental health facility.	§§ 135.61(18)(a), (b), 135.61(14)(e)
	8. A birth center.	§§ 135.61(18)(a), (b), 135.61(14)(f)
Services	1. Any capital expenditure, lease, or donation in excess of \$1.5 million within a 12-month period by or on behalf of: » A hospital. » A nursing facility. » An intermediate care facility for persons with mental illness. » An intermediate care facility for persons with an intellectual disability. » An organized outpatient health facility. » An outpatient surgical facility. » A community mental health facility. » A birth center.	§§ 135.61(18)(c), 135.61(14), 135c.1(7)
	2. Any expenditure in excess of \$500,000 for health services which were not offered on a regular basis within the 12-month period prior to that time by or on behalf of: » A hospital. » A nursing facility. » An intermediate care facility for persons with mental illness. » An intermediate care facility for persons with an intellectual disability. » An organized outpatient health facility. » An outpatient surgical facility. » A community mental health facility. » A birth center.	§§ 135.61(18)(e), 135.61(14), 135c.1(7)

Iowa CONs in Detail

Category	Types of CONs	Iowa Code
Services	3. CON required for deletion of one or more health services, previously offered on a regular basis by: » A hospital. » A nursing facility. » An intermediate care facility for persons with mental illness. » An intermediate care facility for persons with an intellectual disability. » An organized outpatient health facility. » An outpatient surgical facility. » A community mental health facility. » A birth center.	§§ 135.61(18)(f), 135.61(14), 135c.1(7)
	4. Any air transportation service for transportation of patients or medical personnel which was not offered on a regular basis within the 12-month period prior to the specific time offered by: » A hospital. » A nursing facility. » An intermediate care facility for persons with mental illness. » An intermediate care facility for persons with an intellectual disability. » An organized outpatient health facility. » An outpatient surgical facility. » A community mental health facility. » A birth center.	§§ 135.61(18)(k), 135.61(14), 135c.1(7)
	5. Offering or developing any mobile health service with a value in excess of \$1.5 million.	§ 135.61(18)(l)
	6. Offering or developing cardiac catheterization service.	§135.61(18)(m)(1)
	7. Offering or developing open heart surgical service.	§135.61(18)(m)(2)
	8. Offering or developing organ transplantation service.	§135.61(18)(m)(3)
	9. Offering or developing radiation therapy service applying ionizing radiation for the treatment of malignant disease using megavoltage external beam equipment.	§135.61(18)(m)(4)
Emergency Medical Transport	No CONs in this category.	

Iowa CON Exceptions

No CON Required For:	Iowa Code
1. Private offices and private clinics of an individual physician, dentist or other practitioner or group of health care providers.	§ 135.63(2)(a)
2. Dispensaries and first aid stations, located within schools, businesses or industrial establishments, which are maintained solely for the use of students or employees of those establishments and which do not contain inpatient or resident beds that are customarily occupied by the same individual for more than 24 consecutive hours.	§ 135.63(2)(b)
3. Establishments such as motels, hotels and boarding houses which provide medical, nursing personnel and other health related services as an incident to their primary business or function.	§ 135.63(2)(c)
4. The remedial care or treatment of residents or patients in any home or institution conducted only for those who rely solely upon treatment by prayer or spiritual means in accordance with the creed or tenets of any recognized church or religious denomination.	§ 135.63(2)(d)
5. Health maintenance organization or combination of health maintenance organizations except when the health maintenance organization or combination of health maintenance organizations does any of the following: (1) Constructs, develops, renovates, relocates or otherwise establishes an institutional health facility; and (2) Acquires major medical equipment as provided by § 135.61, subsection 18, paragraphs "i" and "j."	§ 135.63(2)(e)
6. Residential care facilities.	§ 135.63(2)(f)
7. A reduction in bed capacity of an institutional health facility, notwithstanding any provision in this subchapter to the contrary, if all of the following conditions exist: (a) The institutional health facility reports to the department the number and type of beds reduced on a form prescribed by the department at least 30 days before the reduction. In the case of a health care facility, the new bed total must be consistent with the number of licensed beds at the facility. In the case of a hospital, the number of beds must be consistent with bed totals reported to the department of inspections and appeals for purposes of licensure and certification; and (b) The institutional health facility reports the new bed total on its next annual report to the department.	§ 135.63(2)(g)(1)
8. The deletion of one or more health services, previously offered on a regular basis by an institutional health facility or health maintenance organization, notwithstanding any provision of this subchapter to the contrary, if all of the following conditions exist: (a) The institutional health facility or health maintenance organization reports to the department the deletion of the service or services at least thirty days before the deletion on a form prescribed by the department; and (b) The institutional health facility or health maintenance organization reports the deletion of the service or services on its next annual report to the department.	§ 135.63(2)(h)(1)
9. A residential program exempt from licensing as a health care facility under chapter 135C.6, subsection 8.	§ 135.63(2)(i)
10. The construction, modification or replacement of nonpatient care services.	§ 135.63(2)(j)

Iowa CON Exceptions

No CON Required For:	Iowa Code
11. The redistribution of beds by a hospital within the acute care category of bed usage, notwithstanding any provision in this subchapter to the contrary, if all of the following conditions exist: (a) The hospital reports to the department the number and type of beds to be redistributed on a form prescribed by the department at least 30 days before the redistribution. (b) The hospital reports the new distribution of beds on its next annual report to the department.	§ 135.63(2)(k)(1)
12. The replacement or modernization of any institutional health facility if the replacement or modernization does not add new health services or additional bed capacity for existing health services—with special rules for nursing home and hospital “replacement.”	§ 135.63(2)(l)
13. Hemodialysis services provided by a hospital or freestanding facility.	§ 135.63(2)(m)
14. Hospice services provided by a hospital.	§ 135.63(2)(n)
15. The change in ownership, licensure, organizational structure or designation of the type of institutional health facility if the health services offered by the successor institutional health facility are unchanged. This exclusion is applicable only if the institutional health facility consents to the change in ownership, licensure, organizational structure, or designation of the type of institutional health facility and ceases offering the health services simultaneously with the initiation of the offering of health services by the successor institutional health facility.	§ 135.63(2)(o)
16. The conversion of an existing number of beds by an intermediate care facility for persons with an intellectual disability to a smaller facility environment, if all the following conditions are met: (1) The intermediate care facility for persons with an intellectual disability reports the number and type of beds to be converted on a form prescribed by the department at least thirty days before the conversion. (2) The intermediate care facility for persons with an intellectual disability reports the conversion of beds on its next annual report to the department.	§ 135.63(2)(p)
17. Health care facility operated by and for the exclusive use of members of a religious order, which does not admit more than two individuals to the facility from the general public, and which was in operation prior to July 1, 1986.	§ 135.63(3)
18. Air ambulance service.	Iowa Dep’t of Justice, <i>Air Ambulances and Certificate of Need</i> (Feb 26, 2016) ³⁸ (concluding Iowa’s air ambulance CON requirement is preempted by federal aviation laws and should not be enforced by the department).

38 Available at <https://ij.org/wp-content/uploads/2020/06/Iowa-Air-CON.pdf>.

KENTUCKY

Kentucky is one of eight states to require CONs across all six broad categories—hospital beds, beds outside hospitals, equipment, facilities, services and emergency medical transportation.

Kentucky maintains 45 independent CON requirements, although it also has 40 exceptions that apply to things like primary care centers, rural health clinics and most mobile clinics. *See* Ky. Rev. Stat. § 216B.020. The state failed to issue any formal guidance or otherwise suspend any CON requirements in response to COVID-19, but it maintains a general emergency CON regulation that allows for temporary expansions without CONs in limited circumstances.

Kentucky's COVID-19 Response

On March 6, 2020, Governor Beshear declared a state of emergency in Kentucky. Exec. Order 2020-215 (Mar. 6, 2020). In response, the Kentucky Cabinet for Health and Human Services (Cabinet) provided a brief update on its website regarding emergency CONs. *See* Cabinet, [Certificate of Need](#).³⁹ Notably, the Cabinet directed potential applications to “follow emergency regulation 900 [Ky. Admin. Regs.] 6:080.” This regulation allows healthcare providers to respond to the emergency without first seeking a CON, so long as they notify the Cabinet about what action was taken after the fact. The emergency service may continue without a CON until “the emergency ceases to exist” or “the [C]abinet issues a final decision to approve or disapprove the application for CON.” 900 Ky. Admin. Regs. 6:080 § 2(5). According to the Cabinet’s website, it received 25 emergency CON applications between March 18, 2020, and June 1, 2020. *See* Cabinet, [CON Search Emergency Approval](#).⁴⁰

Application Process

In Kentucky, formal review of a CON application takes up to 90 days. Ky. Rev. Stat. §216B.015; 900 Ky. Admin. Regs. 6:065. If an application qualifies for nonsubstantive review and no direct competitors request a hearing, the application process takes 35 days once an application is deemed complete. *See* Ky. Rev. Stat. § 216B.095. Applications can be submitted at any time. The fee for a CON application ranges from \$1,000 (for proposals less than \$200,000 in capital expenditures) to \$25,000 (for proposals greater than \$5 million). 900 Ky. Admin. Regs. 6:020 §§ 1(2)-(4). An application fee is nonrefundable unless the applicant withdraws the application within five days after its submission. 900 Ky. Admin. Regs. 6:020 § 2(3). Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. 900 Ky. Admin. Regs. 6:090.

Types of CONs in Kentucky

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	3	0	Any amount	Preexisting regulation implemented
Beds Outside Hospitals	Yes	14	0	Any amount	Preexisting regulation implemented
Equipment	Yes	1	0	\$3,319,893+	Preexisting regulation implemented
Facilities/Buildings	Yes	17	0	\$0 – \$3,319,893	Preexisting regulation implemented
Services	Yes	9	0	\$0 – \$3,319,893	Preexisting regulation implemented
Emergency Medical Transport	Yes	1	0	Any amount	Preexisting regulation implemented

³⁹ Available at <https://chfs.ky.gov/agencies/os/oig/dcn/Pages/cn.aspx>.

⁴⁰ Available at <https://prdweb.chfs.ky.gov/CONOnline/SearchEmergencyApproval.aspx> (search “received date year” 2020).

Kentucky CONs in Detail

Category	Types of CONs	Ky. Rev. Stat.
Hospital Beds	1. Hospital beds. 2. Psychiatric hospital beds. 3. Physical rehabilitation hospital beds.	§§ 216B.061(1)(c), 216B.015(13)
Beds Outside Hospitals	1. Chemical dependency program 2. Nursing facilities. 3. Nursing homes. 4. Personal care homes. 5. Intermediate care facilities. 6. Family care homes. 7. Outpatient clinics. 8. Ambulatory care facilities. 9. Ambulatory surgical centers. 10. Emergency care centers. 11. Hospices. 12. Community mental health centers. 13. Home agencies. 14. Kidney disease treatment centers and free-standing hemodialysis units.	§§ 216B.061(1)(c), 216B.015(13)
Equipment	1. The acquisition of major medical equipment that costs more than \$3,319,893 as updated annually.	§§ 216B.061(1)(f), 216B.015(17)
Facilities/Buildings	1. Hospitals. 2. Psychiatric hospitals. 3. Physical rehabilitation hospitals. 4. Chemical dependency programs. 5. Nursing facilities. 6. Nursing homes. 7. Personal care homes. 8. Intermediate care facilities. 9. Family care homes. 10. Outpatient clinics. 11. Ambulatory care facilities. 12. Ambulatory surgical centers. 13. Emergency care centers. 14. Hospices.	§§ 216B.061(1)(a), 216B.015(13)

Kentucky CONs in Detail

Category	Types of CONs	Ky. Rev. Stat.
Facilities/Buildings	15. Community mental health centers. 16. Kidney disease treatment centers and free-standing hemodialysis units.	§§ 216B.061(1)(a), 216B.015(13)
	17. Any health facility that requests a capital expenditure in excess of \$3,319,893, updated annually.	§§ 216B.020(4)(e), 216B.015(8)
Services	1. Cardiac catheterization.	§ 216B.020(4)(b)(1)
	2. Megavoltage radiation therapy.	§ 216B.020(4)(b)(2)
	3. Adult day health care.	§ 216B.020(4)(b)(3)
	4. Behavioral health services.	§ 216B.020(4)(b)(4)
	5. Chronic renal dialysis.	§ 216B.020(4)(b)(5)
	6. Birthing services.	§ 216B.020(4)(b)(6)
	7. Home health services.	§§ 216B.061(1)(a), 216B.015(13)
	8. Emergency services above the level of treatment for minor illnesses or injuries.	§ 216B.020(4)(b)(7)
	9. Any health service that requests a capital expenditure in excess of \$3,319,893.* The expenditure minimum is updated annually.	§§ 216B.020(4)(e), 216B.015(8)
Emergency Medical Transport	1. Ambulance providers.	§§ 216B.061(1)(a), see 216B.015(13)

Kentucky CON Exceptions

No CON Required For:	Ky. Rev. Stat.
1. Primary care centers.	§§ 216B.020(3)(a), 216B.020(i)
2. Special health clinics.	§ 216B.020(3)(b)
3. Specialized medical technology services, unless providing a state health plan service.	§ 216B.020(3)(c)
4. Retail-based health clinics and ambulatory care clinics that provide nonemergency, noninvasive treatment of patients.	§ 216B.020(3)(d)
5. Ambulatory care clinics treating minor illnesses and injuries.	§ 216B.020(3)(e)
6. Mobile health services, unless providing a service in the state health plan.	§ 216B.020(3)(f)
7. Rehabilitation agencies.	§ 216B.020(3)(g)
8. Rural health clinics.	§ 216B.020(3)(h)
9. Off-campus, hospital-acquired physician practices.	§216B.020(3)(i)
10. Private offices and clinics of physicians, dentists and other practitioners of healing arts.	§ 216B.020(2)(a)
11. Office buildings built by or on behalf of a health facility for the exclusive use of physicians, dentists and other practitioners of the healing arts.	§ 216B.020(2)(b)
12. Outpatient health facilities that do not provide services in the facility after midnight and are exempt from CON and licensure under 216B.020(3).	§ 216B.020(2)(c)
13. Dispensaries and first-aid stations located within business or industrial establishments maintained solely for the use of employees, if the facility does not contain inpatient or resident beds for patients or employees who generally remain in the facility for more than 24 hours.	§ 216B.020(2)(d)
14. Establishments, such as motels, hotels and boarding houses, which provide domiciliary and auxiliary commercial services, but do not provide any health related services and boarding houses which are operated by persons contracting with the United States Department of Veterans Affairs for boarding services.	§ 216B.020(2)(e)
15. The remedial care or treatment of residents or patients in any home or institution conducted only for those who rely solely upon treatment by prayer or spiritual means in accordance with the creed or tenets of any recognized church or religious denomination and recognized by that church or denomination.	§ 216B.020(2)(f)
16. On-duty police and fire department personnel assisting in emergency situations by providing first aid or transportation when regular emergency units licensed to provide first aid or transportation are unable to arrive at the scene of an emergency situation within a reasonable time.	§ 216B.020(2)(g)
17. Abortion facilities as defined in Ky. Rev. Stat. § 216B.015. 18. Hospitals that do not seek or accept Medicare, Medicaid or other financial support from the federal government or any state government. 19. Assisted living residences. 20. Family care homes. 21. State veterans' nursing homes. 22. Services provided on a contractual basis in a rural primary-case hospital.	§ 216B.020(1)

Kentucky CON Exceptions

No CON Required For:	Ky. Rev. Stat.
23. Community mental health centers for services as defined in Ky. Rev. Stat. Chapter 210. 24. Rural health clinics. 25. Private duty nursing services operating as nursing pools. 26. Group homes. 27. Licensed residential crisis stabilization units. 28. Licensed free-standing residential substance use disorder treatment programs with 16 or fewer beds, but not including Levels I and II psychiatric residential treatment facilities or licensed psychiatric inpatient beds. 29. Outpatient behavioral health treatment, but not including partial hospitalization programs. 30. End stage renal disease dialysis facilities, freestanding or hospital based. 31. Swing beds. 32. Special clinics, including but not limited to wellness, weight loss, family planning, disability determination, speech and hearing, counseling, pulmonary care and other clinics which only provide diagnostic services with equipment not exceeding the major medical equipment cost threshold and for which there are no review criteria in the state health plan. 33. Non-clinically related expenditures. 34. Nursing home beds that shall be exclusively limited to on-campus residents of a certified continuing care retirement community. 35. Home health services provided by a continuing care retirement community to its on-campus residents. 36. The relocation of hospital administrative or outpatient services into medical office buildings which are on or contiguous to the premises of the hospital. 37. The relocation of acute care beds which occur among acute care hospitals under common ownership and which are located in the same area development district so long as there is no substantial change in services and the relocation does not result in the establishment of a new service at the receiving hospital for which a CON is required. 38. The redistribution of beds by licensure classification within an acute care hospital so long as the redistribution does not increase the total licensed bed capacity of the hospital. 39. Residential hospice facilities established by licensed hospice programs. 40. The following health services provided on site in an existing health facility when the cost is less than six hundred thousand dollars (\$600,000) and the services are in place by December 30, 1991: psychiatric care where chemical dependency services are provided, level one (1) and level two (2) of neonatal care, cardiac catheterization and open-heart surgery where cardiac catheterization services are in place as of July 15, 1990.	§ 216B.020(1)



LOUISIANA

Louisiana maintains a CON program, which it calls a “facility need review” (FNR) program, within two broad categories—beds outside hospitals and facilities. FNRs function the same as CONs.

Louisiana also maintains three moratoria that prohibit: (1) constructing new nursing facilities; (2) constructing intermediate care facilities for the developmentally disabled with more than 16 beds; or (3) adding beds to nursing facilities. Notably, Louisiana is one of the few states where the Department of Health decides FNR applications without hearing from an applicant’s direct competitors. In fact, competitors may not intervene during the application process or otherwise participate in the review process. La. Admin. Code tit. 48, pt. 1 § 12501 (A).

Louisiana’s COVID-19 Response

As of May 15, 2020, Louisiana had not suspended any FNR requirements in response to COVID-19. Just the opposite, on March 25, 2020, the Louisiana Department of Health suspended review of all pending FNR applications through May 31, 2020. *See* La. Dep’t of Health, [Coronavirus \(COVID-19\) Updates](#).⁴¹ As a result, pending applications were delayed and healthcare providers were unable to expand as needed to respond to COVID-19.

Application Process

In Louisiana, the general FNR application process takes no more than 60 days. La. Admin. Code tit. 48, pt. 1 § 12501(B). Applications can be submitted at any time and the non-refundable application fee is \$200. *See* La. Admin. Code tit. 48, pt. 1 § 12505(A)(2). If an FNR application is denied, the fee for an appeal is \$500. *See* La. Admin. Code tit. 48, pt. 1 § 12505(B)(5). Competitors are not provided notice of applications, cannot intervene in the application process, and cannot offer evidence or argument as to why an application should be denied. La. Admin. Code tit. 48, pt. 1 § 12505(A).

Types of FNRs in Louisiana

	FNR?	Number of FNRs	Moratoria	FNR applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	No	-	-	-	-
Beds Outside Hospitals	Yes	4	1	Any amount	-
Equipment	No	-	-	-	-
Facilities/Buildings	Yes	7	2	Any amount	-
Services	No	-	-	-	-
Emergency Medical Transport	No	-	-	-	-

⁴¹ Available at <http://ldh.la.gov/index.cfm/newsroom/detail/5407>.

Louisiana FNRs in Detail

Category	Moratoria/Types of FNRs	La. Admin. Code tit. 48, pt. 1
Hospital Beds	No FNRs in this category.	
Beds Outside Hospitals	1. Moratorium on adding beds to nursing facilities.	La. R. S. 40:2116(D)(2)
	1. Adult residential care facility beds.	§ 12503(C)(1)
	2. Home and community-based service facility beds.	§ 12503(C)(2)
	3. Hospice facility beds.	§ 12503(C)(4)
	4. Behavioral health facility beds.	§ 12503(C)(6)
Equipment	No FNRs in this category.	
Facilities/Buildings	1. Moratorium on nursing facilities.	La. R. S. 40:2116(D)(2)
	2. Moratorium on intermediate care facilities for the developmentally disabled with more than 16 beds.	§ 12507(D)
	1. Intermediate care facilities for persons with developmental disabilities.	§ 12503(A)(3)
	2. Adult residential care facilities.	§ 12503(C)(1)
	3. Home and community-based service facilities.	§ 12503(C)(2)
	4. Adult day health care facilities.	§ 12503(C)(3)
	5. Hospice facilities.	§ 12503(C)(4)
	6. Pediatric day health care facilities.	§ 12503(C)(5)
	7. Behavioral health facility.	§ 12503(C)(6)
Services	No FNRs in this category.	
Emergency Medical Transport	No FNRs in this category.	

Louisiana FNR Exceptions

No FNR Required For:	La. Admin. Code tit. 48, pt. 1
1. The replacement of a nursing facility due to destruction by fire or a natural disaster.	§ 12503(H)(1)
2. The replacement of a government-owned nursing facility or facility building due to a potential health hazard.	§ 12503(H)(2)

Maine requires CONs within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. Maine’s CON program contains 42 independent CON requirements but exempts some commonly regulated services such as home healthcare and hospice. 10-144-503 Me. Code R. § 4-2(C), (D). Maine’s CON requirements allow providers to increase bed capacity without obtaining a CON if the increase is less than 10% of capacity. 10-144-503 Me. Code R. §§ 4-1(B)(5). The CON application fee can cost up to \$250,000. 10-144-503 Me. Code R. § 6-8(A)-(D).

Maine’s COVID-19 Response

On April 10, 2020, the Division of Licensing and Certification issued guidance allowing hospitals and nursing homes to apply for emergency CONs to increase bed capacity in response to the pandemic.⁴² Any approvals granted were temporary and expired 60 days after the Governor declared an end to the state of emergency.

Application Process

In Maine, the CON application process takes 90 days from the start of the review. 10-144-503 Me. Code R. § 7-1(B). Applications can be submitted at any time. The application fee is nonrefundable and it ranges from \$5,000 to \$250,000, calculated at \$1,000 per \$1 million in proposed capital expenditures. 10-144-503 Me. Code R. §§ 6-8(A)-(D). Competitors can intervene in the application process and offer evidence or argument as to why an application should be denied. 10-144-503 Me. Code R. § 6-6, *see also* § 7-1(C)(1)-(4). Applications that primarily involve maintenance of an existing healthcare facility may undergo a simplified review process. 10-144-503 Me. Code R. § 7-9.

Types of CONs in Maine

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	2	0	Any amount	Expedited review
Beds Outside Hospitals	Yes	8	0	Any amount	Expedited review
Equipment	Yes	2	0	\$3,956,841+	-
Facilities/Buildings	Yes	20	0	\$3 million – \$12,365,130+	-
Services	Yes	10	0	Any amount	-
Emergency Medical Transport	No	-	-	-	-

⁴² Available at <https://ij.org/wp-content/uploads/2020/08/ME-Beds.docx>.

Maine CONs in Detail

Category	Types of CONs	10-144-503 Me. Code R.
Hospital Beds	An increase in the existing licensed bed complement or an increase in the licensed bed category greater than 10% in the following: 1. Hospitals. 2. Psychiatric hospitals.	§ 4-1(B)(5); see Me. Rev. Stat. tit. 22, § 328(8)
Beds Outside Hospitals	An increase in the existing licensed bed complement or an increase in the licensed bed category greater than 10% in the following: 1. Kidney disease treatment centers. 2. Ambulatory surgical facilities. 3. Recovery rooms within ambulatory surgical facilities. 4. Any space with major medical equipment within ambulatory surgical facilities. 5. Any space used primarily to support the activities of an ambulatory surgical facility. 6. Independent radiological service centers. 7. Cancer treatment centers. 8. Operating rooms within ambulatory surgical facilities.	§ 4-1(B)(5); see Me. Rev. Stat. tit. 22, § 328(8)
Equipment	1. The acquisition of major medical equipment costing more than \$3,956,841, as updated annually.	§ 4-1(B)(2); Me. Rev. Stat. tit. 22, § 328(16)
	2. Any proposed use of major medical equipment to serve inpatients of a hospital, if the equipment is not located in a health care facility and was acquired without a CON.	§ 4-1(B)(7)(A)
Facilities/Buildings	1. Hospitals. 2. Psychiatric hospitals. 3. Nursing facilities. 4. Kidney disease treatment centers.	§ 4-1(B)(1); see Me. Rev. Stat. tit. 22, § 328(8)

Maine's CON program contains 42 independent CON requirements, but exempts some commonly regulated services such as home healthcare and hospice.

Maine CONs in Detail

Category	Types of CONs	10-144-503 Me. Code R.
Facilities/Buildings	5. Ambulatory surgical facilities. 6. Independent radiological service centers. 7. Independent cardiac catheterization facilities. 8. Cancer treatment centers. 9. Operating rooms within ambulatory surgical facilities. 10. Recovery rooms within ambulatory surgical facilities. 11. Waiting areas for ambulatory surgical facility patients. 12. Any space with major medical equipment within ambulatory surgical facilities. 13. Any space used primarily to support the activities of an ambulatory surgical facility.	§ 4-1(B)(1); <i>see</i> Maine Rev. Stat. Ann tit. 22, § 328(8)
	Capital expenditures made on behalf of one of the following facilities in excess of the stated expenditure minimum: 14. A capital expenditure on behalf of new or existing hospitals in excess of \$12,365,130. Expenditure threshold is updated annually.	§ 4-1(B)(3)
	15. A capital expenditure on behalf of nursing facilities in excess of \$6,182,565. 16. A capital expenditure on behalf of a new kidney disease treatment center in excess of \$3 million. 17. A capital expenditure on behalf of a new rehabilitation facility in excess of \$3 million. 18. A capital expenditure on behalf of a new ambulatory surgical facility in excess of \$3 million. 19. A capital expenditure on behalf of a new independent radiological service center in excess of \$3 million. 20. A capital expenditure on behalf of a new independent cardiac catheterization center or cancer treatment center in excess of \$3 million.	Me. Rev. Stat. tit. 22 §§ 329(3) (new or existing hospitals or other existing non-nursing facilities), 329(6) (obligation on behalf of new or existing nursing facilities), 329(4-A)(B)(1) (other new facilities)
Services	1. Diagnostic services. 2. Treatment services. 3. Rehabilitative services. 4. Any new health service. 5. Nursing services. 6. Alcohol and drug dependence treatment. 7. Substance use disorder services.	§ 4-1(B)(4); <i>see</i> Maine Rev. Stat. tit. 22 §§ 328(8) (defining “health services”), 329(4)
	8. Mental health services.	§ 4-1(B)(7)(B); Me Rev. Stat. tit. 22 § 328(17)(A)(B)
	9. Any expenditure by a nursing facility related to nursing services.	§ 4-1(B)(6)
	10. Any health care service not subject to review initially, but which exceeds the expenditure minimum of \$1,236,513 in the third fiscal year of operating, following the addition of that service.* Expenditure threshold is updated annually.	§ 4-1(B)(7)(B); Me Rev. Stat. tit. 22 § 328(17)(A)(B)
Emergency Medical Transport	No CONs in this category.	

Maine CON Exceptions

No CON Required For:	10-144-503 Me. Code R.
1. Facilities relying on healing through prayer.	§ 4-2(A)
2. Activities or acquisitions by or on behalf of a health maintenance organization or a health care facility controlled, directly or indirectly, by a health maintenance organization or combination of health maintenance organizations to the extent mandated by the National Health Policy, Planning and Resources Development Act of 1974, as amended, and its accompanying regulations.	§ 4-2(B)
3. Home health care services offered by a home health care provider.	§ 4-2(C)
4. Hospices.	§ 4-2(D)
5. Assisted living programs and services.	§ 4-2(E)
6. The use by an ambulatory surgical facility licensed on January 1, 1998 of capacity in existence on January 1, 1998.	§ 4-2(F)
7. Conversion by a critical access hospital of acute care beds to hospital swing beds.	§ 4-2(G)
8. Capital expenditures in the case of a natural disaster, major accident or equipment failure or for replacement medical equipment that is not major medical equipment defined in section 326, subsection 16. 9. Capital expenditures for parking lots and garages, information and communications systems, or physician office space. 10. Capital expenditures for projects directed solely at reducing energy costs through energy efficiency, renewable energy technology or smart grid technology and that have been certified as likely to be cost-effective by the Efficiency Maine Trust pursuant to Title 35-A, section 10122.	Me. Rev. Stat. tit. 22, § 329(3)

MARYLAND

Maryland requires CONs within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. Maryland maintains 32 independent CON requirements, and 18 specific exceptions. Maryland also maintains two moratoria, one of which prohibits general hospice services from acquiring home-based hospice services. Two of Maryland’s CON requirements are catch-all CONs. That is, if no other specific CON requirements apply, the catch-all CONs require hospitals to obtain a CON for any expenditure over \$12.4 million and non-hospitals to obtain a CON for any expenditure above \$6.2 million. Md. Code Regs. § 10.24.01.02(A)(5).

Maryland’s COVID-19 Response

As of May 15, 2020, Maryland had not suspended any CON requirements in response to COVID-19. Existing state regulations, however, provide for an emergency CON application process. Md. Code Regs. § 10.24.01.20 Under the emergency process, providers may request an emergency CON “[i]f a situation presents hazards to employees or patients of a healthcare facility or the closing of a facility by State licensing authorities requires changes or adjustments in other facilities to accommodate displaced patients[.]” Md. Code Regs. § 10.24.01.20(A). As of July 1, 2020, the Maryland Health Care Commission had approved 36 emergency CON applications.⁴³

Application Process

In Maryland, the CON application process takes up to 90 days if competitors do not request an evidentiary hearing or 150 days if competitors request a hearing. Md. Code Regs. § 10.24.01.09(E)(1). Applications can be submitted at any time, and, although the statute allows the establishment of an application fee through regulation, no such fee has been established. Md. Code Regs., Health-Gen. § 19-120(b). Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. Md. Code Regs. § 10.24.01.09(E)(6)(b).

Types of CONs in Maryland

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	2	0	Any amount	Preexisting regulation implemented
Beds Outside Hospitals	Yes	5	0	Any amount	Preexisting regulation implemented
Equipment	Yes	1	0	\$12.4 million+	Preexisting regulation implemented
Facilities/Buildings	Yes	10	1	Any amount	Preexisting regulation implemented
Services	Yes	14	1	\$0 - \$12.4 million+	Preexisting regulation implemented
Emergency Medical Transport	No	-	-	-	-

⁴³ Available at https://mhcc.maryland.gov/mhcc/pages/hcfs/hcfs_con/hcfs_con_emergency.aspx.

Maryland CONs in Detail

Category	Moratoria/Types of CONs	Md. Code Regs.
Hospital Beds	1. Hospital beds.	§§ 10.24.01.02(A)(3), 10.24.01.01(12)(a)(i)
	2. Beds in limited service hospitals.	§§ 10.24.01.02(A)(3), 10.24.01.01(12)(a)(ii)
Beds Outside Hospitals	1. Beds in “related institutions.”	§§ 10.24.01.02(A)(3), 10.24.01.01(12)(a)(iii)
	2. Beds in ambulatory surgical facilities.	§§ 10.24.01.02(A)(3), 10.24.01.01(12)(a)(iv)
	3. Beds in rehabilitation facilities.	§§ 10.24.01.02(A)(3), 10.24.01.01(12)(a)(v)
	4. Beds in home health agencies.	§§ 10.24.01.02(A)(3), 10.24.01.01(12)(a)(vi)
	5. Beds in hospice facilities.	§§ 10.24.01.02(A)(3), 10.24.01.01(12)(a)(vii)
Equipment	1. A capital expenditure made as part of a replacement of any equipment at a hospital in excess of \$12.4 million, as updated annually.	Md. Code Health § 19-120(k)(1)(i)(2); see Md. Health Care Comm’n, Threshold for Reviewability of Health Care Facility Capital Expenditures (2019); ⁴⁴ Md. Code Regs. § 10.24.01.02(A)(5)
Facilities/Buildings	1. Moratorium on a licensed general hospital located in Kent County converting to a free-standing medical facility prior to July 1, 2020.	Md. Code Health § 19-120(o)(3)(iii)
	Establishment of one of the following facilities:	
	1. Hospitals.	§§ 10.24.01.02(A)(1), 10.24.01.01(12)(a)(i)
	2. Limited service hospitals.	§ 10.24.01.01(12)(a)(ii)
	3. “Related institution” as defined in Md. Code Regs., Health-Gen. § 19-301(o).	§ 10.24.01.01(12)(a)(iii)
	4. Ambulatory surgical facilities.	§ 10.24.01.01(12)(a)(iv)
	5. Rehabilitation facilities.	§ 10.24.01.01(12)(a)(v)
	6. Hospice.	§ 10.24.01.01(12)(a)(vii)
	7. Existing health care facility moved to another site.	§ 10.24.01.02(A)(2)(a-c)
	8. Change of service that establishes a new free-standing surgical facility.	§ 10.24.01.02(A)(4)(c)
	9. Builds or expands ambulatory surgical capacity in any setting owned or controlled by a hospital, if the building or expansion would increase the surgical capacity of the State’s health care system.	§ 10.24.01.02(A)(4)(d)

44 Available at <https://ij.org/wp-content/uploads/2020/06/Md-2019-CE.pdf>.

Maryland CONs in Detail

Category	Moratoria/Types of CONs	Md. Code Regs.
Facilities/Buildings	10. Closing an existing health care facility or converting it to a non-health related use, except for closure of an acute general hospital or the temporary delicensure of a health care facility.	§ 10.24.01.02(A)(4)(g)
Services	1. Moratorium prohibiting the Commission from granting a CON with respect to an acquisition that authorizes a general hospice to provide home-based hospice services on a statewide basis.	Md. Code Health § 19-120(n)
	1. Changing service that establishes a new medical service.	§ 10.24.01.02(A)(4)(a)
	2. Changing service that establishes new open-heart surgery program.	§ 10.24.01.02(A)(4)(b)
	3. Changing service that establishes new organ transplant surgery program.	
	4. Changing service that establishes new burn treatment program.	
	5. Changing service that establishes new neonatal intensive care program.	
	6. Changing service that establishes new home health agency.	§ 10.24.01.02(A)(4)(c)
	7. Changing service that establishes new hospice program.	
	8. Establishing a new home health agency.	§ 10.24.01.01(12)(a)(vi)
	9. Establishing a new subunit by an existing home health agency.	§ 10.24.01.02(A)(4)(e)(i)
	10. The expansion of a home health agency into a jurisdiction not included in a previous CON.	§ 10.24.01.02(A)(4)(e)(ii)
	11. Transferring ownership of a subunit or a facility-based home health care service of an existing health care facility that separates the ownership of the subunit from the home health agency or home health care service that established the subunit.	§ 10.24.01.02(A)(4)(e)(iii)
	12. Closing an existing medical service, unless an exemption applies.	§ 10.24.01.02(A)(4)(f)
Emergency Medical Transport	13. Any capital expenditure in excess of \$12.4 million for hospitals.	§ 10.24.01.02(A)(5); <i>see</i> Threshold for Reviewability of Health Care Facility Capital Expenditures
	14. Any capital expenditure in excess of and \$6.2 million for non-hospital facilities.	

Maryland CON Exceptions

No CON Required For:	Md. Code Regs.
1. The acquisition of an existing health care facility, where the Commission receives notice and determines that the health care services and bed capacity will not change.	§ 10.24.01.03(A)(3)
2. Closure of an acute general hospital, as long as notice is provided and other requirements are met.	§ 10.24.01.03(B)
3. Temporary delicensure of bed capacity of health care facility.	§ 10.24.01.03(C)
4. Relocating an existing health care facility owned or controlled by a merged asset system. If notice is provided and the change does not change the health care services offered or require capital expenditure exceeding the threshold.	§ 10.24.01.03(D)
5. A change in bed capacity that does not exceed ten beds or 10% in certain facilities.	§ 10.24.01.03(E)
6. A project of a health maintenance organization where the project will be used only by the subscribers of that organization.	§ 10.24.01.03(F)
7. A home health agency opening a branch office.	§ 10.24.01.03(G)
8. Religious orders.	§ 10.24.01.03(H)
9. Capital expenditures for site acquisitions, acquisition of a health care facility where §A is satisfied; for business or office equipment unrelated to patient care; acquisition and installation of major medical equipment.	§ 10.24.01.03(I)(2)
10. Capital expenditure by a hospital or nursing home, for equipment, construction or renovation that is not directly related to patient care or a change in patient charges.	§ 10.24.01.03(I)(3)
11. A CON is not required by a hospital before it obligates an amount exceeding the review threshold for capital expenditure for physical plant construction or renovation, or before it receives a donated physical plant whose appraised value exceeds the review threshold under § 10.24.01.03(J)(a)-(c).	§ 10.24.01.03(J)
12. Merger or consolidation of two or more hospitals.	§ 10.24.01.04(A)(1)
13. Relocation of an existing health care facility owned or controlled by a merged asset system.	§ 10.24.01.04(A)(2)
14. Change in bed capacity of an existing facility pursuant to the consolidation or merger of two or more facilities.	§ 10.24.01.04(A)(3)
15. Change in type or scope of services offered by a facility if the Commission finds that the proposed change is pursuant to a consolidation or merger of two facilities, conversion to a non-health related use or conversion to a limited service hospital.	§ 10.24.01.04(A)(4)
16. Capital expenditure exceeding the threshold due to a merger or consolidation of health care facilities, or conversion of a facility to a non-health-related use.	§ 10.24.01.04(A)(5)
17. The closure of an acute general hospital or part of a hospital, in a jurisdiction with fewer than three acute general hospitals.	§ 10.24.01.04(A)(6)
18. Freestanding medical facility pilot project or is established as the result of the conversion of a licensed general hospital.	Md. Code Health § 19-120(o)(2)

MASSACHUSETTS

Massachusetts is one of eight states to require CONs within all six broad categories—hospital beds, beds outside hospitals, equipment, facilities, services and emergency

medical transport. Massachusetts, however, calls its program a determination of need (DON) program. DONs function the same as CONs. Massachusetts maintains regulations that allow applicants to apply for an emergency DON if they are able to “convincingly demonstrate that the Proposed Project will address the Emergency Situation, and without issuance of a Notice of Determination of Need, that the public health will be measurably harmed.” 105 Mass. Code Regs. § 100.740(A).

Massachusetts’s COVID-19 Response

On March 24, 2020, Monica Bharel, Commissioner of the Massachusetts Department of Public Health, acting pursuant to the Governor’s public health emergency declaration, ordered the Department to reduce the burdens associated with the DON program. [Order of the Comm’r of Pub. Health Regarding Determination of Need Approvals Related to COVID-19 \(Mar. 24, 2020\)](#).⁴⁵ The Department issued a memorandum describing an expedited DON application process in response to COVID-19. [Memorandum from Margo Michaels, Massachusetts Pub. Health Director \(Mar. 24, 2020\)](#).⁴⁶ The Department then reviewed applications to determine whether the proposed project actually related to COVID-19 and whether the project was truly temporary in nature.

Application Process

In Massachusetts, the DON application process takes four months. 105 Mass. Code Regs. § 100.405(D). Applications can be submitted at any time and the application fee is \$500 or 0.2% of the total value of the proposed project, whichever is greater. 105 Mass. Code Regs. § 100.405(B). Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. 105 Mass. Code Regs. § 100.440(A).

Types of DONs in Massachusetts

	DON?	Number of DONs	Moratoria	DON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	1	0	Any amount	Expedited Review
Beds Outside Hospitals	Yes	6	0	Any amount	Expedited Review
Equipment	Yes	3	0	Any amount	Expedited Review
Facilities/Buildings	Yes	9	0	Any amount	Expedited Review
Services	Yes	2	0	Any amount	Expedited Review
Emergency Medical Transport	Yes	1	0	Any amount	Expedited Review

⁴⁵ Available at <https://ij.org/wp-content/uploads/2020/06/DON-Order.pdf>.

⁴⁶ Available at <https://ij.org/wp-content/uploads/2020/06/DON-Guidelines.pdf>.

Massachusetts DONs in Detail

Category	Types of DONs	Citation
Hospital Beds	1. Hospital beds.	Mass. Gen. Laws ch. 111 §§ 25C(a), 25B; 105 Mass. Code Regs. § 100.100
Beds Outside Hospital	1. Clinic beds. 2. Long-term care facility beds. 3. Convalescent or nursing home beds. 4. Rest home or a charitable home for the aged beds. 5. Public medical institution beds. 6. Beds in any institution for the developmentally disabled or mentally ill which is administered under Titles 18 and 19 of the Federal Social Security Act.	Mass. Gen. Laws ch. 111 §§ 25C(a), 25B; 105 Mass. Code Regs. § 100.100
Equipment	1. Computerized tomographer. 2. Magnetic resonance image scanner. 3. Positron emission tomographer.	Mass. Gen. Laws ch. 111 § 25C(d); 105 Mass. Code Regs. § 100.100; <i>see</i> Determination of Need-Required Equipment and Services Guideline 4 , (Mass. Dep't of Pub. Health Jan. 2017) ⁴⁷
Facilities/Buildings	1. Hospital. 2. Clinic. 3. Long-term care facility. 4. Convalescent or nursing home. 5. Rest home or a charitable home for the aged. 6. Clinical laboratory. 7. A public medical institution. 8. Any institution for the developmentally disabled or mentally ill which is administered under Titles 18 and 19 of the Federal Social Security Act.	Mass. Gen. Laws ch. 111 §§ 25C(a), 25B; 105 Mass. Code Regs. § 100.100
	9. Ambulatory surgical center.	105 Mass. Code Regs. § 100.730(A)(1)
Services	1. Air ambulance. 2. Megavoltage radiation therapy.	Mass. Gen. Laws ch. 111 § 25C(a), (d); 105 Mass. Code Regs. § 100.100; <i>see</i> Guidelines at 4
Emergency Medical Transport	1. Air ambulance.	105 Mass. Code Regs. § 100.100; <i>see</i> Guideline at 4

⁴⁷ Available at <https://ij.org/wp-content/uploads/2020/06/DON-Guidelines-2017.pdf>.

Massachusetts DON Exceptions

No DON Required For:	Citation
No DON is needed for any substantial capital expenditure for construction related to the provision of inpatient services or for any substantial change in inpatient services if a substantial capital expenditure or such substantial change in services will be made by or on behalf of one of the following: 1. An HMO or combination of HMOs providing inpatient services if: » The HMO or combination of HMOs in the service area have a combined enrollment of at least 50,000 individuals; » The facility to which the service is provided will be reasonably accessible to enrolled individuals, <i>and</i> » At least 75% of the patients served will be enrolled in the HMOs.	Mass. Gen. Laws ch.111 § 25C ½(1)
2. A healthcare facility if: » It provides or will provide inpatient services; » It will be controlled or leased (with 15 years remaining on the lease) by an HMO or a combination of HMOs which has in the service area of the HMOs a combined enrollment of at least 50,000 individuals; » It will be geographically located so that services are reasonably accessible; <i>and</i> » At least 75% of the patients who can be expected to receive such inpatient served will be enrolled in the HMOs.	Mass. Gen. Laws ch.111 § 25C ½(2), (3)
3. A health care facility if: » It will be a long-term care facility, an infirmary maintained in a town, a convalescent or nursing home, or a charitable home for the aged; » It will be located in an underbedded urban area; » It provides a service to at least 70% of its patients as enrollees in Title XIV of the federal Social Security Act; » It presents an adequate quality assurance program plan; <i>and</i> » The need for such facility has been established.	Mass. Gen. Laws ch. 111 § 25C ½(4)
4. Basic biomedical research or applied medical research.	105 Mass. Code Regs § 100.726(A)

MICHIGAN

Michigan is one of eight states to require CONs within all six broad categories—hospital beds, beds outside hospitals, equipment, facilities, services and emergency medical transport.

Unlike most states, Michigan does not allow a CON applicant's competitors to participate in the application process or otherwise object to pending CON applications. In response to COVID-19, Governor Whitmer directed the Department of Health and Human Services (DHHS) to grant CON applications without strictly complying with CON requirements.

Michigan's COVID-19 Response

On March 17, 2020, Governor Whitmer issued an executive order authorizing DHHS to grant CON applications without strictly complying with existing statutory requirements. *Exec. Order 2020-13* (Mar. 17, 2020).⁴⁸ In response, DHHS directed⁴⁹ applicants to existing emergency application rules. DHHS, *Application for Emergency Certificate of Need*.⁵⁰ The application is lengthy compared to emergency notice provisions or applications in other states, and Michigan provides no data online documenting how many healthcare facilities or providers used the emergency application process to expand facilities or services in response to COVID-19.

Application Process

In Michigan, CON applications may undergo comparative, substantive or nonsubstantive review. Applications undergoing nonsubstantive review should be decided within 45 days, *see* Mich. Admin. Code r. 325.9206(4), while the review period for comparative and substantive applications is no longer than 120 days. Mich. Admin. Code r. 325.9207(1); 325.9208(1)(b). Applications can be submitted at any time. The fee ranges from \$3,000 to \$18,000 depending on the proposed capital expenditure. Mich. Comp. Laws § 333.20161(3)(a), (b). Competitors cannot intervene in the application process.

Types of CONs in Michigan

	CON?	Number of CONs	Moratoria	CON applies with expenditure above:	Temporary COVID-19 response:
Hospital Beds	Yes	1	0	Any amount	Preexisting regulation implemented
Beds Outside Hospitals	Yes	4	0	Any amount	Preexisting regulation implemented
Equipment	Yes	8	0	\$0 – \$3.375 million+	Preexisting regulation implemented
Facilities/Buildings	Yes	5	0	\$3.375 million+	Preexisting regulation implemented
Services	Yes	6	0	Any amount	Preexisting regulation implemented
Emergency Medical Transport	Yes	1	0	Any amount	Preexisting regulation implemented

⁴⁸ Available at <https://ij.org/wp-content/uploads/2020/06/Mich-Exec.-Order.pdf>.

⁴⁹ See https://www.michigan.gov/mdhhs/0,5885,7-339-71551_2945_5106-257471--,00.html.

⁵⁰ Available at <https://ij.org/wp-content/uploads/2020/06/DHHS-CON-101.pdf>.

Michigan CONs in Detail

Category	Types of CONs	Mich. Comp. Law
Hospital Beds Any change in the bed capacity of a health facility, or physical relocation of beds from one licensed site to another. Mich. Comp. Laws § 333.22209(1)(b), (c)	1. Hospital beds.	§ 333.22205(1)(a)
Beds Outside Hospitals Any change in the bed capacity of a health facility, or physical relocation of beds from one licensed site to another. Mich. Comp. Law § 333.22209(1)(b), (c)	1. Beds in psychiatric hospitals or psychiatric units.	§ 333.22205(1)(b)
	2. Beds in nursing homes.	§ 333.22205(1)(c)
	3. Beds in freestanding surgical outpatient facilities.	§ 333.22205(1)(d)
	4. Beds in facilities operated by a health maintenance organization.	§ 333.22205(1)(e)
Equipment Initiation, replacement or expansion of one of the covered services. Mich. Comp. Law § 333.22203(10)(b)	1. Extracorporeal shock wave lithotripsy.	§ 333.22203(10)(b)(i)
	2. Megavoltage radiation therapy.	§ 333.22203(10)(b)(ii)
	3. Positron emission tomography.	§ 333.22203(10)(b)(iii)
	4. Fixed magnetic resonance imager.	§ 333.22203(10)(b)(vi)
	5. Mobile magnetic resonance imager.	
	6. Fixed computerized tomography scanner.	§ 333.22203(10)(b)(vii)
	7. Mobile computerized tomography scanner.	
	8. Other equipment if the expenditure is in excess of \$3.375 million, as calculated annually.	§§ 333.22209(1)(d), 333.22203(9); <i>see Capital Expenditure Threshold 2020</i> ⁵¹
Facilities/Buildings The acquisition or operation a health care facility, or any capital expenditure in excess of \$3.375 million on behalf of a health care facility. Mich. Comp. Laws § 333.22209(1)(a), 333.22203(9)	1. Hospitals.	§ 333.22205(1)(a)
	2. Psychiatric hospitals or psychiatric units.	§ 333.22205(1)(b)
	3. Nursing homes.	§ 333.22205(1)(c)
	4. Freestanding surgical outpatient facilities.	§ 333.22205(1)(d)
	5. Health maintenance organizations.	§ 333.22205(1)(e)

51 Available at https://www.michigan.gov/mdhhs/0,5885,7-339-71551_2945_5106-372419--,00.html.

Michigan CONs in Detail

Category	Types of CONs	Mich. Comp. Law
Services	1. Neonatal intensive care services.	§ 333.22203(10)(a)(i)
	2. Open heart surgery.	§ 333.22203(10)(a)(ii)
	3. Extrarenal organ transplantation.	§ 333.22203(10)(a)(iii)
	4. Surgical services at a freestanding surgical out-patient facility, or ambulatory surgery center.	§ 333.22203(10)(b)(iv)
	5. Cardiac catheterization.	§ 333.22203(10)(b)(v)
	6. Any capital expenditure in excess of 3.375 million on behalf of a health care facility.	§§ 333.22209(1)(a), 333.22203(9); <i>see Capital Expenditure Threshold 2020</i> ⁵²
Emergency Medical Transport	1. Air ambulance services.	§ 333.22203(10)(b)(viii)

Michigan CON Exceptions

No CON Required For:	Mich. Comp. Law
1. Institution conducted by and for adherents of a church which depends on prayer through healing.	§ 333.22205(2)(a)
2. Health care facility or agency located in a correctional institution.	§ 333.22205(2)(b)
3. Veterans' facility operated by the state or federal government.	§ 333.22205(2)(c)
4. Facility owned and operated by the department of community health.	§ 333.22205(2)(d)

⁵² Available at https://www.michigan.gov/mdhhs/0,5885,7-339-71551_2945_5106-372419--,00.html.



MINNESOTA

Minnesota strictly limits healthcare growth through the use of moratoria. Minnesota's moratoria apply within two broad categories—hospital beds and facilities/building.

Minnesota does not have a traditional CON program. Instead, it allows narrow exceptions to its existing moratoria through a “public interest review” (PIR) program. *See* Minn. Stat. § 144.552. For this reason, some have deemed Minnesota a “quasi-CON” state. To initiate the PIR process, an applicant must submit a plan illustrating, among other things, that a need exists for a prohibited facility. *See* Minn. Stat. § 144.552. PIR applicants must include their competitors’ positions with their initial application. Minn. Stat. § 144.552(f). The Department of Health reviews those applications and may make changes before recommending action by the full Minnesota Legislature. *See* sidebar on p.87.

Minnesota's COVID-19 Response

As of May 15, 2020, Minnesota had not suspended any PIR requirements in response to COVID-19.

Application Process

In Minnesota, anyone interested in obtaining a license to operate a new hospital or expand beds in an existing hospital must submit a plan to obtain an exception to the state's moratorium. Minn. Stat. § 144.552. The plan must address: (1) whether a new hospital or new beds are necessary to provide access to care or improve services; (2) the financial impact of a new hospital or new beds; (3) how existing hospitals would be affected; (4) whether proposed services would be available to nonpaying or low-income patients; and (5) the views of affected parties. Minn. Stat. § 144.552(c)(1)-(5). The PIR process takes up to 150 days, during which time the Department takes an active role in suggesting adjustments to the plan. The Department then makes a recommendation to the Minnesota Legislature. That recommendation can be different than what the original applicant asked for. Minn. Stat. § 144.552(c). Applications can be submitted at any time and there is no application fee. A public hearing is required before an application is approved or rejected, and competitors can offer evidence and testimony as to why the PIR application should be rejected. Minn. Stat. § 144.552(f).

Types of PIR in Minnesota

	PIR?	Number of PIRs	Moratoria	PIR applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	-	1	Any amount	-
Beds Outside Hospitals	No	-	-	-	-
Equipment	No	-	-	-	-
Facilities/Buildings	Yes	-	2	Any amount	-
Services	No	-	-	-	-
Emergency Medical Transport	No	-	-	-	-

Minnesota PIRs in Detail

Category	Moratoria	Minn. Stat.
Hospital Beds	1. Hospitals must undergo public interest review before increasing the number of licensed beds.	§§ 144.552(a)(1), 144.551(a)(1)
Beds Outside Hospitals	No PIR in this category.	
Equipment	No PIR in this category.	
Facilities/Buildings	1. There is a moratorium on opening new hospitals.	§§ 144.552(a)(2), 144.551(a)(2)
	2. There is a moratorium on radiation therapy facilities. Radiation therapy facilities may only be constructed by an entity owned, operated, or controlled by a hospital and there is a moratorium on the construction of any radiation therapy facilities in the following counties: Hennepin, Ramsey, Dakota, Washington, Anoka, Carver, Scott, St. Louis, Sherburne, Benton, Stearns, Chisago, Isanti, and Wright.	§ 144.5509
Services	No PIR in this category.	
Emergency Medical Transport	No PIR in this category.	

Minnesota maintains moratoria that flatly prohibit the construction of new hospitals beds or any increase in hospital beds. While it is the only state with prohibitions on those specific activities, 12 states maintain some form of moratoria, which present even larger presumptions against entry into the market than CONs.

In 2004, Minnesota enacted its “public interest review” (PIR) program. The program allows providers to obtain exceptions to the moratoria by seeking first a recommendation by the Department of Health and then a vote by the full Minnesota Legislature. This process is

required even when the proposed new hospital is something as small as a 12 bed psychiatric facility. To date only 10 would-be providers have attempted the exception process. Three of them withdrew their applications before the Department issued a recommendation. Two—including the 12 bed psychiatric facility—were denied when the Department determined the proposed services were not in the public interest. The Department determined the remaining five projects to be in the public interest, but they still had to be voted upon by the full Minnesota Legislature before they could proceed.

Minnesota PIR Exceptions

No PIR Required For:	Minn. Stat.
1. Construction or relocation of a hospital, clinic, or other health care facility that is a national referral center engaged in substantial programs of patient care, medical research, and medical education meeting state and national needs that receives more than 40 percent of its patients from outside the state of Minnesota.	§ 144.551(b)(1)
2. A project for construction or modification for which a health care facility held an approved certificate of need on May 1, 1984, regardless of the date of expiration of the certificate.	§ 144.551(b)(2)
3. A project for which a certificate of need was denied before July 1, 1990, if a timely appeal results in an order reversing the denial.	§ 144.551(b)(3)
4. A project exempt from certificate of need requirements by Laws 1981, chapter 200, section 2.	§ 144.551(b)(4)
5. A project involving consolidation of pediatric specialty hospital services within the Minneapolis-St. Paul metropolitan area that would not result in a net increase in the number of pediatric specialty hospital beds among the hospitals being consolidated.	§ 144.551(b)(5)
6. A project involving the temporary relocation of pediatric-orthopedic hospital beds to an existing licensed hospital that will allow for the reconstruction of a new philanthropic, pediatric-orthopedic hospital on an existing site and that will not result in a net increase in the number of hospital beds. Upon completion of the reconstruction, the licenses of both hospitals must be reinstated at the capacity that existed on each site before the relocation.	§ 144.551(b)(6)
7. The relocation or redistribution of hospital beds within a hospital building or identifiable complex of buildings provided the relocation or redistribution does not result in: (i) an increase in the overall bed capacity at that site; (ii) relocation of hospital beds from one physical site or complex to another; or (iii) redistribution of hospital beds within the state or a region of the state.	§ 144.551(b)(7)
8. Relocation or redistribution of hospital beds within a hospital corporate system that involves the transfer of beds from a closed facility site or complex to an existing site or complex provided that: (i) no more than 50 percent of the capacity of the closed facility is transferred; (ii) the capacity of the site or complex to which the beds are transferred does not increase by more than 50 percent; (iii) the beds are not transferred outside of a federal health systems agency boundary in place on July 1, 1983; and (iv) the relocation or redistribution does not involve the construction of a new hospital building.	§ 144.551(b)(8)
9. A project to replace a hospital or hospitals with a combined licensed capacity of 130 beds or less if: (i) the new hospital site is located within five miles of the current site; and (ii) the total licensed capacity of the replacement hospital, either at the time of construction of the initial building or as the result of future expansion, will not exceed 70 licensed hospital beds, or the combined licensed capacity of the hospitals, whichever is less.	§ 144.551(b)(10)
10. The relocation of licensed hospital beds from an existing state facility operated by the Commissioner of Human Services to a new or existing facility, building, or complex operated by the Commissioner of Human Services; from one regional treatment center site to another; or from one building or site to a new or existing building or site on the same campus.	§ 144.551(b)(11)
11. A project for the construction or relocation of up to 20 hospital beds for the operation of up to two psychiatric facilities or units for children provided that the operation of the facilities or units have received the approval of the commissioner of human services.	§ 144.551(b)(16)
12. Projects approved under Minn. Stat. § 144.553.	§ 144.551(b)(21)

MISSISSIPPI

Mississippi requires CONs within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. Overall, Mississippi maintains 80 independent CON requirements, 41 of which apply to facilities and buildings. Additionally, Mississippi has seven moratoria which prohibit the construction of facilities or the conversion of hospital beds in certain situations. *See* 15 Miss. Admin. Code Pt. 9, Subpt. 91, R. 2.2. CON applications cost as much as \$25,000 in Mississippi.

Mississippi's COVID-19 Response

As of May 15, 2020, Mississippi had not suspended any CON requirements in response to COVID-19.

Application Process

In Mississippi, the CON application process typically takes five months, or longer if a hearing is requested. Miss. Code § 41-7-193(3); 15 Miss. Admin. Code Pt. 9, Subpt. 91, R. 3.8, 3.9, 3.13, 5.2. Applications can be submitted at any time. The nonrefundable fee for a CON application ranges from \$500 to \$25,000. Miss. Code §§ 41-7-188(1)(c)–(d), 41-7-193(3). Competitors can intervene in the application process and can submit written comments opposing an application, request a hearing on the application, and appeal the Health Officer's final decision granting an application. 15 Miss. Admin. Code Pt. 9, Subpt. 91, R. 3.12, 4.1, 9.1. At the hearing, competitors can question the applicant and offer evidence or argument as to why an application should be denied. Miss. Code § 41-7-197(2).

Types of CONs in Mississippi

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	7	0	\$0 – \$5 million+	-
Beds Outside Hospitals	Yes	11	1	\$0 – \$5 million+	-
Equipment	Yes	3	0	\$1.5 million+	-
Facilities/Buildings	Yes	41	6	Any amount	-
Services	Yes	18	0	\$0 – \$10 million+	-
Emergency Medical Transport	No	-	-	-	-

Mississippi CONs in Detail

Category	Moratoria/Types of CONs	Citation
Hospital Beds	Any change in the existing bed complement of the following hospitals, through addition or conversion of beds or alteration, modernizing or refurbishing of any unit or department in which the beds may be located: - Hospitals - Psychiatric hospitals. - Chemical dependency hospitals. - Long-term care hospitals.	Miss. Code §§ 41-7-191(1)(c), 41-7-173(h)
	5. Change in ownership of existing hospitals if it results in a change in bed capacity—if no letter of intent is filed.	Miss. Code § 41-7-191(1)(g)
	6. Using some beds for the “swing-bed” concept.	15 Miss. Admin. Code Pt. 9, Subpt. 91, R. 2.4.
	7. Any capital expenditure (over \$5 million for clinical health services, or services involving a change in existing bed complement) by a healthcare facility not covered above.	Miss. Code §§ 41-7-173(c),(k), 41-7-191(1)(j)
Beds Outside Hospitals	1. Moratorium on conversion of hospital beds to skilled or intermediate care beds.	15 Miss. Admin. Code Pt. 9, Subpt. 91, R. 2.2.
	Any change in the existing bed complement of the following health facilities, through addition or conversion of beds or alteration, modernizing or refurbishing of any unit or department in which the beds may be located: - Skilled nursing facilities, - End-stage renal disease facilities, - Intermediate care facilities, - Ambulatory surgical facilities, - Intermediate care facilities for the mentally retarded, - Home health agencies, - Psychiatric residential treatment facilities, - Pediatric skilled nursing facilities and - Comprehensive medical rehabilitation facilities (including facilities owned or operated by the state or a political subdivision or instrumentality of the state).	Miss. Code §§ 41-7-191(1)(c), 41-7-173(h)
	10. Change in ownership of existing health care facilities if it results in a change in bed capacity.	Miss. Code § 41-7-191(1)(g)
	11. Any capital expenditure (over \$5 million for clinical health services, or services involving a change in existing bed complement) by a healthcare facility not covered above.*	Miss. Code §§ 41-7-173(c), (k), 41-7-191(1)(j)

Mississippi CONs in Detail

Category	Moratoria/Types of CONs	Citation
Equipment	1. Relocation of major medical equipment, or equipment that costs more than \$1.5 million.*	Miss. Code §§ 41-7-191(1)(b), 41-7-173(m)
	2. Acquisition or control of major medical equipment, or equipment that costs more than \$1.5 million (including acquisitions for less than fair market value if the acquisition at fair market value would be subject to review).*	Miss. Code §§ 41-7-191(1)(f), 41-7-173(m)
	3. Any capital expenditure (\$1.5 million for major medical equipment) by a healthcare facility not covered above.*	Miss. Code §§ 41-7-173(c), 41-7-191(1)(j)
Facilities/Buildings	1. Moratorium on opening a hospital that will contain child/adolescent psychiatric or child/adolescent chemical dependency beds. 2. Moratorium on opening a psychiatric hospital that will contain child/adolescent psychiatric or child/adolescent chemical dependency beds. 3. Moratorium on opening a chemical dependency hospital that will contain any child/adolescent psychiatric or child/adolescent chemical dependency beds.	Miss. Code § 41-7-191(4)
	4. Moratorium on opening a new skilled nursing facility.	15 Miss. Admin. Code Pt. 9, Subpt. 91, R. 2.2
	5. Moratorium on opening a new intermediate care facility.	15 Miss. Admin. Code Pt. 9, Subpt. 91, R. 2.2
	6. Moratorium on opening a new intermediate care facility for the mentally retarded.	15 Miss. Admin. Code Pt. 9, Subpt. 91, R. 2.2
	Opening the following new facilities: 1. Hospitals. 2. Psychiatric hospitals. 3. Chemical dependency hospitals. 4. Skilled nursing facilities. 5. End-stage renal disease facilities (including freestanding hemodialysis units). 6. Intermediate care facilities. 7. Ambulatory surgical facilities. 8. Intermediate care facilities for the mentally retarded. 9. Psychiatric residential treatment facilities. 10. Pediatric skilled nursing facilities. 11. Long-term care hospitals. 12. Comprehensive medical rehabilitation facilities (including facilities owned or operated by the state or a political subdivision or instrumentality of the state).	Miss. Code §§ 41-7-191(1)(a), 41-7-173(h)

Mississippi CONs in Detail

Category	Moratoria/Types of CONs	Citation
Facilities/Buildings	Reopening the following healthcare facilities if they have not been in operation for 60 months or more: 13. Hospital. 14. Psychiatric hospital. 15. Chemical dependency hospitals. 16. Skilled nursing facilities. 17. End-stage renal disease facilities (including freestanding hemodialysis units). 18. Intermediate care facilities. 19. Ambulatory surgical facilities. 20. Intermediate care facilities for the mentally retarded, 21. Home health agencies. 22. Psychiatric residential treatment facilities. 23. Pediatric skilled nursing facilities. 24. Long-term care hospitals. 25. Comprehensive medical rehabilitation facilities (including facilities owned or operated by the state or a political subdivision or instrumentality of the state).	Miss. Code §§ 41-7-191(1)(a),(m), 41-7-173(h)
	Relocation, in whole or in part, of the following healthcare facilities: 26. Hospital, 27. Psychiatric hospital, 28. Chemical dependency hospitals, 29. Skilled nursing facilities, 30. End-stage renal disease facilities (including freestanding hemodialysis units), 31. Intermediate care facilities, 32. Ambulatory surgical facilities, 33. Intermediate care facilities for the mentally retarded, 34. Home health agencies, 35. Psychiatric residential treatment facilities, 36. Pediatric skilled nursing facilities, 37. Long-term care hospitals and 38. Comprehensive medical rehabilitation facilities (including facilities owned or operated by the state or a political subdivision or instrumentality of the state).	Miss. Code §§ 41-7-191(1)(b), 41-7-173(h)
	39. Change in ownership of existing healthcare facilities if a notice of intent has not been filed at least 30 days prior with the State Health Department.	Miss. Code § 41-7-191(1)(g)
	40. Change in ownership of healthcare facility if a notice of intent has not been filed, and the Executive Director of the Division of Medicaid in the Office of the Governor has not certified that the change in ownership will not increase allowable costs to Medicaid.	Miss. Code §§ 41-7-191(1)(h), 41-7-173(h)(iv),(vi),(viii)

Mississippi CONs in Detail

Category	Moratoria/Types of CONs	Citation
	41. The contracting of a healthcare facility to establish a home office, sub-unit or branch office in the space operated as a health care facility through a formal arrangement with an existing healthcare facility.	Miss. Code § 41-7-191(1)(k)
Services	The following health services, if those services have not been provided on a regular basis by the provider within the previous year: 1. Open-heart surgery services, 2. Cardiac catheterization services, 3. Comprehensive inpatient rehabilitation services, 4. Licensed psychiatric services, 5. Licensed chemical dependency services, 6. Radiation therapy services, 7. Diagnostic imaging services of an invasive nature (i.e., invasive digital angiography), 8. Nursing home care at skilled nursing facilities, intermediate care facilities and intermediate care facilities for the mentally retarded. 9. Home health services, 10. Swing-bed services, 11. Ambulatory surgical services, 12. Magnetic resonance imaging services, 13. Long-term care hospital services and 14. Positron emission tomography (PET) services	Miss. Code §§ 41-7-191(1)(d), 41-7-173(h)
	15. Relocation of one or more health services from one physical facility or site to another physical facility or site.	Miss. Code § 41-7-191(e)
	16. Change in ownership of existing health care facilities if it results in a change of services.	Miss. Code § 41-7-191(1)(g)
	17. Any capital expenditure (over \$10 million for nonclinical health services, or services not involving a change in existing bed complement) by a healthcare facility not covered above.*	Miss. Code §§ 41-7-173(c), (k), 41-7-191(1)(j)
	18. Any activity undertaken by a person, if such action would require a CON if undertaken by a health care facility.	Miss. Code § 41-7-191(1)(i)
Emergency Medical Transport	No CONs in this category.	

Mississippi CON Exceptions

No CON Required For:	Miss. Code
1. Christian Science sanatoriums operated or listed and certified by the First Church of Christ, Scientist, Boston, Massachusetts.	§ 41-7-173(h)
2. Facilities for the private practice, either independently or by incorporated medical groups, of physicians, dentists or health care professionals, except where such facilities are an integral part of a health service provided by a health facility that requires a CON.	§ 41-7-173(h), (l)
3. Relocation of healthcare facilities, in whole or in part, which do not involve a capital expenditure.	§ 41-7-191(1)(b)
4. Relocation of major medical equipment, or equipment that costs more than \$1.5 million, which does not involve a capital expenditure.	§§ 41-7-191(1)(b), 41-7-173(m)
5. Relocation of healthcare facilities, in whole or in part, if the relocation is within 5,280 feet (1 mile) from the main entrance of the healthcare facility.	§ 41-7-191(1)(b)
6. Relocation of major medical equipment, or equipment that costs more than \$1.5 million, if the relocation is within 5,280 feet (1 mile) from the main entrance of the healthcare facility.	§§ 41-7-191(1)(b), 41-7-173(m)
7. A healthcare facility relicensing some beds that it voluntarily delicensed, as long as relicensure would not increase its bed count.	§ 41-7-191(1)(c)
8. Relocation of healthcare services if it does not involve a capital expenditure and is either (i) to a physical facility or site within 5,280 feet (1 mile) from the main entrance of the healthcare facility where the healthcare service is located, or (ii) the result of a court order or pending litigation, by order of the Department of Health, or by order of any other agency or legal entity of the state, the federal government or any political subdivision of either, whose order is approved by the Department of Health.	§ 41-7-191(1)(e)
9. Acquisition of medical equipment costing less than \$1.5 million.	§ 41-7-173(m)

Mississippi CON Exceptions

No CON Required For:	Miss. Code
10. Acquisition of major medical equipment (equipment costing more than \$1.5 million) used for research purposes.	§§ 41-7-173(m), 41-7-191(1)(f)
11. Acquisition of major medical equipment (equipment costing more than \$1.5 million) to replace equipment for which a facility is already providing medical services and for which the State Dept. of Health has been notified.	§§ 41-7-173(m), 41-7-191(1)(f)
12. The replacement or relocation of a critical access hospital as long as it complied with all applicable federal law and regulation regarding the replacement or relocation.	§ 41-7-191(1)(l)
13. The addition or expansion of healthcare facilities owned and/or operated by the state or its agencies do not need a CON if it is to comply with state licensure law. The exception does not apply to new construction of any building or to facilities owned and/or operated by local governments.	§ 41-7-191(10)
14. New construction, renovation, expansion or addition of any psychiatric hospital, skilled nursing facilities, intermediate care facility, intermediate care facilities for the mentally retarded, or psychiatric facility which is owned by the State, and the addition or conversion of beds in any of those healthcare facilities, does not require a CON.	§ 41-7-191(11)
15. New construction, renovation, expansion or addition of any veterans' homes or domiciliaries for eligible veterans.	§ 41-7-191(12)
16. Repair or rebuilding of existing, operating healthcare facilities that sustained significant damage from a natural disaster, provided that the repair or rebuild is within 1 mile of the pre-disaster location, it does not increase or change the bed complement, it does not increase or change its levels and types of services and it does not rebuild in a different county.	§ 41-7-191(13)(a)-(b)
17. Planning, design, construction, renovation, addition, furnishing and equipping of a clinical research unit at any healthcare facility that is under the direction and control of the University of Mississippi Medical Center.	§ 41-7-191(18)



MISSOURI

Missouri requires CONs within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. Missouri maintains 91 CON requirements which are primarily focused on nursing facilities, long-term care facilities and hospitals, and the construction of new hospitals. For example, a private physician’s office can purchase an MRI scanner without obtaining a CON, but a skilled nursing facility or a long-term care hospital must obtain a CON before purchasing the same MRI scanner. Missouri further maintains many specific expenditure minimums, although they are not always standardized. If an intermediate care facility wants to acquire a CT scanner, the CON requirement is not triggered unless the scanner will cost more than \$400,000. In comparison, if a long-term hospital wants to purchase the same CT scanner, it must apply for a CON regardless of cost.

Missouri’s COVID-19 Response

As of May 15, 2020, Missouri had not suspended any CON requirements in response to COVID-19.

Application Process

In Missouri, the CON application review process takes up to four months. Mo. Rev. Stat. § 197.330(1)(1), (4)–(5). Applications for full review must be submitted at least 71 days prior to each Missouri Health Facilities Review Committee meeting, and expedited applications must be submitted by the 10th day of each month. Mo. Code Regs. tit. 19, § 60-50.420(1). Expedited applications only apply to limited circumstances, such as renovation of long-term care facilities or replacement of specific types of equipment. See Mo. Code Regs. tit. 19, § 60-50.300(5). The fee for a CON application is \$1,000 or 0.1% of the total cost of the proposed project. Mo. Rev. Stat. § 197.315(10). Competitors can intervene in the application process and offer evidence or argument as to why an application should be denied. Mo. Stat. § 197.330(1), (3)–(5).

Types of CONs in Missouri

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	5	0	\$0 – \$600,000+	-
Beds Outside Hospitals	Yes	16	0	\$0 – \$600,000+	-
Equipment	Yes	40	0	\$ 0 – \$400,000+	-
Facilities/Buildings	Yes	25	0	\$0 – \$1 million+	-
Services	Yes	5	0	Any Amount	-
Emergency Medical Transport	No	-	-	-	-

Missouri CONs in Detail

Category	Types of CONs	Citation
Hospital Beds	1. Acquisition of beds in a long-term care hospital, at any cost.	Mo. Code Regs. tit. 19, § 60-50.400(6)(F)(4)
	2. A reallocation by an existing long-term care hospital of licensed beds among major types of services by more than 10 beds or more than 10% of the total licensed bed capacity, whichever is less, over a 2-year period.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(g), 197.366(3)
	3. A reallocation by an existing long-term care hospital of licensed beds from one physical facility or site to another by more than 10 beds or more than 10% of the total licensed bed capacity, whichever is less, over a 2-year period.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(g), 197.366(3)
	4. Expansion of long-term care beds in a hospital that costs \$600,000 or more.	Mo. Rev. Stat. 197.366(2); Mo. Code Regs. tit. 19, § 60-50.400(6)(F)(7)
	5. Expansion of long-term care beds in a hospital that exceeds 10 beds or 10% of that facility's existing licensed capacity, whichever is less.	Mo. Rev. Stat. 197.366(2); Mo. Code Regs. tit. 19, § 60-50.400(6)(F)(7)
Beds Outside Hospitals	Any change in a nursing home's licensed bed capacity which increases the total number of beds by more than 10 or more than 10% of the total bed capacity, whichever is less, over a 2-year period, which includes: 1. Residential care facilities. 2. Assisted living facilities. 3. Intermediate care facilities. 4. Skilled nursing facilities.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(e), 198.015(1)

A private physician's office can purchase an MRI scanner without obtaining a CON, but a skilled nursing facility or a long-term care hospital must obtain a CON before purchasing the same MRI scanner.

Missouri CONs in Detail

Category	Types of CONs	Citation
Beds Outside Hospitals	A reallocation by an existing nursing home of licensed beds among major types of services by more than 10 beds or more than 10% of the total licensed bed capacity, whichever is less, over a 2-year period, which includes: 5. Residential care facilities. 6. Assisted living facilities. 7. Intermediate care facilities. 8. Skilled nursing facilities.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(g), 197.366(1), 198.015(1)
	A reallocation by an existing nursing home of licensed beds from one physical facility or site to another by more than 10 beds or more than 10% of the total licensed bed capacity, whichever is less, over a 2-year period, which includes: 9. Residential care facilities. 10. Assisted living facilities. 11. Intermediate care facilities. 12. Skilled nursing facilities.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(g), 197.366(1), 198.015(1)
	A project that involves additional beds in a nursing home that costs \$600,000 or more, which includes: 13. Residential care facilities. 14. Assisted living facilities. 15. Intermediate care facilities. 16. Skilled nursing facilities.	Mo. Rev. Stat. § 198.015(1); Mo. Code Regs. tit. 19, § 60-50.400(6)(F)(6)
Equipment	Acquisition by a residential care facility of major medical equipment costing more than \$400,000, which includes following: 1. Cardiac catheterization. 2. Computed tomography. 3. Gamma knife. 4. Lithotripsy. 5. Magnetic resonance imaging. 6. Linear accelerator. 7. Positron emission tomography/computed tomography. 8. Evolving technology.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(a), (6)(a), 198.015(1); Mo. Code Regs. tit. 19, §§ 60-50.300(11), 60-50.400(6)(F)(3)
	Acquisition by an assisted living facility of major medical equipment costing more than \$400,000, which includes following: 9. Cardiac catheterization. 10. Computed tomography. 11. Gamma knife. 12. Lithotripsy. 13. Magnetic resonance imaging. 14. Linear accelerator. 15. Positron emission tomography/computed tomography. 16. Evolving technology.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(a), (6)(a), 198.015(1); Mo. Code Regs. tit. 19, §§ 60-50.300(11), 60-50.400(6)(F)(3)

Missouri CONs in Detail

Category	Types of CONs	Citation
Equipment	Acquisition by an intermediate care facility of major medical equipment costing more than \$400,000, which includes the following: 17. Cardiac catheterization. 18. Computed tomography. 19. Gamma knife. 20. Lithotripsy. 21. Magnetic resonance imaging. 22. Linear accelerator. 23. Positron emission tomography/computed tomography. 24. Evolving technology.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(a), (6)(a), 198.015(1); Mo. Code Regs. tit. 19, §§ 60-50.300(11), 60-50.400(6)(F)(3)
	Acquisition by a skilled nursing facility of major medical equipment costing more than \$400,000, which includes the following: 25. Cardiac catheterization. 26. Computed tomography. 27. Gamma knife. 28. Lithotripsy. 29. Magnetic resonance imaging. 30. Linear accelerator. 31. Positron emission tomography/computed tomography. 32. Evolving technology.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(a), (6)(a), 198.015(1); Mo. Code Regs. tit. 19, §§ 60-50.300(11), 60-50.400(6)(F)(3)
	Acquisition by a long-term care hospital of major medical equipment, at any cost, which includes the following: 33. Cardiac catheterization. 34. Computed tomography. 35. Gamma knife. 36. Lithotripsy. 37. Magnetic resonance imaging. 38. Linear accelerator. 39. Positron emission tomography/computed tomography. 40. Evolving technology.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(a), (6)(b); 198.015(1) Mo. Code Regs. tit. 19, §§ 60-50.300(11), 60-50.400(6)(F)(4)
Facilities/Buildings	1. Construction of a new hospital that costs more than \$1 million.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(a), (6)(c), 197.366(4)
	Development of a new nursing home that costs more than \$1 million, which includes: 2. Residential care facilities. 3. Assisted living facilities. 4. Intermediate care facilities. 5. Skilled nursing facilities.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(a), (6)(c), 197.366(1), 198.015(1)

Missouri CONs in Detail

Category	Types of CONs	Citation
Facilities/Buildings	6. Development of a new long-term care hospital.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(a), (6)(c), 197.366(3); Mo. Code Regs. tit. 19, § 60-50.400(6)(F)(1)
	Acquisition, including acquisition by lease, of any nursing home for more than \$1 million, which includes: 7. Residential care facilities. 8. Assisted living facilities. 9. Intermediate care facilities. 10. Skilled nursing facilities.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(b),(6)(c), 197.366(1), 198.015(1)
	11. Acquisition, including acquisition by lease, of any long-term care hospital for more than \$1 million.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(b),(6)(c), 197.366(3)
	Any capital expenditure by or on behalf of a nursing home that exceeds \$600,000, which includes: 12. Residential care facilities. 13. Assisted living facilities. 14. Intermediate care facilities. 15. Skilled nursing facilities.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(c), (6)(a), 197.366(1), 198.015(1); Mo. Code Regs. tit. 19, § 60-50.400(6)(F)(6)
	16. Any capital expenditure by or on behalf of a long-term care hospital that exceeds \$1 million.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(c), (6)(c), 197.366(3)
	Predevelopment activities (expenditures for architectural designs, plans, working drawings and specifications and any arrangement or commitment made for financing) by or on behalf of a nursing home that exceed \$150,000, which includes: 17. Residential care facilities. 18. Assisted living facilities. 19. Intermediate care facilities. 20. Skilled nursing facilities.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(d), (12), 197.366(1), 198.015(1)
	21. Predevelopment activities (expenditures for architectural designs, plans, working drawings and specifications and any arrangement or commitment made for financing) by or on behalf of a long-term care hospital that exceed \$150,000.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(d),(12), 197.366(3)
	Expansion of an existing nursing home that costs \$600,000 or more, which includes: 22. Residential care facilities. 23. Assisted living facilities. 24. Intermediate care facilities. 25. Skilled nursing facilities.	Mo. Rev. Stat. 198.015(1); Mo. Code Regs. tit. 19, § 60-50.400(6)(F)(7)

Missouri CONs in Detail

Category	Types of CONs	Citation
Services	Health services offered by a nursing home which were not offered on a regular basis in the nursing home within the previous year, which includes: 1. Residential care facilities. 2. Assisted living facilities. 3. Intermediate care facilities. 4. Skilled nursing facilities.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(f), 197.366(1), 198.015(1)
	5. Health services offered by a long-term care hospital which were not offered on a regular basis in the long-term care hospital within the previous year.	Mo. Rev. Stat. §§ 197.315(1), 197.305(9)(f), 197.366(3)
Emergency Medical Transport	No CONs in this category.	

Missouri CON Exceptions

No CON Required For:	Citation
1. Home health services.	Mo. Rev. Stat. § 197.305(9)(f)
Nonsubstantive projects, which include: 2. An expenditure which is required solely to meet federal or state requirements or involves predevelopment costs or the development of a health maintenance organization. 3. The construction or modification of nonpatient care services, including parking facilities, sprinkler systems, heating or air-conditioning equipment, fire doors, food service equipment, building maintenance, administrative equipment, telephone systems, energy conservation measures, land acquisitions, medical office buildings and other projects of a similar nature. 4. Expenditure for construction, equipment, or both, due to an act of God or a normal consequence of maintenance, but not replacement, of health care facilities, beds or equipment.	Mo. Code Regs. tit. 19, §§ 60-50.400(7), 60-50.300(13)
5. Expenditures for new institutional health services below the applicable expenditure minimum of \$1 million.	Mo. Rev. Stat. §§ 197.305(6),(9), 197.315(1)
6. Capital expenditures under the expenditure minimum. 7. Development of a new facility under the applicable expenditure minimum. 8. Acquisition of a facility under the applicable expenditure minimum. 9. Acquisition of major medical equipment under the applicable expenditure minimum.	Mo. Rev. Stat. § 197.305(6)
10. A nursing facility returning, after it has shifted from a skilled to an intermediate level of care, to the higher level of care.	Mo. Rev. Stat. § 197.315(12)
11. The transfer of ownership of an existing and operational health care facility in its entirety.	Mo. Rev. Stat. § 197.315(14)
12. The purchase and operation of research equipment to be used in a clinical trial (but a CON must be obtained for continued use in the facility after the clinical trial is completed).	Mo. Rev. Stat. § 197.315(18)(1)
13. The purchase and operation of equipment to be used by an academic health center operated by the state.	Mo. Rev. Stat. § 197.315(18)(2)
14. Operating nursing homes for the care and treatment of <i>only</i> AIDS patients.	Mo. Rev. Stat. § 197.316



MONTANA

Montana requires CONs within four broad categories—hospital beds, beds outside hospitals, facilities and services. Montana’s 23 CONs primarily regulate home health agencies, long-term care facilities and inpatient chemical dependency facilities. Mont. Code § 50-5-301(2)(b)(ii). Under Montana’s CON application process, whenever an applicant submits a proposed application, direct competitors are invited to submit competing applications for the same facility or service. Mont. Code § 50-5-302(5), (12).

Montana’s COVID-19 Response

As of May 15, 2020, Montana had not suspended any CON requirements in response to COVID-19.

Application Process

In Montana, the CON application process takes at least six months. *See* Department of Public Health and Human Services (DPHHS), *How Does The Process Work?*⁵³ Applications can be submitted at any time. The fee for a CON application is \$500 or 0.3% of the project’s capital expenditure, whichever is greater. Mont. Code § 50-5-310(2). Competitors can intervene in the application process by submitting a competing letter of intent and application, requesting a public hearing or requesting a “contested case hearing” after DPHHS renders its decision. Mont. Code §§ 50-5-302(5), (11), (12), 50-5-306(1). They can also offer evidence or argument during the hearing as to why an application should be denied. Mont. Code § 50-5-306(1); Mont. Admin. R. 37.106.115.

Types of CONs in Montana

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	3	0	Any amount	-
Beds Outside Hospitals	Yes	3	0	Any amount	-
Equipment	No	-	-	-	-
Facilities/Buildings	Yes	6	0	\$0 – \$1.5 million	-
Services	Yes	11	0	\$0 – \$150,000+	-
Emergency Medical Transport	No	-	-	-	-

⁵³ Available at <https://dphhs.mt.gov/qad/Licensure/HealthCareFacilityLicensure/CertificateofNeed#688807855-how-does-the-process-work>.

Montana CONs in Detail

Category	Types of CONs	Mont. Code
Hospital Beds	1. Converting five or more hospital beds to skilled nursing beds. 2. Converting five or more hospital beds to intermediate nursing care beds. 3. Converting five or more hospital beds to intermediate developmental disability care beds.	§ 50-5-301(1)(g)
Beds Outside Hospitals	1. Changes in bed capacity through an increase in number or relocation of beds in home health agencies. 2. Changes in bed capacity through an increase in number or relocation of beds in long-term care facilities. 3. Changes in bed capacity through an increase in number or relocation of beds in inpatient chemical dependency facilities.	§ 50-5-301(1)(b), (2)
Equipment	No CONs in this category.	
Facilities/Buildings	Capital expenditures over \$1.5 million (other than acquiring an existing health care facility) by or on behalf of: 1. Long-term care facilities. 2. Inpatient chemical dependency facilities.	§ 50-5-301(1)(a), (2)
	Incurring an obligation for a capital expenditure of any amount by a person to acquire 50% or more of: 3. Existing long-term care facilities. 4. Existing chemical dependency facilities.	§ 50-5-301(1)(d), (2)
	Construction, development, or other establishment of the following facilities that are being replaced or that did not previously exist: 5. Long-term care facilities. 6. Inpatient chemical dependency facilities.	§ 50-5-301(1)(e), (2)
Services	1. Addition of a health service offered by a home health agency that was not offered within the previous year and will result in additional annual operating and amortization expenses of \$150,000 or more. 2. Addition of a health service offered by a long-term care facility that was not offered within the previous year and will result in additional annual operating and amortization expenses of \$150,000 or more.	§ 50-5-301(1)(c), (2)

Montana CONs in Detail

Category	Types of CONs	Mont. Code
Services	3. Addition of a health service offered by an inpatient chemical dependency facility that was not offered within the previous year and will result in additional annual operating and amortization expenses of \$150,000 or more.	§ 50-5-301(1)(c), (2)
	4. Expansion of the geographical service area of a home health agency.	§ 50-5-301(1)(f)
	The provision by a hospital of services for: 5. Home health care, 6. Long-term care and 7. Inpatient chemical dependency treatment.	§ 50-5-301(1)(h)
	8. Capital expenditures over \$1.5 million by or on behalf of a home health agency. 9. Incurring an obligation for a capital expenditure of any amount by a person to acquire 50% or more of a home health agency. 10. Construction, development or establishment of a home health agency that is being replaced or did not previously exist.	§ 50-5-301(1)(a), (2)
	11. Construction, development or other establishment of a facility for ambulatory surgical care through an outpatient center for surgical services in a county with a population of 20,000 or less.	§ 50-5-301(1)(i)
Emergency Medical Transport	No CONs in this category.	

Montana CON Exceptions

No CON Required For:	Mont. Code
1. Capital expenditures over \$1.5 million for acquiring an existing healthcare facility.	§ 50-5-301(1)(a)
2. A change in the bed capacity, through an increase in number or relocation of beds from one facility to another, of a home health agency, long-term care facility or inpatient chemical dependency facility if (1) the number of beds is 10 or less or 10% or less, (2) no beds have been added or relocated during the two years prior, (3) a letter of intent is submitted to the Department of Health and (4) the Department determines the proposal will not significantly increase the cost of care or exceed bed need projected in the state healthcare facilities plan.	§ 50-5-301(1)(b), (2)
3. Incurring an obligation for a capital expenditure by a person to acquire 50% or more of an existing home health agency, long-term care facility or inpatient chemical dependency facility, if (1) the person submits a letter of intent and (2) the Department finds that the acquisition will not significantly increase the cost of care provided or increase bed capacity.	§ 50-5-301(1)(d), (2)
4. Use of five or fewer hospital beds to provide nursing care, intermediate nursing care or intermediate developmental disability care.	§ 50-5-301(1)(g)
5. Hospitals (except to the extent they offer home health care, long-term care or inpatient chemical dependency treatment services).	§ 50-5-301(2)(a)(i)
6. Offices of private physicians, dentists or other physical or mental healthcare professionals, including licensed addiction counselors.	§ 50-5-301(2)(a)(ii)
7. The CON requirements for long-term care facilities do not apply to residential care facilities. 8. The CON requirements for long-term care facilities do not apply to community homes for persons with developmental disabilities. 9. The CON requirements for long-term care facilities do not apply to community homes for persons with severe disabilities. 10. The CON requirements for long-term care facilities do not apply to boarding or foster homes for children. 11. The CON requirements for long-term care facilities do not apply to hotels, motels, boarding-houses, roominghouses, or similar accommodations for transients, students, or individuals not requiring institutional health care. 12. The CON requirements for long-term care facilities do not apply to juvenile and adult correctional facilities operating under the authority of the Department of Corrections. 13. Construction of a state-owned facility.	§ 50-5-301(2)(b)(ii)
14. Repair or replacement of a facility damaged in a natural disaster if the use of the facility after repair or replacement is within the scope of the facility's original license.	§ 50-5-309(1)
	§ 50-5-309(2)

NEBRASKA

Nebraska requires CONs within two broad categories – hospital beds and beds outside hospitals. Its CON laws apply only to long-term care and rehabilitation beds in hospitals, skilled nursing facilities, intermediate care facilities and nursing facilities. Nebraska also maintains moratoria on adding long-term care beds and rehabilitation beds. Neb. Rev. Stat. §§ 71-5829.04, 71-5829.06. Nebraska is one of only five states that do not allow competitors to intervene during the CON application process.

Nebraska's COVID-19 Response

On March 31, 2020, Governor Ricketts suspended the CON requirements for long-term care and rehabilitation beds to permit hospitals to add and/or convert any beds to long-term care or rehabilitation beds. [Exec. Order No. 20-12](#) (Mar. 31, 2020).⁵⁴ The order also suspended the existing moratoria on increasing long-term care beds and rehabilitation beds. The suspension was to remain effect until 30 days after the lifting of the COVID-19 state of emergency.

Application Process

In Nebraska, the CON application process takes 60 days. Neb. Rev. Stat. § 71-5846. Applications can be submitted at any time. The nonrefundable fee for a CON application is \$1,000. Neb. Rev. Stat. § 71-5837. The Nebraska CON law does not allow competitors to intervene in the application process or offer evidence or argument as to why an application should be denied.

Types of CONs in Nebraska

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	7	2	Any amount	Suspended
Beds Outside Hospitals	Yes	11	2	Any amount	Suspended
Equipment	No	-	-	-	-
Facilities/Buildings	No	-	-	-	-
Services	No	-	-	-	-
Emergency Medical Transport	No	-	-	-	-

⁵⁴ Available at <https://ij.org/wp-content/uploads/2020/06/Neb.-011.pdf>.

Nebraska CONs in Detail

Category	Moratoria/Types of CONs	Neb. Rev. Stat
Hospital Beds	1. Moratorium on long-term care beds unless a listed exception applies.	§ 71-5829.04
	2. Moratorium on rehabilitation beds unless a listed exception applies.	§ 71-5829.06
	1. Initial establishment of long-term care beds.	§ 71-5829.03(1)
	2. Initial establishment of rehabilitation beds.	§ 71-5829.03(1)
	3. Increase in long-term care beds by more than 10 beds or more than 10% of the total long-term care bed capacity of the hospital, whichever is less, over a two-year period.	§§ 71-5829.03(2), 71-5803.06
	4. Increase in rehabilitation beds by more than 10 beds or more than 10% of the total rehabilitation bed capacity of the hospital, whichever is less, over a two-year period.	§§ 71-5829.03(3), 71-5803.06
	5. Any initial establishment of long-term care beds through conversion by a hospital of any type of hospital beds to long-term care beds if the total beds converted by the hospital are more than 10 beds or more than 10% of the total bed capacity, whichever is less, over a two-year period.	§ 71-5829.03(4)
	6. Any initial establishment of rehabilitation beds through conversion by a hospital of any type of hospital beds to rehabilitation beds if the total beds converted by the hospital are more than 10 beds or more than 10% of the total bed capacity, whichever is less, over a two-year period.	§ 71-5829.03(5)
	7. Any relocation of rehabilitation beds in Nebraska from one hospital to another health facility.	§§ 71-5829.03(6), 71-5803.06

Nebraska is one of only five states that do not allow competitors to intervene during the CON application process.

Nebraska CONs in Detail

Category	Moratoria/Types of CONs	Neb. Rev. Stat
Beds Outside Hospitals	1. Moratorium on long-term care beds unless a listed exception applies.	§ 71-5829.04
	2. Moratorium on rehabilitation beds unless a listed exemption applies.	§ 71-5829.06
	1. Initial establishment of long-term care beds. 2. Initial establishment of rehabilitation beds.	§ 71-5829.03(1)
	3. Increase in long-term care beds in a skilled nursing facility by more than 10 beds or more than 10% of the total long-term care bed capacity, whichever is less, over a two-year period. 4. Increase in long-term care beds in an intermediate care facility by more than 10 beds or more than 10% of the total long-term care bed capacity, whichever is less, over a two-year period. 5. Increase in long-term care beds in a nursing facility by more than 10 beds or more than 10% of the total long-term care bed capacity, whichever is less, over a two-year period.	§§ 71-5829.03(2), 71-5803.04
	6. Increase in rehabilitation beds in a skilled nursing facility by more than 10 beds or more than 10% of the total rehabilitation bed capacity of the hospital, whichever is less, over a two-year period. 7. Increase in rehabilitation beds in an intermediate care facility by more than 10 beds or more than 10% of the total rehabilitation bed capacity of the hospital, whichever is less, over a two-year period.	§§ 71-5829.03(3), 71-5803.06
	8. Increase in rehabilitation beds in a nursing facility by more than 10 beds or more than 10% of the total rehabilitation bed capacity of the hospital, whichever is less, over a two-year period. 9. Any relocation of rehabilitation beds in Nebraska from one skilled nursing facility to another health facility. 10. Any relocation of rehabilitation beds in Nebraska from one intermediate care facility to another health facility. 11. Any relocation of rehabilitation beds in Nebraska from one nursing facility to another health facility.	§§ 71-5829.03(6), 71-5803.06
	No CONs in this category.	
	No CONs in this category.	
Equipment	No CONs in this category.	
Facilities/Buildings	No CONs in this category.	
Services	No CONs in this category.	
Emergency Medical Transport	No CONs in this category.	

Nebraska CON Exceptions

No CON Required For:	Neb. Rev. Stat.
1. Transfer or relocation of rehabilitation beds from a hospital, skilled nursing facility, intermediate care facility, and nursing facility to another health care facility owned and operated by the same entity.	§§ 71-5829.03(6), 71-5803.06
2. A change in classification between an intermediate care facility, a nursing facility, or a skilled nursing facility.	§ 71-5830.01(1)
3. A project of a county in which is located a metropolitan city for which a bond issue has been approved by the electorate of the county on or after 1/1/94.	§ 71-5830.01(2)
4. A project of a federally recognized Indian tribe to be located on tribal lands within Nebraska where (a) the tribe's governing body has made a determination that the cultural needs of the tribe's members cannot be adequately met by existing facility, and (b) the tribe has a self-determination agreement with the Indian Health Service of the U.S. Department of Health and Human Services.	§ 71-5830.01(3)
5. A transfer or relocation of long-term care beds from one facility to another entity in the same health planning region or any other health planning region.	§ 71-5830.01(4)

NEVADA

Nevada requires CONs within two broad categories – facilities and emergency medical transport. Further, it limits its requirements to healthcare facilities in rural areas and new medical helicopter services. Nevada's exceptions outnumber its CON requirements five to two, and urban healthcare facilities are entirely exempt from any CON requirements.

Nevada's COVID-19 Response

As of May 15, 2020, Nevada had not suspended any CON requirements in response to COVID-19.

Application Process

In Nevada, the CON application process takes between 75 and 90 days. Nev. Admin. Code § 439A.405. Applications can be submitted at any time but DHHS will only review applications that address need that is projected to arise within the next five years. Nev. Admin. Code § 439A.355(2). The nonrefundable fee for a CON application is \$9,500. Nev. Admin. Code § 439A.365(2). Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. Nev. Admin. Code §§ 439A.395, .415(4).

Types of CONs in Nevada

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	No	-	-	-	-
Beds Outside Hospitals	No	-	-	-	-
Equipment	No	-	-	-	-
Facilities/Buildings	Yes	1	0	\$2 million+	-
Services	No	-	-	-	-
Emergency Medical Transport	Yes	1	0	Any amount	-

Nevada CONs in Detail

Category	Types of CONs	Citation
Hospital Beds	No CONs in this category.	
Beds Outside Hospitals	No CONs in this category.	
Equipment	No CONs in this category.	
Facilities/Buildings	1. Construction, expansion, or renovation of health facilities, using a capital expenditure of more than \$2 million, in counties with populations less than 100,000 or cities with populations less than 25,000 that are in counties with a population over 100,000.	Nev. Rev. Stat. § 439A.100(1).015; Nev. Admin. Code § 439A.226.
Services	No CONs in this category.	
Emergency Medical Transport	1. Operation or proposed expenditure for the operation of a new medical helicopter that will provide services in an area located within 150 miles from the base of an existing medical helicopter.	Nev. Rev. Stat. § 439A.104(1)

Nevada CON Exceptions

No CON Required For:	Nev. Rev. Stat.
1. The construction, expansion, or renovation of a health facility that costs less than \$2 million.	§ 439A.100(1)
2. Capital expenditures for non-healthcare related expenses (i.e., the acquisition of land, parking facilities, maintenance of a health facility, renovation to comply with safety, licensure, certification, or accreditation standards, installation of a system to conserve energy, installation of a system for data processing or communication, or any other project which, in the opinion of the DHHS Director, does not relate directly to the provision of any health service).	§ 439A.100(2)(a)
3. Any project for the development of a health facility that has received legislative approval and authorization.	§ 439A.100(2)(b)
4. A project for the construction of a hospital in an unincorporated town if: (1) the population is more than 24,000, (2) no other hospital exists in town, (3) no other hospital has been approved for construction or qualified for an exemption from approval for construction in the town, and (4) the unincorporated town is at least a 45-minute drive from the nearest center for the treatment of trauma that is licensed by the Division of Public and Behavioral Health of DHHS.	§ 439A.100(2)(c)
5. Offices of practitioners used solely to provide routine services for health to the practitioner's patients.	§ 439A.015

NEW JERSEY

New Jersey is one of eight states to require CONs within all six broad categories—hospital beds, beds outside hospitals, equipment, facilities, services and emergency medical transport.

New Jersey's CON program includes 100 distinct CON requirements, including one for paramedic services. N.J. Stat. §§ 26:2H-7, 26:2H-2(b); N.J. Admin. Code § 8:33-3.1. New Jersey and the District of Columbia are the only jurisdictions to require such a CON. Unlike most other states, New Jersey limits the number of applications which may be submitted by pre-determining the need for projects each year. N.J. Admin. Code § 8:33-4.1. Despite New Jersey's robust CON program, it maintains only one equipment CON for cardiac catheterization equipment costing more than \$ 2 million. *See* N.J. Stat. § 26:2H-7(c); N.J. Admin. Code §§ 8:33-1.3.

New Jersey's COVID-19 Response

On March 9, 2020, Governor Murphy issued an Executive Order declaring a state of emergency, which empowered the Department of Health to take any steps necessary to eliminate barriers to medical care. *Exec. Order No. 103* (Mar. 9, 2020).⁵⁵ On March 14, 2020, the Department responded by issuing a guidance regarding temporary operational waivers to allow hospitals to add additional beds without first obtaining a CON. Dep't of Health, *Temporary Operational Waivers during a State of Emergency* (Mar. 13, 2020).⁵⁶ After the state of emergency ends, facilities must return to their pre-emergency capacity.

Application Process

In New Jersey, the CON application process takes between three and nine months, depending on whether the project must go through "full review" or "expedited review." N.J. Admin. Code § 8:33-4.1(a)–(b). The Commissioner of Health, who makes the final decision to approve or disapprove applications, receives recommendations from both Department of Health staff and the State Health Planning Board for applications under full review and from just the Department of Health for applications under expedited review. N.J. Stat. § 26:2H-5.8(b); N.J. Admin. Code § 8:33-4.1(b). Applications may only be submitted according to the schedule, published yearly by the Commissioner, which identifies the services and geographic areas projected to need additional providers over the next two years. N.J. Admin. Code § 8:33-4.1(a). The fee for a CON application is \$7,500, plus 0.25% of the total cost for projects costing more than \$1 million. N.J. Admin. Code § 8:33-4.3(b). Competitors generally cannot intervene in the application process. Except in limited circumstances, there are no public hearings prior to the Commissioner's decision. N.J. Stat. § 26:2H-5.8(c).

Types of CONs in New Jersey

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	10	0	Any amount	Suspended
Beds Outside Hospitals	Yes	35	0	Any amount	Suspended
Equipment	Yes	5	0	\$2 million+	-
Facilities / Buildings	Yes	29	0	\$0 – \$2 million+	-
Services	Yes	20	0	Any amount	-
Emergency Medical Transport	Yes	1	0	Any amount	-

⁵⁵ Available at <https://ij.org/wp-content/uploads/2020/06/NJ-103.pdf>.

⁵⁶ Available at <https://ij.org/wp-content/uploads/2020/06/DOH-Suspension.pdf>.

New Jersey CONs in Detail

Category	Types of CONs	Citation
Full Review		
Hospital Beds	Any increase or conversion of beds by licensure and/or health planning in: 1. General hospitals. 2. Special hospitals. 3. Mental hospitals. 4. Tuberculosis hospitals. 5. Chronic disease hospitals. 6. Maternity hospitals.	N.J. Admin. Code § 8:33-3.4(a)(1)–(2); N.J. Stat. § 26:2H-2(a)
	7. Increasing the number of intermediate or intensive bassinets.	N.J. Admin. Code § 8:33C-1.4(b)(4)
	8. Conversion of residential health care beds to long-term care beds.	N.J. Admin. Code § 8:33H-1.13(b)
	9. Conversion of specialized care beds to general long-term care beds (or to any other specialized care use).	N.J. Admin. Code § 8:33H-1.13(f)
	10. Conversion of acute care hospital beds to general or specialized long-term care beds.	N.J. Admin. Code § 8:33H-1.13(g)
Expedited Review		
Beds Outside Hospitals	Relocation of some or all of a facility's beds licensed for a particular service from one facility to another within the same planning region, including: 1. General hospitals. 2. Special hospitals. 3. Mental hospitals. 4. Tuberculosis hospitals. 5. Chronic disease hospitals. 6. Maternity hospitals.	N.J. Admin. Code § 8:33-3.4(a)(3); N.J. Stat. § 26:2H-2(a)
	7. Addition of beds to long-term acute care hospitals.	N.J. Admin. Code § 8:33F-2.3(a)

Unlike most other states, New Jersey limits the number of applications which may be submitted by predetermining the need for projects each year.

New Jersey CONs in Detail

Category	Types of CONs	Citation
Full Review		
Beds Outside Hospitals	Any increase or conversion of beds by licensure and/or health planning category in: 8. Public health centers. 9. Diagnostic centers. 10. Treatment centers. 11. Rehabilitation centers. 12. Extended care facilities. 13. Skilled nursing homes. 14. Nursing homes. 15. Intermediate care facilities. 16. Assisted living residences. 17. Comprehensive personal care facilities. 18. Outpatient clinics. 19. Home health care agencies. 20. Residential health care facilities.	N.J. Admin. Code § 8:33-3.4(a)(1)–(2); N.J. Stat. § 26:2H-2(a)
	21. Conversion of residential health care beds to long-term care beds.	N.J. Admin. Code § 8:33H-1.13(b)
	22. Conversion of specialized care beds to general long-term care beds (or to any other specialized care use).	N.J. Admin. Code § 8:33H-1.13(f)
Expedited Review		
Beds Outside Hospitals	Relocation of some or all of a facility's beds licensed for a particular service from one facility to another within the same planning region, including: 23. Public health centers. 24. Diagnostic centers. 25. Treatment centers. 26. Rehabilitation centers. 27. Extended care facilities. 28. Skilled nursing homes. 29. Nursing homes. 30. Intermediate care facilities. 31. Assisted living residences. 32. Comprehensive personal care facilities. 33. Outpatient clinics. 34. Home health care agencies. 35. Residential health care facilities.	N.J. Admin. Code § 8:33-3.4(a)(3); N.J. Stat. § 26:2H-2(a)

New Jersey CONs in Detail

Category	Types of CONs	Citation
Expedited Review		
Equipment	1. Addition of cardiac catheterization equipment exceeding \$2 million* (other than by a general hospital licensed to provide full service invasive cardiac diagnostics).	N.J. Stat. § 26:2H-7(c); N.J. Admin. Code §§ 8:33-1.3, 8:33-3.7(a)
Type of Review Unspecified		
	2. Computerized axial tomography. 3. Magnetic resonance imaging. 4. Positron emission tomography. 5. Ventilator beds.	Facility Types ⁵⁷
Full Review *(if cost exceeds \$2 million for the construction of new facilities)		
Facilities/Buildings	1. General hospitals, including voluntary closure and transfer of ownership.	N.J. Stat. §§ 26:2H-7, 26:2H-2(a); N.J. Admin. Code §§ 8:33-3.2(b), 8:33-3.3(a)(1)
	2. Special hospitals. 3. Mental hospitals. 4. Public health centers. 5. Diagnostic centers. 6. Treatment centers. 7. Rehabilitation centers. 8. Extended care facilities. 9. Skilled nursing homes. 10. Nursing homes. 11. Intermediate care facilities. 12. Tuberculosis hospitals. 13. Chronic disease hospitals. 14. Maternity hospitals. 15. Outpatient clinics. 16. Dispensaries. 17. Home health care agencies. 18. Residential health care facilities. 19. Dementia care home. 20. Bioanalytical laboratories owned by one of the facilities above.	N.J. Stat. §§ 26:2H-7, 26:2H-2(a)

⁵⁷ Available at <https://www.state.nj.us/health/healthfacilities/about-us/facility-types/>.

New Jersey CONs in Detail

Category	Types of CONs	Citation
Full Review		
Facilities/Buildings	21. Transfer ownership of a hospital that will result in a new Medicare provider number for the hospitals involved.	N.J. Admin. Code § 8:33-3.3(a)(2)
	22. Establishment of a maternal and child health consortium.	N.J. Admin. Code § 8:33C-1.4(a)
	23. Regional cardiac surgery centers.	N.J. Admin. Code § 8:33E-2.14
	24. Long-term acute care hospitals.	N.J. Admin. Code § 8:33F-2.3(a)
Expedited Review		
Facilities/Buildings	25. Relocation of an entire health facility (other than a general hospital) to a location within the same planning region, provided it does not add beds or services and services at the original location cease.	N.J. Admin. Code § 8:33-3.5(a)(4)
	26. Assisted living residences.	N.J. Admin. Code § 8:33H-1.7(a)
	27. Comprehensive personal care homes.	N.J. Admin. Code § 8:33H-1.10(b)
	28. Restricted admissions facilities.	N.J. Admin. Code § 8:33H-1.11(a)–(b)
Type of Review Unspecified		
	29. Ambulatory surgical centers.	Facility Types
Full Review		
Services	1. Nursing service. 2. Home care nursing. 3. Paramedical service. 4. Service provided by an intern, resident in training, or physician employed by the facility. 5. Laboratory service. 6. Medical social service.	N.J. Stat. § 26:2H-7, 26:2H-2(b); N.J. Admin. Code § 8:33-3.1
	7. Change in a hospital's membership in a maternal and child health consortium.	N.J. Admin. Code § 8:33C-1.4(b)(1)
	8. Hospital's establishment of new services as a regional perinatal center, community perinatal center-intensive, and community perinatal center-intermediate.	N.J. Admin. Code § 8:33C-1.4(b)(2)
	9. Hospital changing its perinatal designation to regional perinatal center, community perinatal center-intensive, and community perinatal center-intermediate.	N.J. Admin. Code § 8:33C-1.4(b)(3)

New Jersey CONs in Detail

Category	Types of CONs	Citation
Expedited Review		
Services	10. Establishment of new perinatal services as a community perinatal center-basic.	N.J. Admin. Code § 8:33C-1.4(c)(1)
	11. Establishment of new perinatal services as a community perinatal center-birth center.	N.J. Admin. Code § 8:33C-1.4(c)(2)
	12. Initiation of full service invasive cardiac diagnostic services (including converting low-risk invasive cardiac diagnostic services).	N.J. Admin. Code §§ 8:33E-1.11, 8:33E-1.15
	13. Assisted living program.	N.J. Admin. Code § 8:33H-1.7(b)
Type of Review Unspecified		
Services	14. Pediatric long-term care.	N.J. Admin. Code §§ 8:33H-1.1(c)(3), 8:33H-1.5
	15. Specialized care program.	N.J. Admin. Code § 8:33H-1.6
	16. Kidney, liver, or pancreas transplantation services.	N.J. Admin. Code § 8:33Q-1.1
	17. Mobile intensive care.	N.J. Admin. Code § 8:41-9.2
	18. Advanced life support.	N.J. Admin. Code § 8:41-9.2(c)
	19. Lithotripsy. 20. Megavoltage radiation oncology services.	Facility Types
Full Review		
Emergency Medical Transport	1. Ambulance service.	N.J. Stat. §§ 26:2H-7, 26:2H-2(b); N.J. Admin. Code § 8:33-3.1

New Jersey CON Exceptions

No CON Required For:	Citation
- Community-based primary care centers - Outpatient drug and alcohol services - Hospital-based medical detoxification for drugs and alcohol - Ambulance and invalid coach services - Mental health services which are non-bed related outpatient services - Residential health care facility services (but residential health care <i>facilities</i> require a CON) - Dementia care homes - Capital improvements and renovations to health care facilities - Additions of medical/surgical, adult intensive care and adult critical care beds in hospitals - Inpatient special psychiatric beds used solely for patients with co-occurring mental health and substance abuse disorders	N.J. Stat. § 26:2H-7a
Addition (by a general hospital licensed to provide full service invasive cardiac diagnostic) or replacement of existing "major moveable equipment" (defined as cardiac catheterization equipment)	N.J. Admin. Code § 8:33-3.7(b)–(c); N.J. Stat. § 26:2H-7(c)
- Acquisition, replacement, expansion, or transfer of minor medical equipment (defined as anything other than cardiac catheterization equipment) - Inpatient operating rooms	N.J. Admin. Code §§ 8:33-1.3, 8:33-3.8; N.J. Stat. § 26:2H-7(a)
- Alternate family care programs - Hospital-based subacute care - Ambulatory care facilities - Comprehensive outpatient rehabilitation services - Special child health clinics - Health care equipment that involves new technology not identified in the regulations - Transfer of ownership interest (except in the case of an acute care hospital) - Change of site for approved CON within same county - Additions to vehicles or hours of operation of a mobile intensive care unit - Replacement or relocation of a health care facility within the same county (other than an acute care hospital) - Continuing care retirement communities - Magnetic resonance imaging - Adult day health care facilities - Pediatric day health care facilities - Chronic or acute renal dialysis facilities - Transfer of ownership of a hospital to an authority - Extracorporeal shock wave lithotripter (to treat kidney stones)	N.J. Stat. § 26:2H-7a

New Jersey CON Exceptions

No CON Required For:	Citation
31. Hyperbaric chamber 32. Positron emission tomography (PET scan) 33. Residential drug and alcohol services 34. Ambulatory surgical services 35. Basic obstetric and pediatric services and birth centers, including additions of basic obstetric and pediatric beds in hospitals 36. Linear accelerator	N.J. Stat. § 26:2H-7c
37. New technology, not covered by regulation, which meets certain standards	N.J. Stat. § 26:2H-7d
38. Increasing the total number of licensed beds at a nursing home by 10 or fewer beds or 10% or less of the bed capacity, whichever is less, within a period of five years	N.J. Stat. § 26:2H-7.2
39. Nursing homes affiliated with a “well established religious body or denomination” that reserve at least 65% of its licensed bed capacity for patients who are members of that religious body or denomination	N.J. Stat. § 26:2H-7.3
40. Services provided by a physician in a private practice	N.J. Stat. § 26:2H-2(b)
41. Practitioners of “healing solely by prayer”	N.J. Stat. § 26:2H-2(a)–(b)
42. Bioanalytical laboratories not owned by a health care facility	N.J. Stat. § 26:2H-2(a)
43. Services provided by first aid, rescue, and ambulance squads regulated by the New Jersey Highway Traffic Safety Act of 1987	N.J. Stat. § 26:2H-2(b)
44. Discontinuance of a component service of a health care facility or satellite emergency department, that is not required for an inpatient health care facility, as long as it does not decrease access to the population it serves	N.J. Admin. Code § 8:33-3.2(c)
45. Transfer of ownership of operating health care facilities, beds, services, or equipment (unless a general hospital or a transfer that will result in a new Medicare provider number)	N.J. Admin. Code § 8:33-3.3(a)–(b)
46. Any decrease in the number of licensed beds by licensure and/or health planning category	N.J. Admin. Code § 8:33-3.4(a)(2)
47. Replacement at the same site of an existing health care facility (other than a general hospital) that already has a CON, provided the replacement does not add beds or services not previously offered and the existing facility ceases operations	N.J. Admin. Code § 8:33-3.5(a)(2)
48. A new CON is not needed when the total cost of a project exceeds initial estimates (but fees and penalties may be imposed)	N.J. Admin. Code § 8:33-3.9(a)
49. Research projects for the duration of the investigational study or scientific research	N.J. Admin. Code § 8:33-3.11(a)–(b)

NEW YORK

New York is one of eight states to require CONs within all six broad categories—hospital beds, beds outside hospitals, equipment, facilities, services and emergency medical transport.

New York's CON regime is easily the most complex in the country, with 203 distinct CON requirements. This could be because in 1964, it was the first state to adopt a CON law. Today, New York's CON requirements are spread throughout dozens of statutes and regulations. And some CON requirements are simply listed on the Department of Health's (DOH) website with no specific corresponding statutory or regulatory authorization.

New York further complicated the CON process by creating three different levels of CON review for applications, depending on the type of facility, service or equipment. Some of New York's CON requirements are as specific as requiring a clinic to obtain a CON before it may change its hours of operation. Another requires home health agencies to obtain a CON before eliminating nutrition services. New York is also the only state that applies its CON laws to dentists' offices.

New York's COVID-19 Response

On March 12, 2020, Governor Cuomo suspended several laws and regulations to allow for the expansion of healthcare services, including CON requirements, to allow facilities to increase bed capacity and to allow for the construction of temporary hospital locations. [Exec. Order No. 202.1](#) (Mar. 12, 2020).⁵⁸ Then, on March 23, 2020, Governor Cuomo suspended further laws to allow hospitals to increase capacity and allow ambulances to provide services outside their normal service areas. [Exec. Order No. 202.10](#) (Mar. 23, 2020).⁵⁹ On March 19, 2020, DOH clarified that providers must seek emergency approval to expand or create additional sites for testing, triage or screening. Emergency approvals, however, appeared to be notices submitted to regional DOH offices explaining that a facility or provider needed to expand capacity to respond to the pandemic. *See* DOH, [Emergency Approvals for COVID-19 \(REVISED\)](#) (Mar. 19, 2020)⁶⁰ ("Upon notification to the appropriate DOH Regional Office Department, providers are authorized to immediately move forward with the project.").

Application Process

In New York, CON applications can be submitted at any time. The fee for a CON application ranges from \$500 to \$3,000, depending on whether the application is subject to full, administrative or limited review. *See* DOH, [CON Application Fees](#) (Sept 2010).⁶¹ Full review means an application is reviewed by both DOH staff and the [Public Health and Health Planning Council](#) (PHHPC) before the Commissioner of Health makes the final decision to approve or disapprove, while applications subject to administrative or limited review are reviewed by only Department of Health staff before they go to the Commissioner. N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3), (5). The PHHPC has final decision-making authority for changes in ownership or the establishment of new healthcare facilities, home health agencies and hospice programs. N.Y. Pub. Health Law §§ 2801-a(1), 3606(1), 4004(1). Competitors cannot intervene in the application process, and the applicant may only request a public hearing if the Commissioner proposes to disapprove a project. N.Y. Comp. Codes R. & Regs. tit. 10, § 710.2(e)(2). DOH has also published a [flowchart](#)⁶² describing the process.

Types of CONs in New York

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	18	0	Any amount	Suspended
Beds Outside Hospitals	Yes	19	0	Any amount	Suspended
Equipment	Yes	65	0	\$0 – \$1 million+	Suspended
Facilities/ Buildings	Yes	35	0	\$0 – \$1 million+	Suspended
Services	Yes	65	0	\$0 – \$400,000+	Suspended
Emergency Medical Transport	Yes	1	0	Any amount	Suspended

⁵⁸ Available at <https://ij.org/wp-content/uploads/2020/06/NY-Exec.-Order-202.1.pdf>.

⁵⁹ Available at <https://ij.org/wp-content/uploads/2020/06/NY-Exec.-Order-202.10.pdf>.

⁶⁰ Available at <https://ij.org/wp-content/uploads/2020/06/NY-DOH-2020.03.19.pdf>.

⁶¹ Available at https://www.health.ny.gov/facilities/cons/more_information/fees.htm.

⁶² Available at https://www.health.ny.gov/facilities/cons/more_information/fees.htm.

New York CONs in Detail

Category	Types of CONs	Citation
Full Review		
Hospital Beds	Converting beds or changing bed capacity in: 1. General Hospitals. 2. Tuberculosis Hospitals. 3. Chronic Disease Hospitals. 4. Maternity Hospitals.	N.Y. Pub. Health Law § 2801(1); N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(2)(i)(a)
Administrative Review		
Hospital Beds	5. Conversion of hospital beds which would not establish a different level of care.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(c)
	6. Temporary addition of hospital beds to a facility's certified capacity, for up to a year, to address high priority health care needs or an acute shortage.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(s)

Healthcare providers and facilities need flexibility both during emergencies and outside emergencies to offer patients the most options for care.

New York's program provides a recent example of how moratoria can create problems even after they expire.

In the two years leading up to the 2020 COVID-19 pandemic, New York maintained a statutory moratorium on opening new home service agencies except in limited circumstances. See SB 2075 § 9-e (signed Apr. 12, 2018).^a By the time it was set to expire in 2020, the Department of Health was busy responding to the health crisis and was not able to administer the program. It quickly added a note to its website that "[D]ue to the Department's focus on the COVID-19 pandemic, a revised application and guidance will be delayed until further notice." See N.Y. Dep't of Health, *Certificate of Need*.^b

In light of the pandemic, home care services were more critical than ever. Such health services would have allowed high-risk patients, such as the elderly or immunocompromised individuals, to receive care safely at home. Instead of waiving requirements or broadly welcoming applications for new home care service agencies, the Department's failure to review new applications essentially left the moratorium in place longer than the Legislature intended. This example illustrates the potential pitfalls of moratoria or other rigid requirements. Healthcare providers and facilities need flexibility both during emergencies and outside emergencies to offer patients the most options for care.

^a Available at <https://ij.org/wp-content/uploads/2020/06/NY-S7507.pdf>.
^b Available at <https://www.health.ny.gov/facilities/cons/>.

New York CONs in Detail

Category	Types of CONs	Citation
Limited Review		
Hospital Beds	7. Decertification of hospital beds which would not otherwise require full or administrative review.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(5)(iv)(a)
	Converting any of the following beds in a certified acute care inpatient facility: 8. Medical/surgical. 9. Intensive care. 10. Coronary care. 11. Pediatric. 12. Pediatric intensive care. 13. Neonatal intensive care. 14. Neonatal intermediate care. 15. Neonatal continuing care. 16. Maternity. 17. Chemical dependence detoxification.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(5)(iv)(d)
	18. Reallocation, relocation, or redistribution of acute care beds from one general hospital to another general hospital within the same network.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(5)(iv)(f)
Full Review		
Beds Outside Hospitals	Converting beds or changing bed capacity in: 1. Public Health Centers. 2. Diagnostic Centers. 3. Treatment Centers. 4. Dental Clinics. 5. Rehabilitation Centers (other than facilities used solely for vocational rehabilitation). 6. Nursing Homes. 7. Midwifery Birth Centers. 8. Lying-in Asylums. 9. Out-patient Departments. 10. Out-patient lodges.	N.Y. Pub. Health Law § 2801(1); N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(2)(i)(a)
	11. Change in long term home health care program patient capacity (other than for an AIDS home care program).	N.Y. Comp. Codes R. & Regs. tit. 10, § 762.2(c)(5)
	12. Adding certified hospice inpatient or residence beds.	N.Y. Comp. Codes R. & Regs. tit. 10, § 791.2(d)(2)
	13. Approval of any dually certified hospice residence beds.	N.Y. Comp. Codes R. & Regs. tit. 10, § 791.2(d)(7)

New York CONs in Detail

Category	Types of CONs	Citation
Administrative Review		
Beds Outside Hospitals	14. Conversion of Article 28 facility beds which would not establish a different level of care.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(c)
	15. Temporary addition of beds to an Article 28 facility's certified capacity, for up to a year, to address high priority health care needs or an acute shortage.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(s)
	16. Addition of skilled nursing facility beds designated for AIDS patients by a residential health care facility.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(n)
	17. Change in bed capacity of AIDS center which does not result in net increase in certified bed capacity.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(k)
	18. Conversion of residential health care facility beds to ventilator dependent beds.	DOH, CON Review Types as Determined By Facility Type ⁶³
Limited Review		
Beds Outside Hospitals	19. Decertification of certain facility beds which would not otherwise require full or administrative review.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(5)(iv)(a)
Full CON Review		
Equipment	Equipment, regardless of cost, used in: 1. Therapeutic radiology. 2. Adult or pediatric cardiac surgery. 3. Cardiac catheterization. 4. Kidney, heart, liver, and bone marrow transplantation. 5. Burns care. 6. AIDS Centers. 7. Epilepsy service.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(2)(i)(b)
	8. Home health care equipment, exceeding \$400,000.	N.Y. Comp. Codes R. & Regs. tit. 10, § 762.2(c)(4)
	9. Hospice equipment, exceeding \$1 million.	N.Y. Comp. Codes R. & Regs. tit. 10, § 791.2(d)(3)

⁶³ Available at https://www.health.ny.gov/facilities/cons/more_information/review_process.htm.

New York CONs in Detail

Category	Types of CONs	Citation
Administrative Review		
Equipment	Addition, updating, or modification of equipment that requires full review in the following facilities, if that facility is already approved to provide the service: 10. General hospitals. 11. Public health centers. 12. Diagnostic centers. 13. Treatment centers. 14. Dental clinics. 15. Dental dispensaries. 16. Rehabilitation centers (other than facilities used solely for vocational rehabilitation). 17. Nursing Homes. 18. Tuberculosis Hospitals. 19. Chronic Disease Hospitals. 20. Maternity Hospitals. 21. Midwifery Birth Centers. 22. Lying-in-Asylums. 23. Out-Patient Departments. 24. Out-Patient Lodges. 25. Dispensaries. 26. Laboratories or Central Service Facilities that serve one or more of the above facilities.	N.Y. Pub. Health Law § 2801(1); N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(a)
	Acquisition of MRIs in the following facilities: 27. General hospitals. 28. Public health centers. 29. Diagnostic centers. 30. Treatment centers. 31. Dental clinics. 32. Dental dispensaries. 33. Rehabilitation centers (other than facilities used solely for vocational rehabilitation). 34. Nursing Homes. 35. Tuberculosis Hospitals. 36. Chronic Disease Hospitals. 37. Maternity Hospitals. 38. Midwifery Birth Centers. 39. Lying-in-Asylums. 40. Out-Patient Departments. 41. Out-Patient Lodges. 42. Dispensaries. 43. Laboratories or Central Service Facilities that serve one or more of the above facilities.	N.Y. Pub. Health Law § 2801(1); N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(I)

New York CONs in Detail

Category	Types of CONs	Citation
Equipment	Acquisition of CT scanners in the following facilities: 44. General hospitals. 45. Public health centers. 46. Diagnostic centers. 47. Treatment centers. 48. Dental clinics. 49. Dental dispensaries. 50. Rehabilitation centers (other than facilities used solely for vocational rehabilitation). 51. Nursing Homes. 52. Tuberculosis Hospitals. 53. Chronic Disease Hospitals. 54. Maternity Hospitals. 55. Midwifery Birth Centers. 56. Lying-in-Asylums. 57. Out-Patient Departments. 58. Out-Patient Lodges. 59. Dispensaries. 60. Laboratories or Central Service Facilities that serve one or more of the above facilities.	N.Y. Pub. Health Law § 2801(1); N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(p)
	61. Replacement of a cobalt unit with a linear facility by a facility providing therapeutic radiology and radiation oncology.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(r)
	62. Addition of chronic renal dialysis stations by a facility operating dialysis stations.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(v)
	63. Home health care equipment if the cost does not exceed \$400,000.	N.Y. Comp. Codes R. & Regs. tit. 10, § 762.2(c)(4); see CON Review Types as Determined By Facility Type
	64. Hospice equipment, between \$500,000 and \$1 million.	N.Y. Comp. Codes R. & Regs. tit. 10, § 791.2(c)(2)
Limited Review		
Equipment	65. Adding or modifying equipment by a facility already approved to provide Diagnostic Cardiac Catheterization Services.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710 (c)(5)(i)(b)
Full Review		
Facilities/Buildings	1. General Hospitals. 2. Public Health Centers. 3. Diagnostic Centers. 4. Treatment Centers. 5. Dental Clinics. 6. Dental Dispensaries. 7. Rehabilitation centers (other than facilities used solely for vocational rehabilitation).	N.Y. Pub. Health Law § 2801(1); N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)

New York CONs in Detail

Category	Types of CONs	Citation
Facilities/Buildings	8. Nursing Homes. 9. Tuberculosis Hospitals. 10. Chronic Disease Hospitals. 11. Maternity Hospitals. 12. Midwifery Birth Centers. 13. Lying-in-Asylums. 14. Out-Patient Departments. 15. Out-Patient Lodges. 16. Dispensaries. 17. Laboratories or Central Service Facilities that serve one or more of the above facilities.	N.Y. Pub. Health Law § 2801(1); N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)
	18. Long-Term Home Care Services Agencies (including transfer of ownership).	N.Y. Pub. Health Law § 3608; N.Y. Comp. Codes R. & Regs. tit. 10, § 760.2
	19. Building, acquisition, or alteration of home health care facility if the cost exceeds \$400,000.	N.Y. Comp. Codes R. & Regs. tit. 10, § 762.2(c)(4)
	20. Relocation, repair, or alteration of a hospice if the cost exceeds \$1 million.	N.Y. Pub. Health Law § 4008; N.Y. Comp. Codes R. & Regs. tit. 10, § 791.2(d)(5)
	21. Acquisition or construction of a new hospice if the cost exceeds \$250,000.	N.Y. Pub. Health Law § 4008; N.Y. Comp. Codes R. & Regs. tit. 10, § 791.2(d)(6)
	22. Relocation, repair, alteration, or building of hospice administrative office site, if the cost exceeds \$1 million.	N.Y. Pub. Health Law § 4008; N.Y. Comp. Codes R. & Regs. tit. 10, § 791.2(d)(4)
	23. Adult Care Facilities.	N.Y. Soc. Serv. Law § 460-b(1)
	24. Adult Day Health Care Programs.	CON Review Types as Determined By Facility Type
	25. Certain health programs associated with the Office of Mental Health, Office of Mental Retardation & Developmental Disabilities, and the Office of Alcoholism and Substance Abuse Services.	CON Review Types as Determined By Facility Type

New York CONs in Detail

Category	Types of CONs	Citation
Administrative Review		
Facilities/Buildings	26. Correction of patient deficiencies, ordinary repairs and maintenance, energy conservation measures, or modernization (if it does not substantively change the capacity or type of service) in Article 28 facilities.	CON Review Types as Determined By Facility Type
	27. Operation or relocation of an extension clinic.	
	28. Expansion or modernization of an emergency room.	
	29. Addition of primary care sites, if: » Total project costs do not exceed \$15 million. » The Department of Health finds there is a need and it would not adversely affect other PPCPs.	
	30. Building, acquisition, or alteration of home health care facility if the cost does not exceed \$400,000.	
	31. Relocation, repair, maintenance, acquisition, or building of hospice administrative office sites, between \$500,000 and \$1 million.	
	32. Repair or maintenance of hospice facilities or units, between \$250,000 and \$1 million.	
	33. Acquisition or building of hospice facility or unit when total cost does not exceed \$250,000.	
	34. Addition of hospital operating rooms (unless total project cost requires a full review application).	
	35. Operating, changing services or hours of operation, or relocation of a part-time clinic site.	

New York CONs in Detail

Category	Types of CONs	Citation
Full Review		
Services	- Therapeutic Radiology. - Adult or Pediatric Cardiac Surgery. - Cardiac Catheterization (including relocation of Cardiac Catheterization Lab Center Services, and the addition of PCI services). - Kidney, Heart, Liver, and Bone Marrow Transplantation. - Burns Care. - Epilepsy Service.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(2)(i)(b)
	- Addition or deletion of certified home health agency services, including: - Physical therapy. - Occupational therapy. - Speech pathology. - Social work services. - Respiratory therapy. - Nutrition. - Personal care services. - Physician services.	N.Y. Comp. Codes R. & Regs. tit. 10, § 762.2(c)(1)
	Certified Home Health Agencies (including transfer of ownership).	N.Y. Pub. Health Law § 3608; N.Y. Comp. Codes R. & Regs. tit. 10, § 760.2
	Change in a home health agency's or long-term home health care program's geographic service area.	N.Y. Comp. Codes R. & Regs. tit. 10, § 762.2(c)(2)
	Change in the method of providing home health services, if the change in cost exceeds \$400,000.	N.Y. Comp. Codes R. & Regs. tit. 10, § 762.2(c)(3)
	Increase in long-term home health care program's capacity requiring a competitive review.	CON Review Types as Determined By Facility Type
	Change in hospice's geographic service area.	N.Y. Comp. Codes R. & Regs. tit. 10, § 791.2(b)(3), (c)(1)
	Change in method of hospice inpatient or hospice residence care and services.	N.Y. Comp. Codes R. & Regs. tit. 10, § 791.2(d)(1)
	Advanced life support first response services.	N.Y. Pub. Health Law § 3005(1)
	- Any proposal undertaken by a general hospital that costs in excess of \$30 million. - Any proposal undertaken by a facility other than a general hospital that will cost more than \$15 million.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(2)(i)(c)

New York CONs in Detail

Category	Types of CONs	Citation
Administrative Review		
Services	Addition or modification of services in the following facilities, other than the ones that require full review: 17. General hospitals. 18. Public health centers. 19. Diagnostic centers. 20. Treatment centers. 21. Dental clinics. 22. Dental dispensaries. 23. Rehabilitation centers (other than facilities used solely for vocational rehabilitation). 24. Nursing Homes. 25. Tuberculosis Hospitals. 26. Chronic Disease Hospitals. 27. Maternity Hospitals. 28. Midwifery Birth Centers. 29. Lying-in-Asylums. 30. Out-Patient Departments. 31. Out-Patient Lodges. 32. Dispensaries. 33. Laboratories or Central Service Facilities that serve one or more of the above facilities.	N.Y. Pub. Health Law § 2801(1); N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(a)
	34. Conversion of cardiac catheterization service to PCI capable cardiac catheterization laboratory center, and addition of cardiac EP laboratory program services in Article 28 facilities <i>not yet</i> approved to provide those services.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(2)(i)(b)(3)
	Additions to existing services not involving additional site or beds in the following facilities: 35. General hospitals. 36. Public health centers. 37. Diagnostic centers. 38. Treatment centers. 39. Dental clinics. 40. Dental dispensaries. 41. Rehabilitation centers (other than facilities used solely for vocational rehabilitation). 42. Nursing Homes. 43. Tuberculosis Hospitals. 44. Chronic Disease Hospitals. 45. Maternity Hospitals. 46. Midwifery Birth Centers. 47. Lying-in-Asylums. 48. Out-Patient Departments. 49. Out-Patient Lodges. 50. Dispensaries. 51. Laboratories or Central Service Facilities that serve one or more of the above facilities.	N.Y. Pub. Health Law § 2801(1); N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(d)

New York CONs in Detail

Category	Types of CONs	Citation
Services	52. Addition or deletion of approval to operate part-time clinic services.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(g)
	53. Addition of offsite or expanded adult day health care services provided by a residential health care facility approved to provide the service.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(m)
	54. Addition of a methadone maintenance treatment program.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(o)
	55. Addition of a ventilator dependent service.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(t)
	56. Swing Bed Demonstration Program.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)(u)
	57. Addition of an AIDS home care program.	N.Y. Comp. Codes R. & Regs. tit. 10, § 762.2(d)
	58. Increase in long-term home health care program capacity not requiring a competitive review.	CON Review Types as Determined By Facility Type
	59. Certain proposals, as defined by regulation, proposed by general hospitals that will cost less than \$30 million.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)
	60. Certain proposals, as defined by regulation, proposed by other facilities that will cost less than \$30 million.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(3)(i)
Limited Review		
Services	61. Decertification of any services excluding: » Therapeutic radiology » Adult or pediatric cardiac surgery » Cardiac Catheterization » Kidney, Heart, Liver, and Bone Marrow Transplantation » Burns Care » AIDS Centers » Epilepsy Service	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(5)(iv)(b)
	62. Addition of any services, other than those that require full or administrative review.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(5)(iv)(c)
	63. Adding or modifying cardiac catheterization labs, or adding cardiac EP laboratory program services in Article 28 facilities that <i>are</i> approved to provide those services.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(6)(i)(a), (c)
	64. Other proposals by a general hospital that will cost less than \$15 million.	
	65. Other proposals by a facility that will cost less than \$6 million.	
Emergency Medical Transport	1. Ambulances.	N.Y. Pub. Health Law § 3005(6)

New York CON Exceptions

No CON Required For:	Citation
1. Mental Health Facilities (except for distinct parts of the facility which provide hospital service).	N.Y. Pub. Health Law § 2801(1)
2. Religious facilities or institutions that rely on healing “through prayer alone”	N.Y. Pub. Health Law § 2801(1)
3. Correction of cited deficiencies, authorized by the Department of Health.	N.Y. Pub. Health Law § 2802(1-a)(a)
4. Repair or maintenance, regardless of cost (includes routine purchases and the acquisition of minor equipment).	N.Y. Pub. Health Law § 2802(1-a)(b)
5. Non-clinical infrastructure projects, regardless of cost (includes HVAC systems, fire alarms, parking lots, etc.)	N.Y. Pub. Health Law § 2802(1-a)(c)
6. One for one equipment replacements, regardless of cost (including replacement of equipment with updated equipment used for similar purposes).	N.Y. Pub. Health Law § 2802(1-a)(d)
7. Any proposal that related to health information technology, regardless of cost.	N.Y. Comp. Codes R. & Regs. tit. 10, § 710.1(c)(4)(g)

NORTH CAROLINA

North Carolina is one of eight states to require CONs across all six broad categories—hospital beds, beds outside hospitals, equipment, facilities, services and emergency

medical transport. North Carolina is the only state to have had its CON program declared unconstitutional. *In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542 (1973). After that, the General Assembly adopted a new CON regime and expressly included a legislative findings of fact section. See N.C. Gen. Stat. § 131E-175. In addition to North Carolina's existing 12 service CONs, North Carolina also maintains a catch-all CON. That is, if no specific CON applies, the catch-all CON requires healthcare facilities to obtain a CON to develop or expand any healthcare service if doing so will cost above \$2 million. N.C. Gen. Stat. § 131E-176(16)(b).

North Carolina's COVID-19 Response

On April 8, 2020, Governor Cooper issued an order authorizing the Department of Health and Human Services to accept requests to temporarily: (1) relocate beds; (2) add or relocate dialysis stations; (3) acquire medical imaging equipment and (4) operate ambulatory surgical facilities as temporary hospitals. *Exec. Order 130* (Apr. 8, 2020).⁶⁴ The Order included detailed instructions explaining how healthcare facilities and providers must request approval. Although less burdensome than a CON, the Order still required healthcare providers and facilities to submit to an application process and wait for an approval before expanding capacity to respond to COVID-19.

Application Process

In North Carolina, the CON application process takes approximately 90 days. N.C. Gen. Stat. § 131E-185(a1); 10A N.C. Admin. Code 14C.0205(a). Applications can be submitted at any time throughout the year but are reviewed on batching cycles as set forth in the *State Medical Facilities Plan*.⁶⁵ The fee for a CON application ranges from \$5,000 to \$50,000. N.C. Gen. Stat. § 131E-182(c). Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. N.C. Gen. Stat. § 131E-185(a1)(1)–(2).

Types of CONs in North Carolina

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	3	0	Any amount	Expedited Review
Beds Outside Hospitals	Yes	13	0	Any amount	Expedited Review
Equipment	Yes	10	0	\$0 – \$750,000+	Expedited Review
Facilities/Buildings	Yes	22	0	Any amount	Expedited Review
Services	Yes	12	0	\$0 – \$2 million+	Expedited Review
Emergency Medical Transport	Yes	1	0	Any amount	-

⁶⁴ Available at <https://ij.org/wp-content/uploads/2020/06/NC-130.pdf>.

⁶⁵ Available at <https://ij.org/wp-content/uploads/2020/06/NC-Plan-2020.pdf>.

North Carolina CONs in Detail

Category	Types of CONs	N.C. Gen. Stat.
Hospital Beds Any increase in beds, relocation of beds from one facility to another, or redistribution of capacity among categories of beds. N.C. Gen. Stat. § 131E-176(5)	1. Hospital.	§§ 131E-178(a), 131E-176(9)(9a)-(9c)
	2. Long-term care hospital.	§ 131E-176(9b)
	3. Non-health service facility bed to a hospital bed.	§ 131E-176(16)(m)
Beds Outside Hospitals Any increase in beds, relocation of beds from one facility to another, or redistribution of capacity among categories of beds. N.C. Gen. Stat. § 131E-176(5)	1. Psychiatric facility.	§§ 131E-178(a), 131E-176(9a)-(9c), (16)(c)
	2. Rehabilitation facility.	§ 131E-176(9b)
	3. Nursing home facility.	
	4. Adult care home.	
	5. Kidney disease treatment center, including freestanding hemodialysis units.	
	6. Intermediate care facility for individuals with intellectual disabilities.	
	7. Home health agency office.	
	8. Chemical dependency treatment facility.	

North Carolina is the only state that has had its CON program declared unconstitutional. *See In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542 (1973). ^{Ta.} There, a hospital sued when it was unable to open because it could not get a CON. The state Supreme Court ruled it was unconstitutional to deny the CON—after all, the hospital had private funding and would promote the public health. Undeterred, North Carolina reintroduced its CON laws after this loss in court.

Today, another CON challenge is pending in North Carolina.^a *See Singleton v N.C. Dep’t of Health Servs.*,

No. 20 CVS 5150 (Cty. of Wake, Sup. Ct. filed Apr. 23, 2020).^a This time, North Carolina’s CON law prohibits ophthalmologist Dr. Jay Singleton from offering low-cost surgeries to his patients. Dr. Singleton owns a state of the art operating facility, but the law forbids him from using it. Instead, he is legally required to perform surgeries at the local hospital, which ends up costing his patients thousands of dollars more. But patients and providers—not government—should decide what healthcare services are “needed.”

^a Available at <https://ij.org/cases/north-carolina-con-ii/>.

North Carolina CONs in Detail

Category	Types of CONs	N.C. Gen. Stat.
Beds Outside Hospitals Any increase in beds, relocation of beds from one facility to another, or redistribution of capacity among categories of beds. N.C. Gen. Stat. § 131E-176(5)	9. Diagnostic center. 10. Hospice inpatient facility. 11. Hospice residential care facility. 12. Ambulatory surgical facility.	§ 131E-176(9b)
	13. Conversion of a non-health service facility bed to a hospital bed.	§ 131E-176(16)(m)
Equipment Acquisition by purchase, donation, lease, transfer or comparable arrangement of any of the listed equipment requires a CON. N.C. Gen. Stat. § 131E-178(b)	1. Cardiac catheterization equipment.	§ 131E-176(16)(f1)(3)
	2. Gamma knife.	§ 131E-176(16)(f1)(4)
	3. Heart-lung bypass machine.	§ 131E-176(16)(f1)(5)
	4. Linear accelerator.	§ 131E-176(16)(f1)(5a)
	5. Lithotripter.	§ 131E-176(16)(f1)(6)
	6. Magnetic resonance imaging scanner.	§ 131E-176(16)(f1)(7)
	7. Positron emission tomography scanner.	§ 131E-176(16)(f1)(8)
	8. Simulator.	§ 131E-176(16)(f1)(9)
	9. The furnishing of mobile medical equipment to any person to provide health services in North Carolina, which was not in use in North Carolina prior to the adoption of this provision, if the equipment would otherwise be subject to review.	§ 131E-176(16)(s)
	10. Other single unit or single system of components used to provide medical and other health services that costs more than \$750,000.	§ 131E-176(14o)
Facilities/Buildings	1. Hospital. 2. Long-term care hospital. 3. Psychiatric facility. 4. Rehabilitation facility.	§ 131E-176(9b)

North Carolina CONs in Detail

Category	Types of CONs	N.C. Gen. Stat.
Facilities/Buildings	5. Nursing home facility. 6. Adult care home. 7. Kidney disease treatment center, including freestanding hemodialysis units. 8. Intermediate care facility for individuals with intellectual disabilities. 9. Home health agency office. 10. Chemical dependency treatment facility. 11. Diagnostic center.	§ 131E-176(9b)
	12. Hospice office.	§§ 131E-176(9b), 131E-176(16)(n)
	13. Hospice inpatient facility.	§§ 131E-176(9b), 131E-176(16)(n)
	14. Hospice residential care facility.	§ 131E-176(16)(n)
	15. Ambulatory surgical facility.	§ 131E-176(9b)
	16. The construction, development, establishment, increase in the number or relocation of an operating room or gastrointestinal endoscopy room in a licensed health service facility.	§ 131E-176(16)(u)
	17. Opening an additional office by an existing home health agency within its service area.	§ 131E-176(16)(o)
	18. Opening an additional office by hospice within its service area.	§ 131E-176(16)(o)
	19. Opening of any office by an existing home health agency outside its service area.	§ 131E-176(16)(o)
	20. Opening of any office by hospice outside its service area.	§ 131E-176(16)(o)

North Carolina CONs in Detail

Category	Types of CONs	N.C. Gen. Stat.
Facilities/Buildings	21. The purchase, lease or acquisition of any health service facility, or portion thereof, or a controlling interest in the health service facility or portion thereof, if the health service facility was developed under a certificate of need issued pursuant to Gen. Stat. 131E-180.	§§ 131E-176(16)(l), 131E-176(9b)
	22. The acquisition by purchase, donation, lease, transfer or comparable arrangement by any person of major medical equipment.	§§ 131E-176(16)(p), 131E-176(14o)
Services	1. Offering dialysis services by a home service facility if not offered in the previous 12 months.	§ 131E-176(16)(d)
	2. Offering home health services by a health service facility if not offered in the previous 12 months.	§ 131E-176(16)(d)
	3. Development or offering bone marrow transplantation services.	§ 131E-176(16)(f)(1)
	4. Development or offering burn intensive care services.	§ 131E-176(16)(f)(2)
	5. Development or offering cardiac catheterization services.	§ 131E-176(16)(f)(2a)
	6. Development or offering neonatal intensive care services.	§ 131E-176(16)(f)(3)
	7. Development or offering open-heart surgery services.	§ 131E-176(16)(f)(4)
	8. Development or offering solid organ transplantation services.	§ 131E-176(16)(f)(5)
	9. The conversion of a specialty ambulatory surgical program to a multispecialty ambulatory surgical program.	§ 131E-176(16)(r)
	10. The addition of a specialty to a specialty ambulatory surgical program.	§ 131E-176(16)(r)
	11. Any change in the approved capital expenditure amount for any approved project during construction or within one year of CON approval requires a new CON.	§ 131E-176(16)(e)
	12. Any expenditure above \$2 million to develop or expand a health service.	§ 131E-176(16)(b)
Emergency Medical Transport	1. Air ambulance. (Although this CON has not been repealed, the North Carolina Department of Health and Human Services repealed the coordinating regulation in 2013 and no longer enforces this CON.)	§ 131E-176(16)(f1)(1)

North Carolina CON Exceptions

No CON Required for:	N.C. Gen. Stat.
1. A facility may offer a new institutional health service solely for research so long as the service will not: (1) affect the facility's charges for provision of medical or other patient care services other than those related to the research; (2) substantially change the bed capacity at the facility; or (3) substantially change the medical or other patient care services of the facility.	§ 131E-179
2. If a written proposal explains why a new health facility is needed for any of the following reasons, then it is exempt from a CON, if the service is required: (1) to eliminate or prevent imminent safety hazards as defined in federal, state or local fire, building, or life safety codes or regulations, (1a) to comply with state licensure standards, (1b) to comply with accreditation or certification standards which must be met to receive reimbursement under Title XVIII of the Social Security Act or payments under a state plan for medical assistance approved under Title XIX of that Act, (2) repealed, (3) to provide data processing equipment, (4) to provide parking, heating, cooling, elevators or other basic plan or mechanical improvements, (5) to replace or repair facilities destroyed or damaged by accident or natural disaster, (6) to provide any nonhealthy service facility or service, (7) to provide replacement equipment, (8) to acquire an existing health service facility, including equipment owned by the health service facility at the time of acquisition. A facility not currently licensed as an adult care home that was licensed as an adult care home within the preceding 12 months is considered an existing health service facility for the purposes of this subdivision and (9) to develop or acquire a physician office building regardless of cost, unless a new institutional health service other than defined in Gen. Stat. 131E-176(16)(b) is offered or developed in the building.	§ 131E-184(a)
3. Transfer of existing acute care beds to psychiatric beds if certain conditions are met.	§ 131E-184(c)
4. New chemical dependency or substance abuse facility for the purpose of providing services solely to inmates of the Division of Adult Correction and Juvenile Justice of the Department of Public Safety.	§ 131E-184(d)
5. Capital expenditure over \$2 million if: (a) solely for the purpose of renovating, replacing on the same site, or expanding any of the following existing facilities: 1. nursing home, 2. adult care home, 3. immediate care facility for individuals with intellectual disabilities; and (b) not resulting in change in bed capacity or any other new institutional health service.	§ 131E-184(e)(1)
6. Capital expenditure over \$2 million if entity writes to Department and says expenditure is for: (a) conversion of semiprivate resident rooms to private rooms, (b) providing innovative, homelike residential dining spaces, or (c) changing residential living or common areas to improve quality of life of residents.	§ 131E-184(e)(2)
7. Capital expenditure on replacement equipment over \$2 million if: (1) equipment replaced is located on main campus, (2) previously issued CON for the equipment being replaced and (3) meets exemption criteria.	§ 131E-184(f); 10A N.C. Admin. Code 14C.0303
8. Capital expenditure over \$2 million if: (1) the sole purpose is to renovate, expand or replace same site, (2) no change in bed capacity, no new facility or no new service and (3) meets exemption criteria.	§ 131E-184(g)
9. Legacy medical care facility.	§ 131E-184(h)
10. Relocation of an operating room or gastrointestinal endoscopy room within the same building or on the same grounds or to grounds not separated by more than a public right-of-way adjacent to the grounds where the operating room or gastrointestinal endoscopy room is currently located.	§§ 131E-178(a), 131E-176(16)(u)

Ohio requires CONs within three broad categories—hospital beds, beds outside hospitals and facilities. Ohio's CON program applies only to long-term care facilities, which it defines as nursing homes, skilled nursing facilities or portions of hospitals that contain skilled nursing beds or long-term care beds. Ohio Rev. Code § 3702.51(N). Additionally, the state maintains two moratoria applicable only to long-term care facilities. One prohibits new long-term care facilities from opening under specific circumstances, and the other prohibits an existing long-term care facility from increasing its beds under specific circumstances. Ohio Rev. Code § 3702.59.

Ohio's COVID-19 Response

As of May 15, 2020, Ohio had not suspended any CON requirements in response to COVID-19.

Application Process

In Ohio, the CON application process takes between 60 and 90 days. Ohio Rev. Code §§ 3702.52(C)(4)–(6). Most applications can be submitted at any time, but applications for the relocation of long-term care beds to a county with fewer long-term care beds than needed may only be submitted every four years in the month of July. Ohio Rev. Code § 3702.593(A), (D); Ohio Admin. Code § 3701-12-09. For projects not involving a capital expenditure, the fee for a CON application is \$5,000. For projects involving a capital expenditure, the fee is \$5,000 or 1.5% of the proposed capital expenditure, whichever is greater. Ohio Admin. Code 3701-12-08(E). Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. Ohio Admin. Code 3702-12-08, 3702-12-11.

Types of CONs in Ohio

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	3	0	Any amount	-
Beds Outside Hospitals	Yes	3	1	Any amount	-
Equipment	No	-	-	-	-
Facilities/Buildings	Yes	10	1	\$0 – \$2 million+	-
Services	No	-	-	-	-
Emergency Medical Transport	No	-	-	-	-

Ohio CONs in Detail

Category	Moratoria/Types of CONs	Ohio Rev. Code
Hospital Beds	1. Increase in long-term care bed capacity.	§ 3702.511(A)(4)
	2. Relocation of long-term care bed from one site to another.	§ 3702.511(A)(5)
	3. Expenditure of more than 110% of the maximum expenditure specified in a CON concerning long-term care beds.	§ 3702.511(A)(6)
Beds Outside Hospitals	1. Moratorium on adding long-term care beds to long-term care facilities in enumerated circumstances.	§ 3702.59
	1. Increase in long-term care bed capacity.	§ 3702.511(A)(4)
	2. Relocation of long-term care bed from one site to another.	§ 3702.511(A)(5)
	3. Expenditure of more than 110% of the maximum expenditure specified in a CON concerning long-term care beds.	§ 3702.511(A)(6)
Equipment	No CONs in this category.	-
Facilities/Buildings	1. Moratorium on developing new long-term care facilities in enumerated circumstances.	§ 3702.59
	Establishment, development, or construction of a new long-term care facility, which includes: 1. Nursing homes 2. Portion of any facility that is certified as a skilled nursing facility 3. Portion of any hospital that contains skilled nursing or long-term care beds	§§ 3702.511(A)(1), 3702.51(N)
	Replacement of an existing long-term care facility, which includes: 4. Nursing homes 5. Portion of any facility that is certified as a skilled nursing facility 6. Portion of any hospital that contains skilled nursing or long-term care beds	§§ 3702.511(A)(2), 3702.51(N)

Certain CON applications may only be submitted every four years in the month of July.

Ohio CONs in Detail

Category	Moratoria/Types of CONs	Ohio Rev. Code
Facilities/Buildings	Renovation or addition that involves a capital expenditure of \$2 million or more (not including expenditures for equipment, staffing, or operational costs) to a long-term care facility, which includes: 7. Nursing homes 8. Portion of any facility that is certified as a skilled nursing facility 9. Portion of any hospital that contains skilled nursing or long-term care beds	§§ 3702.511(A)(3), 3702.51(N)
	10. Failure to act in substantial accordance with an approved CON application, including a change in site, within 5 years after implementing the activity for which the CON was granted.	§ 3702.511(A)(7)
Services	No CONs in this category.	-
Emergency Medical Transport	No CONs in this category.	-

Ohio CON Exceptions

No CON Required For:	Ohio Rev. Code
1. Acquisition of computer hardware or software.	§ 3702.511(B)(1)
2. Acquisition of a telephone system.	§ 3702.511(B)(2)
3. Construction or acquisition of parking facilities.	§ 3702.511(B)(3)
4. Correction of cited deficiencies that constitute an imminent threat to public health or safety and are in violation of federal, state, or local fire, building, or safety statutes, ordinances, rules, or regulations.	§ 3702.511(B)(4)
5. Acquisition of an existing long-term care facility that does not involve a change in the number of beds.	§ 3702.511(B)(5)
6. Mergers, consolidations, or other corporate reorganization of long-term facilities that do not involve a change in the number of beds.	§ 3702.511(B)(6)
7. Construction, repair, or renovation of bathroom facilities.	§ 3702.511(B)(7)
8. Construction of laundry facilities, waste disposal facilities, dietary department projects, heating and air conditioning projects, administrative offices, and portions of medical office buildings used exclusively for physician services.	§ 3702.511(B)(8)
9. Removal of asbestos from a healthcare facility.	§ 3702.511(B)(9)
10. Any part of a long-term facility's campus that is certified as an intermediate care facility for individuals with intellectual disabilities.	§ 3702.62
11. Addition of 20 or fewer long-term beds to a nursing home if (1) the nursing home is licensed, (2) it does not participate in Medicare or Medicaid, and (3) all of the long-term care beds added are to be used solely for palliative care.	§ 3702.512(A)



OKLAHOMA

Oklahoma requires CONs within four broad categories—hospital beds, beds outside hospitals, facilities and services. The state's 27 CON laws apply only to long-term care and psychiatric or chemical dependency beds and facilities. The Oklahoma Department of Health reviews applications and applies different fees and timing schemes depending on whether applications are related to long-term care or psychiatric and chemical dependency care.

Oklahoma's COVID-19 Response

On April 8, 2020, Governor Stitt issued an Executive order that suspended CON requirements for adding long-term care and psychiatric or chemical dependency beds for the duration of the state of emergency. [Exec. Order 2020-13 at 4–5](#) (Apr. 11, 2020).⁶⁶

Application Process

In Oklahoma, the Department accepts CON applications at any time. Once an application is deemed complete, the Department must issue a decision within 45 days after the deadline for evidence and argument, except for applications for the acquisition of a psychiatric or chemical dependency facility, which must be decided within 15 days. Okla. Admin. Code § 310:4-1-5(7). The maximum fee for a long-term care facility CON application is \$1,000 for the replacement of an existing facility and \$5,000 for the acquisition of a facility. Okla. Stat. tit. 63, § 1-852(J). For psychiatric or chemical dependency CON applications, the fee is 0.75% of the capital cost of the project, with a minimum of \$1,500 and a maximum of \$10,000. Okla. Admin. Code § 310:4-1-5(3). Competitors can intervene in the application process by offering evidence or argument as to why an application should be denied, requesting a reconsideration hearing and appealing the final decision on an application in court. Okla. Stat. tit. 63, §§ 1-854.1, 1-880.8; Okla. Admin. Code §§ 310:4-1-5(6), 310:4-1-8.

Types of CONs in Oklahoma

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	4	0	Any amount	Suspended
Beds Outside Hospitals	Yes	4	0	Any amount	Suspended
Equipment	No	-	-	-	-
Facilities/Buildings	Yes	16	0	\$0 – \$1 million+	-
Services	Yes	3	0	Any amount	-
Emergency Medical Transport	No	-	-	-	-

⁶⁶ Available at <https://ij.org/wp-content/uploads/2020/06/Okla.-2020-13.pdf>.

Oklahoma CONs in Detail

Category	Types of CONs	Okla. Stat. tit. 63
Hospital Beds	1. An increase in licensed long-term care beds, whether through establishment of a new facility or expansion of an existing one.	§ 1-852(B)(3)
	2. Conversion of existing beds to psychiatric or chemical dependency beds.	§ 1-880.6(E)(3)
	3. Increase in psychiatric or chemical dependency bed capacity.	
	4. Adding new psychiatric or chemical dependency beds.	
Beds Outside Hospitals	1. An increase in licensed long-term care beds, whether through establishment of a new facility or expansion of an existing one.	§ 1-852(B)(3)
	2. Conversion of existing beds to psychiatric or chemical dependency beds.	
	3. Increase in psychiatric or chemical dependency bed capacity.	
	4. Adding new psychiatric or chemical dependency beds.	
Equipment	No CONs in this category.	
Facilities/Buildings	Establishment of a new long-term care facility, which includes: 1. Nursing or specialized facilities. 2. Skilled nursing care provided in a distinct part of a hospital. 3. The nursing care component of a continuum of care facility. 4. The nursing care component of a life care community.	§§ 1-851.1(4), 1-851.3, 1-852(A), (B)(3)
	Any capital investment of \$1 million or more for a long-term care facility, which includes: 5. Nursing or specialized facilities. 6. Skilled nursing care provided in a distinct part of a hospital. 7. The nursing care component of a continuum of care facility.	§§ 1-851.1(4), 1-852(B)(1)
	Acquisition of the ownership or operation of a long-term care facility, which includes: 8. Nursing or specialized facilities. 9. Skilled nursing care provided in a distinct part of a hospital. 10. The nursing care component of a continuum of care facility. 11. The nursing care component of a life care community.	§§ 1-851.1(4), 1-852(B)(2)

Oklahoma CONs in Detail

Category	Types of CONs	Okla. Stat. tit. 63
Facilities/Buildings	12. Establishment or conversion of a psychiatric facility or unit. 13. Establishment or conversion of a chemical dependency facility or unit. 14. Conversion of a facility to a psychiatric or chemical dependency facility.	§ 1-880.6(A)
	15. Any capital investment or lease of \$500,000 or more.	§ 1-880.6(E)(1)
	16. Acquisition of psychiatric or chemical dependency facility by purchase, lease, donation or through transfer of stock or merger.	§ 1-880.6(A), (E)(2)
Services	1. Establishment of psychiatric or chemical dependency services. 2. Expansion of psychiatric or chemical dependency services.	§ 1-880.6(A)
	3. Inpatient psychiatric or chemical dependency services for persons under 18 years of age offered or provided by a hospital or other health facility.	§ 1-880.6(E)(3)
Emergency Medical Transport	No CONs in this category.	

Oklahoma CON Exceptions

No CON Required For:	Okla. Stat. tit. 63
1. An increase of no more than ten long-term care beds or 10% of the facility's licensed beds, whichever is greater, per calendar year if: (a) the total capital cost is less than \$1 million, and (b) the facility's occupancy rate averaged 93% or more during the 12 months preceding the filing of the exemption request.	§ 1-852(C)(1)
2. Construction of a long-term care facility to replace or relocate all or part of the licensed bed capacity of an existing facility if: (a) the project involves no increase in licensed beds; (b) the facility shall be constructed no further than three miles for rural areas and 7.5 miles for urban areas from the facility it is replacing or relocating and (c) a plan for the use of the facility to be replaced or relocated is provided that ensures continuity of services.	§ 1-852(C)(2)
3. A management agreement for a long-term care facility if: (a) the management entity discloses all persons with controlling interest in the management entity and discloses all experience in long-term care facility management or operating in any state during the preceding three years; (b) the management entity and any person with controlling interest in the management entity has less than three years' experience in management or operation of facilities and does not have a history of noncompliance and (c) the licensed entity remained responsible for facility operation, financial performance, staffing, and delivery of resident services required under the Nursing Home Care Act.	§ 1-852(3)(a)-(c)
4. Any changes in ownership of a long-term care facility resulting from the operation of law, including but not limited to divorce, probate, reversions and bankruptcy if the transfer of interest is to any already existing stockholder or person or entity listed on the license application disclosure statement. Also includes cancellations and expirations of leases.	§ 1-852(D)(1)
5. Ownership changes of a long-term care facility for estate planning purposes, treasury stock purchases, and transfers between existing owners and/or family members; increases in the amount of common stock or partnership interest for any individual who already owns 50% of the common stock or corporate entity involved or controls 50% or more of the interest in the partnership involved.	§ 1-852(D)(2)
6. New purchases of common stock or partnership interest in a long-term care facility by any legal entity if such new purchaser will own, in total, less than 50% of the corporate entity involved or partnership involved.	§ 1-852(D)(3)
7. A capital expenditure, for a psychiatric or chemical dependency facility, to eliminate or prevent imminent safety hazards, to comply with state licensure standards, or to comply with accreditation standards.	§ 1-880.7(B)(1)

OREGON

Oregon requires CONs within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. Most of its 43 CON requirements apply to facilities and services, but the state's facility requirements do not always apply uniformly. For example, out of all types of healthcare facilities, only hospitals, intermediate care facilities and skilled nursing facilities must obtain a CON to relocate. Oregon further maintains a robust application regime and utilizes four different levels of review to consider CON applications. See Or. Admin. R. 333-560-0020, -0120, -0150, 333-570-0070.

Oregon's COVID-19 Response

As of May 15, 2020, Oregon had not suspended any CON requirements in response to COVID-19.

Application Process

In Oregon, depending on whether the CON application is subject to full, abbreviated, expedited or accelerated review, the CON application process can take up to four months. Or. Admin. R. 333-570-0070. Applications can be submitted at any time. The fee for a CON application varies according to the project cost and the type of review, and it can range from \$5,000 to \$90,900. Or. Admin. R. 333-565-000, Table 4.⁶⁷ Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. Or. Admin. R. 333-560-0020, -0120, -0150, 333-570-0070.

Types of CONs in Oregon

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	2	0	Any amount	-
Beds Outside Hospitals	Yes	6	0	Any amount	-
Equipment	Yes	5	0	Any amount	-
Facilities/Buildings	Yes	15	0	Any amount	-
Services	Yes	15	0	Any amount	-
Emergency Medical Transport	No	-	-	-	-

⁶⁷ Available at <https://ij.org/wp-content/uploads/2020/06/Or.-Table-4.pdf>.

Oregon CONs in Detail

Category	Types of CONs	Or. Admin. R.
Full Review		
Hospital Beds	1. Any increase in bed capacity of a service or facility.	333-550-0010(2)
Expedited Review		
Hospital Beds	2. Relocation of existing long-term care beds to a hospital-based setting, if: (a) the long-term care beds are relocated from one existing long-term care facility to only one licensed long-term care facility which is within the same standard metropolitan statistical area or within 15 miles of the hospital, whichever is greater; and (b) the project involves the relocation of not more than 50% of the licensed long-term care beds from one site to another.	333-560-0130(1)(a)–(b)
Full Review		
Beds Outside Hospitals	1. Any increase in the skilled nursing bed capacity of a long-term care facility by more than 10 beds or more than 10% of the current long-term care bed capacity, whichever is less, within a 2-year period after the most recent increase in beds at the facility.	333-550-0010(3)(b)
	2. Any increase in the intermediate care bed capacity of a long-term care facility by more than 10 beds or more than 10% of the current long-term care bed capacity, whichever is less, within a 2-year period after the most recent increase in beds at the facility.	
	3. Remodeling a long-term care facility which involves replacement through new construction of at least 50% of the facility's structural bed capacity.	333-550-0010(3)(c)
	4. Relocation of existing long-term care beds from one licensed health care facility to another.	Or. Rev. Stat. §§ 442.015(20), 442.315(1); Or. Admin. R. 333-550-0010(3)(e)
Expedited Review		
Beds Outside Hospitals	5. Relocation or replacement of existing long-term care beds, which includes relocation of all or part of the beds in two existing long-term care facilities within the same service area, at either one of the facilities, or at a new location in the same service area.	§ 333-560-0110
Abbreviated Review Available		
Beds Outside Hospitals	6. Relicensing long-term care beds by a facility participating in Seniors and People with Disabilities Division approved Nursing Home Vision 2000 Project if all of the conditions in the section are met.	§ 333-560-0010(3)

Oregon CONs in Detail

Category	Types of CONs	Or. Admin. R.
Full Review		
Equipment	Acquisition by hospitals, skilled nursing facilities or intermediate care facilities of any of the following equipment: 1. Magnetic resonance imaging scanners. 2. Positron emission tomography scanners. 3. Cardiac catheterization equipment. 4. Megavoltage radiation therapy equipment. 5. Extracorporeal shock wave lithotripters.	Or. Rev. Stat. § 442.315(9)
Full Review		
Facilities/Buildings	1. New hospital, which includes any facility that did not offer inpatient hospital services on a regular basis within its service area within the prior year and is initiating or proposing to initiate those services.	Or. Rev. Stat. §§ 442.015(20), 442.315(1); Or. Admin. R. 333-550-0010(2)
	2. Replacement, rebuilding or relocation of an existing hospital that involves a substantial increase in services (including any increase in bed capacity of the service or facility) or change in the services (including establishment of new health service) offered.	Or. Rev. Stat. §§ 442.015(19), 442.315(1); Or. Admin. R. 333-550-0010(2)
	3. New skilled nursing facility.	Or. Rev. Stat. §§ 442-015(20), 442.315(1)
	4. Rebuilding an existing skilled nursing facility, which includes construction in which at least 50% of the existing square footage is replaced through new construction or remodeling if the cost is at least 50% of the estimated replacement cost of the facility.	Or. Rev. Stat. §§ 442-015(20), 442.315(1); Or. Admin. R. 333-550-0010(3)(c)
	5. Relocation of an existing skilled nursing facility building to a new site.	Or. Rev. Stat. §§ 442-015(21), 442.315(1); Or. Admin. R. 333-550-0010(3)(d)
	6. New intermediate care facility.	Or. Rev. Stat. §§ 442-015(20), 442.315(1)
	7. Rebuilding an existing intermediate care facility, which includes construction in which at least 50% of the existing square footage is replaced through new construction or remodeling if the cost is at least 50% of the estimated replacement cost of the facility.	Or. Rev. Stat. §§ 442-015(20), 442.315(1); Or. Admin. R. 333-550-0010(3)(c)
	8. Relocation of an existing intermediate care facility building to a new site.	Or. Rev. Stat. §§ 442-015(20), 442.315(1); Or. Admin. R. 333-550-0010(3)(d)
	9. Development or establishment of a health care facility of any new health maintenance organization.	Or. Rev. Stat. § 442.325(1)
Expedited Review		
Facilities/Buildings	10. Rebuilding of all or part of a long-term care facility within its service area.	333-560-0110

Oregon CONs in Detail

Category	Types of CONs	Or. Admin. R.
Accelerated Review		
Facilities/Buildings	11. Development of a “new hospital” when all of the conditions in the section are met.	333-560-0140
Abbreviated Review Available		
Facilities/Buildings	12. Establishment of a new health facility that will predominantly or exclusively service medically indigent patient.	333-560-0010(1)
	13. Partnerships or joint ventures between hospitals, health systems and existing non-hospital-based, long-term care facilities neither owned or controlled by the same entity.	333-560-0010(2)
	14. Development of a freestanding hospice facility if all of the conditions in the section are met.	333-560-0010(4)
	15. Development of a new Oregon State Hospital facility.	333-560-0010(5)
Full Review		
Services	1. New skilled nursing service by initiation of inpatient skilled nursing services by a new facility. 2. New skilled nursing service by health care facility that did not offer such services within the prior year. 3. New intermediate care service by initiation of inpatient intermediate care services by a new facility. 4. New intermediate care services by health care facility that did not offer such services within the prior year.	Or. Rev. Stat. § 442.315(1); Or. Admin. R. 333-550-0010(3)(a)
	5. A change in the category of a license for an already-operating hospital if the hospital proposes to offer one or more new services not encompassed within its existing license.	333-550-0010(2)
	6. Change in services of an existing long-term care facility if the new services are not within the scope of services allowable under a long-term care facility license and require licensure under a hospital licensure category.	Or. Rev. Stat. § 442.315(1); Or. Admin. R. 333-550-0010(3)(a)
	7. A series of projects which affect a single health service which in the aggregate exceeds any of the CON thresholds and when 12 months or less can be expected to elapse or have elapsed between the completion of the first component of the project and the start of the next component of the project.	333-550-0000(6)
	8. Burn care. 9. Trauma care. 10. Inpatient psychiatric services. 11. Inpatient chemical dependency services. 12. Inpatient rehabilitation services. 13. Open heart surgery. 14. Organ transplant services. 15. Establishment of a new health facility that will predominantly or exclusively service medically indigent patients.	Or. Admin. R. 333-560-0010(1); Or. Rev. Stat. § 442.315(9)
Emergency Medical Transport	No CONs in this category.	

Oregon CON Exceptions

No CON Required For:	Citation
1. Religious institutions that conduct remedial care or treatment “solely by prayer or spiritual means.”	Or. Rev. Stat. § 441.065(1)
2. Reinstatement of services by an established hospital which has experienced an interruption of services of less than a year.	Or. Admin. R 333-550-0010(2), (4)
3. A change in category of license for an already-operating hospital that does not offer one or more new services.	Or. Admin. R 333-550-0010(2)
4. Expansion of an existing hospital at its current site that does not involve a substantial increase or change in the services offered.	Or. Admin. R 333-550-0010(2)
5. A change in ownership of a skilled nursing or intermediate care facility.	Or. Admin. R 333-550-0010(3)(a)
6. A change in the services of an existing long-term facility if the new services are within the scope of services allowable under a long-term care facility and do not require licensure under a hospital licensure category.	Or. Admin. R 333-550-0010(3)(a)
7. Development of operating units or areas of the hospital dedicated exclusively to the provision of ambulatory surgery services.	Or. Admin. R 333-550-0010(4)
8. The replacement by any hospital, skilled nursing or intermediate care service or facility of equipment of similar basic technological function or an upgrade that improves the quality or cost-effectiveness of the service provided.	Or. Rev. Stat. § 442.315(7)
9. Operation of rural hospitals, except for a new hospital or a new skilled nursing or intermediate care facility not operating as a Medicare swing bed program.	Or. Rev. Stat. §§ 442.315(8), 442.347
10. The provision of basic health services by a hospital.	Or. Rev. Stat. § 442.315(9)
11. Any activity of a health maintenance organization (HMO) which does not involve the direct delivery of health services.	Or. Rev. Stat. § 442.325(2)
12. Any decision of an HMO involving its organizational structure, its arrangements for financing health services, the terms of its contracts with enrolled beneficiaries or its scope of benefits.	Or. Rev. Stat. § 442.325(3)
13. Ambulatory surgical centers performing only ophthalmic surgery.	Or. Rev. Stat. § 442.344
14. Residential care facilities.	Or. Rev. Stat. §§ 442.015(18)(b), 443.400 et seq.

OR

RHODE ISLAND

Rhode Island requires CONs within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. The state maintains moratoria prohibiting construction of new nursing facilities or increasing beds at existing nursing facilities. *See* R.I. Gen. Laws § 23-17-44. The moratoria are currently set to expire on July 1, 2022. Rhode Island further maintains three generally applicable catch-all CONs. Catch-all CONs apply if no other specific CON applies. In that case, the catch-all CON requires healthcare facilities to obtain CONs for projects that will exceed a certain expenditure limit, which is adjusted on an annual basis.

Rhode Island's COVID-19 Response

On April 10, 2020, Governor Raimondo suspended CON requirements for hospitals and nursing homes and suspended the moratorium on nursing facility beds to allow providers flexibility to respond to COVID-19 as needed. *Exec. Order 20-21* (Apr. 10, 2020).⁶⁸ This order was originally set to expire on May 8, 2020, but was later extended through June 7, 2020, *Exec. Order 20-33* (May 8, 2020),⁶⁹ and was extended again on June 4, 2020, for expiration July 4, 2020. *Exec. Order 20-42* (June 4, 2020).

Application Process

In Rhode Island, the CON application process takes 120 days. 216 R.I. Code R. § 40-10-22.10(K)(1). Applications are only accepted twice each year, on January 10 or June 10, 216 R.I. Code R. § 40-10-22.10(C)(3). The fee for a CON application is \$500 for regular review or \$10,000 for new or expanded tertiary or specialty care services, plus an amount equal to 0.25% of the total capital expenditure costs. R.I. Gen. Laws § 23-15-10. Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. R.I. Gen. Laws § 23-15-6(b)(5).

Types of CONs in Rhode Island

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	1	0	Any amount	Suspended
Beds Outside Hospitals	Yes	15	1	Any amount	Suspended
Equipment	Yes	6	0	\$0 – \$2,542,234+	Suspended
Facilities/Buildings	Yes	8	1	\$0 – \$5,932,090+	-
Services	Yes	7	0	\$0 – \$5,932,090	Suspended
Emergency Medical Transport	No	-	-	-	-

⁶⁸ Available at <https://ij.org/wp-content/uploads/2020/06/RI-20-21.pdf>.

⁶⁹ Available at <https://ij.org/wp-content/uploads/2020/06/RI-20-33.pdf>.

Rhode Island CONs in Detail

Category	Moratoria/Types of CONs	216 R.I. Code R.
Hospital Beds An increase in bed capacity that increases the total number of beds or the redistribution or relocation of beds from one physical place to another by ten beds or 10%, whichever is less, in any two-year period. 216 R.I. Code R. § 40-10-22.2(A)(20)(c)	1. Hospital beds.	§ 40-10-22.2(A)(20)(f)
Beds Outside Hospitals An increase in bed capacity that increases the total number of beds or the redistribution or relocation of beds from one physical place to another by ten beds or 10%, whichever is less, in any two-year period 216 R.I. Code R. § 40-10-22.2(A)(20)(c)	1. Moratorium through July 1, 2022 on increasing bed capacity of any nursing facility to greater than the level of the facility's bed capacity as of August 21, 1996, plus the greater of ten beds or ten percent.	R.I. Gen. Laws § 23-17-44 (b)
	1. Obstetrics beds. 2. Pediatric beds. 3. Medical beds. 4. Surgical beds. 5. Intensive coronary beds. 6. Special care beds. 7. Post-acute care beds. 8. Skilled nursing beds. 9. Intermediate care beds. 10. Rehabilitative care beds.	§ 40-10-22.2(A)(20)(c)
	11. Hospice beds. 12. Inpatient rehabilitation centers. 13. Surgi-center beds. 14. Multi-practice physician ambulatory surgery center beds. 15. Multi-practice podiatry ambulatory surgery center beds.	§ 40-10-22.2(A)(12)
Equipment	1. Positron emission tomography. 2. Linear accelerators.	§§ 40-10-22-2(A)(20)(i), 40-10-22.2(A)(33)

Rhode Island CONs in Detail

Category	Moratoria/Types of CONs	216 R.I. Code R.
Equipment	- Full body magnetic resonance imaging. - Computerized axial tomography. - Cardiac catheterization services	§§ 40-10-22-2(A)(20)(i), 40-10-22.2(A)(33)
	Any piece of medical equipment costing more than \$2,542,234 as adjusted annually.	§§ 40-10-22-2(A)(20)(i), 40-10-22.2(A)(19)
Facilities/Buildings “A certificate of need is required as a precondition to licensure of any new health care facility . . .” 216 R.I. Code R. § 40-10-22.4(F).	1. Moratorium through July 1, 2022 on opening any new nursing facility.	23 R.I. Gen. Laws § 23-17-44(a)
	Construction or establishment of one of the following: - Hospitals. - Nursing facilities. - Inpatient rehabilitation centers. - Surgi-centers. - Multi-practice physician ambulatory surgery centers. - Multi-practice podiatry ambulatory surgery centers. - Inpatient hospice care.	§ 40-10-22.2(A)(12)
	Any capital expenditure by or on behalf of an existing facility in excess of \$5,932,090 as adjusted annually.	§ 40-10-22.2(A)(20)(b)
Services “No person may incur an obligation for a capital expenditure for a new institutional health service or new health care equipment without obtaining approval for the capital expenditure.” 216 R.I. Code R. § 40-10-22.4(E). “New institutional health services” includes tertiary or specialty care services. 216 R.I. Code R. § 40-10-22.2(A)(20)(d)(i).	Establishment of one of the following services: - Open heart surgery. - Organ transplantation. - Neonatal intensive care services. - Home care providers. - Home nursing care providers.	§ 40-10-22.2(A)(33)
	Hospice providers.	§ 40-10-22.2(A)(12)
	Any health service not offered on a regular basis by a facility within the preceding 12 months that exceeds \$1,694,883, adjusted annually, in annualized operating costs.	§ 40-10-22.2(A)(20)(h)
Emergency Medical Transport	No CONs in this category.	

Rhode Island CON Exceptions

No CON Required For:	Citation
1. Any provider of hospice care who provides such hospice care without charge.	216 R.I. Code R. § 40-10-22.4(G)
2. Acquisition of full body magnetic resonance imaging and computerized axial tomography \$1 million on or before January 1, 2010 and was in operation on or before July 1, 2010.	216 R.I. Code R. § 40-10-22.2(A)(33)
3. Domestic medical tourism.	R.I. Gen. Laws § 23-93-2
4. Multi-practice facilities.	R.I. Gen. Laws § 23-93-3
5. Non-clinical capital expenditures.	R.I. Gen. Laws § 23-15-4.1
6. Research.	R.I. Gen. Laws § 23-15-4.2
7. Voter approved capital bonds authorizing capital expenditures for state health care facilities.	R.I. Gen. Laws § 23-15-4.4
8. Single-practice surgical centers.	216 R.I. Code R. § 40-10-22.2(A)(12)
9. Single-practice podiatry centers.	216 R.I. Code R. § 40-10-22.2(A)(12)
10. Licensed nursing facility increasing bed capacity not more than 10 beds or 10% of capacity, whichever is greater, if capital expenditure is under \$2 million.	216 R.I. Code R. § 40-10-22.2(A)(20)(g)
11. Acquisitions of existing health care facility that does not result in a change in the service or bed capacity.	216 R.I. Code R. § 40-10-22.2(A)(20)(b)
12. One-to-one equipment replacement.	216 R.I. Code R. § 40-10-22.4

SOUTH CAROLINA

South Carolina requires CONs within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. The Department of Health and Environmental Control administers the CON program through a comprehensive state health plan issued at least once every two years. S.C. Code § 44-7-180(C); S.C. Code Regs. 61-15 § 106. South Carolina requires facilities to obtain a CON when offering any new service, yet it also requires facilities to obtain a CON when expanding a service at the cost of \$2 million or more.

South Carolina's COVID-19 Response

On March 19, 2020, Governor McMaster issued a robust executive order that broadly lifted requirements to allow healthcare facilities and providers to respond to the pandemic by, among other things: (1) converting non-traditional beds and spaces into areas for patient care without a CON and (2) purchasing equipment necessary to care for COVID-19 patients without a CON. [Exec. Order 2020-11](#) (Mar. 19, 2020).⁷⁰ The Department issued further guidance on the orders. S.C. Dep't of Health and Envtl. Control, [Exec. Order No. 2020-11, Section 4 Suspending Certain Aspects of Certificate of Need Review Frequently Asked Questions](#).⁷¹

Application Process

In South Carolina, the application process takes 30 to 150 days after an application is complete and affected parties have been notified of the application. S.C. Code § 44-7-210(A). The entire process from submission to approval typically takes much longer. Applications can be submitted at any time and the fee for a CON application is \$500. S.C. Code § 44-7-200(A); S.C. Code Regs. 61-15 § 301. Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. S.C. Code § 44-7-210(A), (E).

Types of CONs in South Carolina

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	4	0	Any amount	Suspended
Beds Outside Hospitals	Yes	9	0	Any amount	Suspended
Equipment	Yes	3	0	\$600,000+	-
Facilities/Buildings	Yes	12	0	Any amount	Suspended
Services	Yes	7	0	\$0 – \$2 million+	Suspended
Emergency Medical Transport	No	-	-	-	-

⁷⁰ Available at <https://ij.org/wp-content/uploads/2020/06/SC-2020-11.pdf>.

⁷¹ Available at <https://ij.org/wp-content/uploads/2020/06/SC-EO-Guidance.pdf>.

South Carolina CONs in Detail

Category	Types of CONs	S.C. Code
Hospital Beds	The addition of one or more beds or change in the classification of licensure of one or more beds in: 1. Acute care hospitals. 2. Psychiatric hospitals. 3. Alcohol and substance abuse hospitals.	§§ 44-7-160(2), 44-7-130(10), (12)
	4. Obstetrical beds.	2020 South Carolina Health Plan at 18-19 ⁷²
Beds Outside Hospitals	The addition of one or more beds or change in the classification of licensure of one or more beds in: 1. Nursing homes. 2. Ambulatory surgical facilities. 3. Hospice facilities. 4. Radiation therapy facilities. 5. Rehabilitation facilities. 6. Residential treatment facilities for children and adolescents. 7. Intermediate care facilities for persons with intellectual disability. 8. Narcotic treatment programs. 9. Any other facility for which CON review is required by federal law.	§§ 44-7-160(2), 44-7-130(10)
Equipment	1. Gamma knife. 2. Linear accelerator.	2020 South Carolina Health Plan at 87
	3. The acquisition of medical equipment which is to be used for diagnosis or treatment if the total project cost is in excess of \$600,000.	§ 44-7-160(6); S.C. Regs. 61-15 § 102(1)(f)

72 Available at <https://ij.org/wp-content/uploads/2020/07/SC-SHP.pdf>.

South Carolina CONs in Detail

Category	Types of CONs	S.C. Code
Facilities/Buildings	Construction or establishment of: 1. Acute care hospital. 2. Psychiatric hospital. 3. Alcohol and substance abuse hospital. 4. Nursing home. 5. Ambulatory surgical facility. 6. Hospice facility. 7. Radiation therapy facility. 8. Rehabilitation facility. 9. Residential treatment facility for children and adolescents. 10. Intermediate care facility for persons with intellectual disability. 11. Narcotic treatment program. 12. Any other facility for which CON review is required by federal law.	§§ 44-7-160(1), 44-7-130(10)
Services	1. Home health agency.	§ 44-69-75
	2. Radiotherapy services. 3. Cardiac catheterization. 4. Neonatal intensive care services. 5. Openheart surgery.	2020 South Carolina Health Plan
	6. A capital expenditure by or on behalf of a health care facility in excess of \$2 million which is associated with the addition or substantial expansion of a health service for which specific standards or criteria are prescribed in the South Carolina Health Plan.	§§ 44-7-160(4), 44-7-130(10); S.C. Ann. Regs. 61-15 § 102(1)(c)
	7. The offering of a health service by or on behalf of a health care facility which has not been offered by the facility in the preceding 12 months and for which specific standards or criteria are prescribed in the South Carolina Health Plan.	§§ 44-7-160(5), 44-7-130(10)
Emergency Medical Transport	No CONs in this category.	

South Carolina CON Exceptions

No CON Required For:	S.C. Code
1. Acquisition of medical equipment, offering an institutional health service or obligation of a capital expenditure solely for research if it does not: (a) affect the charges imposed other than for the services that are included in the research; (b) change the bed capacity of a health care facility or (c) substantially change the services provided.	§ 44-77-170(A)(1); S.C. Code Regs. 61-15 § 104(1)(b)
2. The offices of a licensed private practitioner whether for individual or group practice.	§ 44-77-170(A)(2); S.C. Code Regs. 61-15 § 104(4)
3. The replacement of like equipment for which a Certificate of Need has been issued which does not constitute a material change in service or a new service.	§ 44-77-170(A)(3); S.C. Code Regs. 61-15 § 104(1)(a)
4. Crisis stabilization unit facilities.	§ 44-77-170(A)(4)
5. Expenditure by or on behalf of a health care facility for nonmedical projects.	§ 44-77-170(B)(1); S.C. Code Regs. 61-15 § 105(5)(a)
6. Facilities owned and operated by the South Carolina Department of Mental Health and the South Carolina Department of Disabilities and Special Needs.	§ 44-77-170(B)(2); S.C. Code Regs. 61-15 § 105(4)(d)
7. Educational and penal institutions maintaining infirmaries for the exclusive use of student bodies and inmate populations.	§ 44-77-170(B)(3); S.C. Code Regs. 61-15 § 105(4)(c)
8. Any federal health care facility sponsored and operated by South Carolina's state government.	§ 44-77-170(B)(4); S.C. Code Regs. 61-15 § 105(4)(b)
9. Community-based housing designed to promote independent living for persons with mental or physical disabilities.	§ 44-77-170(B)(5)
10. Kidney disease treatment centers.	§ 44-77-170(B)(6)
11. Health care facilities owned and operated by the federal government.	§ 44-77-170(B)(7); S.C. Code Regs. 61-15 § 105(4)(a)
12. The permanent reduction in bed capacity, including the permanent closure of a health care facility.	S.C. Code Regs. 61-15 § 104(1)(c)
13. Continuing care retirement communities may provide home health services.	§ 44-69-75

TENNESSEE

Tennessee requires CONs within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. The state’s Health Services Department Agency manages the CON program and maintains authority to revoke CONs if recipients fail to implement their projects in a “timely manner.” Tenn. Code § 68-11-1611. The minimum CON application fee in Tennessee is \$15,000. Tenn. Comp. R. & Regs. § 0720-10-02(5).

Tennessee’s COVID-19 Response

On March 19, 2020, Governor Lee suspended certain CON requirements to allow hospitals to temporarily increase bed capacity and establish hospital and diagnostic services at any location as necessary to respond to COVID-19. *See* Exec. Order No. 15 (Mar. 19, 2020).⁷³ The Department of Health responded by implementing temporary rules effective through October 7, 2020. *See* Dep’t of Health, *Interpretation and Temporary Waiver of Rules Related to Treatment and Containment of COVID-19* (Apr. 1, 2020);⁷⁴ *see also* sidebar on p.170.

Application Process

In Tennessee, the CON application process takes up to 60 days. Tenn. Code § 68-11-1608(c). The Agency reviews applications (called letters of intent) filed by the 10th of any month in the review cycle beginning the following month. Tenn. Code § 68-11-1607(c)(1), (5). The fee is \$5.75 per \$1,000 of the estimated expenditure, but not less than \$15,000 or more than \$95,000. Tenn. Comp. R. & Regs. § 0720-10-02(5). Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. Tenn. Code § 68-11-1610.

Types of CONs in Tennessee

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	2	0	Any amount	Suspended
Beds Outside Hospitals	Yes	8	0	Any amount	Suspended
Equipment	Yes	4	0	Any amount	-
Facilities/Buildings	Yes	10	0	Any amount	Suspended
Services	Yes	14	0	Any amount	Suspended
Emergency Medical Transport	No	-	-	-	-

⁷³ Available at <https://ij.org/wp-content/uploads/2020/06/TN-EO-15.pdf>.

⁷⁴ Available at <https://ij.org/wp-content/uploads/2020/06/TN-Temp-Rules.pdf>.

Tennessee CONs in Detail

Category	Types of CONs	Tenn. Code
Hospital Beds	1. Hospital beds. 2. Mental health hospital beds.	§ 68-11-1602(7)(A)
Beds Outside Hospitals	1. Nursing home beds. 2. Recuperation center beds. 3. Ambulatory surgical treatment center. 4. Intellectual disability institutional habilitation facility beds. 5. Outpatient diagnostic center beds. 6. Rehabilitation facility beds. 7. Residential hospice beds. 8. Nonresidential substitution-based treatment center for opiate addiction beds.	§ 68-11-1602(7)(A)
Equipment	1. Initiation of magnetic resonance imaging in any county with a population in excess of 250,000 only for providing magnetic resonance imaging to pediatric patients.	§ 68-11-1607(a)(10)(A)
	2. Initiation of magnetic resonance imaging in any county with a population in excess of 250,000 only for providing magnetic resonance imaging to any patients.	§ 68-11-1607(a)(10)(B)

Tennessee took a commonsense approach in recognizing that during a public health emergency, every second matters.

Governor Lee's executive order included suspending Tennessee's CON statutes and regulations "to the extent necessary to allow hospitals ... to temporarily increase their number of licensed hospital beds at any location or temporarily establish hospital or diagnostic services at any location, if necessary for the treatment of COVID-19 patients." *See* Exec. Order No. 15 (Mar. 19, 2020).^a

For its part, the Department of Health responded by promptly confirming the suspension of the CON program. *See* Dep't of Health, Interpretation and Temporary Waiver of Rules Related to Treatment and Containment of COVID-19 (Apr. 1, 2020).^b This was a critical step because healthcare providers should never choose between spending resources on patients

and filling out paperwork. In other states, executive orders and proclamations loosened CON requirements, but either mandated that providers spend critical time applying for emergency CONs or else were silent as to compliance. Worse, in Indiana, the governor authorized the Department of Health to waive its CON program, but the Department never acted to exercise that authority, leaving CONs in place despite the governor's intentions.

Tennessee's practical response waived the most burdensome laws and regulations without forcing providers to fill out emergency CON applications just to expand bed services or otherwise respond to COVID-19. This gave healthcare facilities the freedom to prioritize patients over paperwork.

^a Available at <https://ij.org/wp-content/uploads/2020/06/TN-EO-15.pdf>.
^b Available at <https://ij.org/wp-content/uploads/2020/06/TN-Temp-Rules.pdf>.

Tennessee CONs in Detail

Category	Types of CONs	Tenn. Code
Equipment	3. Increasing the number of magnetic resonance imaging machines in any county with a population of over 250,000 by one or more, except for replacing or decommissioning an existing machine.	§ 68-11-1607(a)(11)
	4. Positron emission tomography.	§ 68-11-1607(a)(4)
Facilities/Buildings	1. Nursing home. 2. Recuperation center. 3. Hospital. 4. Ambulatory surgical treatment center. 5. Mental health hospital. 6. Intellectual disability institutional habilitation facility. 7. Outpatient diagnostic center. 8. Rehabilitation facility. 9. Residential hospice. 10. Nonresidential substitution-based treatment center for opiate addiction.	§ 68-11-1602(7)(A)
Services	1. Diagnostic services. 2. Treatment services. 3. Rehabilitative services.	§ 68-11-1602(8)
	4. Home care organization (or any category of service provided by a home care organization for which authorization is required).	§ 68-11-1602(7)(A)
	5. Home health services. 6. Burn care. 7. Cardiac catheterization. 8. Neonatal intensive care. 9. Open heart surgery. 10. Organ transplant. 11. Linear accelerator. 12. Psychiatry services. 13. Opiate addiction treatment provided through a nonresidential substitution-based treatment center for opiate addiction.	§ 68-11-1607(a)(4)
	14. Megavoltage radiation therapy services.	State Health Plan ⁷⁵
Emergency Medical Transport	No CONs in this category.	

⁷⁵ Available at <https://ij.org/wp-content/uploads/2020/07/TN-SHP.pdf>.

Tennessee CON Exceptions

No CON Required For:	Tenn. Code
1. An entity that was formerly licensed as a hospital, and that has received from the Commissioner of Health a written determination that it will be eligible for designation as a critical access hospital under the Medicare rural hospital flexibility program.	§ 68-11-1607(j)
2. A nursing home may increase its total number of licensed beds by the lesser of ten (10) beds or ten percent (10%) of its licensed capacity over any period of one (1) year without obtaining a CON.	§ 68-11-1607(k)(1)
3. A home care organization that is authorized to provide only professional support services which are defined in Tenn. Code Ann. § 68-11-201.	§ 68-11-1607(l)
4. An existing hospital licensed by the Department of Mental Health and Substance Abuse Services to become licensed by the Department of Health as a satellite of an affiliated general acute care hospital.	§ 68-11-1607(a)(8)

VERMONT

Vermont requires CONs within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. The definitions of “services” and “equipment” are extremely broad in Vermont, where the program instead relies heavily on expenditures. For example, Vermont does not define individual services that require a CON in its statute or regulations. Instead, any activity or function related to “care, treatment or diagnosis of patients” costing more than \$500,000 requires a CON. Vt. Stat. tit. 18, §§ 9432(10), 9434(a)(5). Vermont further maintains a statewide moratorium preventing any new home health agencies from opening through 2025. 2019 Vt. Act. § Resolves No. 5. Sec. 2.

Vermont’s COVID-19 Response

On March 13, 2020, Governor Scott declared a state of emergency in response to COVID-19. Exec. Order 01-20 (Mar. 13, 2020).⁷⁶ The Legislature then passed a bill to grant state agencies emergency powers. See H.742 (Act 91) § 5 (signed Mar. 30, 2020). In response, the Green Mountain Care Board (Board), the agency in charge of overseeing and approving the CON program, issued a temporary waiver of CON requirements for certain COVID-19 related projects. Board, *Certificate of Need Bulletin 003* (Apr. 9, 2020).⁷⁷ The waiver requires facilities to submit a brief notice to the Board before expanding to respond to COVID-19, unless it had already applied for a Medicare or Medicaid waiver or obtained approval to expand services from the State Survey Agency. See *Certificate of Need Bulletin 003* at (a), (b). Operating an expanded facility or service after the state of emergency is terminated requires applying for a regular CON.

Application Process

In Vermont, the CON application process takes up to 120 days. Vt. Stat. tit. 18, § 9440(d)(3). Applications can be submitted at any time, and the fee for a CON application is 0.125% of project costs, not to exceed \$20,000 with a minimum fee of \$250. Vt. Stat. tit. 18, § 9441(a), (b). Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. See Board Rules § 4.406.

Types of CONs in Vermont

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	6	0	Any amount	Suspended
Beds Outside Hospitals	Yes	4	0	Any amount	Suspended
Equipment	Yes	2	0	\$1 million+	Suspended
Facilities/Buildings	Yes	16	0	\$1.5 million–\$ 3 million+	Suspended
Services	Yes	2	1	\$500,000+	Suspended
Emergency Medical Transport	No	-	-	-	-

⁷⁶ Available at <https://ij.org/wp-content/uploads/2020/06/VT-01-20.pdf>.

⁷⁷ Available at <https://ij.org/wp-content/uploads/2020/06/Vt.-Bulletin.pdf>.

Vermont CONs in Detail

Category	Moratoria/Types of CONs	Vt. Stat. tit. 18
Hospital Beds A CON is required for a “new healthcare project” which includes a “change from one licensing period to the next in the number of licensed beds of a healthcare facility[.]” Vt. Code R. § 80.280-004; Vt. Stat. tit. 18 § 9434(a)(2)	1. General hospital beds. 2. Mental hospital beds. 3. Chronic disease facility beds. 4. Birthing center beds. 5. Maternity hospital beds. 6. Psychiatric facility beds.	§ 9432(8)(A)
Beds Outside Hospitals A CON is needed for a “new healthcare project” which includes a “change from one licensing period to the next in the number of licensed beds of a healthcare facility[.]” Vt. Code R. § 80-280-004; Vt. Stat. tit. 18 § 9434(a)(2)	1. Nursing homes. 2. Kidney disease treatment centers. 3. Mental health agencies or centers. 4. Any inpatient or ambulatory surgical, diagnostic or treatment center.	§ 9432(8)(B)

Vermont has a statewide moratorium preventing any new home health agencies from opening through 2025.

Vermont CONs in Detail

Category	Moratoria/Types of CONs	Vt. Stat. tit. 18
Equipment	1. A single unit of medical equipment or a single system of components with related functions used in a patient care environment to support patient treatment and diagnosis or to provide medical and other health services.	Board Rules § 4.104(7)
	2. The purchase, lease, or other comparable arrangement of a single piece of diagnostic or therapeutic equipment that costs more than \$1 million.	§ 9434(a)(4)
Facilities/Buildings The construction, development, purchase, renovation, or other establishment of the following facilities costing more than \$1.5 million requires a CON. Vt. Stat. tit. 18 § 9434(a)(1)	1. Mental hospitals. 2. Chronic disease facilities. 3. Birthing centers. 4. Maternity hospitals. 5. Psychiatric facilities.	§ 9432(8)(A)
	6. Nursing homes. 7. Health maintenance organizations. 8. Outpatient diagnostic or therapy programs. 9. Kidney disease treatment centers. 10. Mental health agencies or centers. 11. Diagnostic imaging facilities. 12. Independent diagnostic laboratories. 13. Cardiac catheterization laboratories. 14. Radiation therapy facilities. 15. Any inpatient or ambulatory surgical, diagnostic or treatment center.	§ 9432(8)(B)
	16. The construction, development, purchase, renovation, or other establishment of a health care facility by a hospital exceeding \$3 million.	§ 9434(b)(1)
Services	1. Moratorium on new home health services through 2025.	2019 Vt. Acts & Resolves No. 5, Sec. 2
	1. Home health agencies.	§ 9432(8)(B)
	2. Activities and functions of a health care facility that are directly related to care, treatment or diagnosis of patients and that cost more than \$500,000.	§§ 9432(10), 9434(a)(5)
Emergency Medical Transport	No CONS in this category.	

Vermont CON Exceptions

No CON Required For:	Vt. Stat. tit. 18
1. Offices of physicians, dentists or other practitioners of the healing arts.	§ 9435(a)
2. Community mental health or developmental disability center health care projects.	§ 9435(b)
3. Redesignations, designation revocations and collaborative agreements of home health agencies subject to the supervision of the Commissioner of Disabilities, Aging, and Independent Living.	§ 9435(d)
4. Routine replacements of nonmedical equipment and fixtures, including furnaces, boilers, refrigeration units, kitchen equipment, heating and cooling units and similar items.	§ 9435(f)

VIRGINIA

Virginia requires CONs within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. Virginia maintains 57 independent CONs and a single exception for certain nursing facilities. In April 2020, Virginia enacted minor CON legislation, which took effect July 1, 2020. *See* 2020 Va. Legis. Serv. 1271 (S.B. No. 764, signed Apr. 22, 2020). The legislation mainly clarified the State Board of Health’s responsibilities. In addition to its many specific CON requirements, Virginia maintains a catch-all CON for any capital expenditure over \$15 million. Va. Code § 32.1-102.1:3(B)(8). This means that if none of Virginia’s specific CON requirement’s apply, hospitals in Virginia must still obtain CONs for any expenditure that will exceed \$15 million.

Virginia’s COVID-19 Response

On March 20, 2020, Governor Northam suspended CON requirements for the addition of beds in general hospitals or nursing homes. *Exec. Order No. 52* (Mar. 20, 2020).⁷⁸

Application Process

In Virginia, the CON application process takes up to 190 days. Va. Code § 32.1-102.6(D). Applications must be submitted at least 40 days before the review cycle begins, and there are only two cycles annually. 12 Va. Admin. Code § 5-220-200. The new legislation provides that the Board may establish a schedule of fees for CON applications, but the exact costs are no longer listed. *See* Va. Code § 32.1-102.2(A)(5). Competitors can intervene in the application process and can directly submit written opinions, data and other information for consideration. Va. Code § 32.1-102.6(B), (E)(3).

Types of CONs in Virginia

	CON?	Number of CONs	Moratoria	CON required when cost exceeds:	Temporary COVID-19 response:
Hospital Beds	Yes	6	0	Any amount	Suspended
Beds Outside Hospitals	Yes	20	0	Any amount	Suspended
Equipment	Yes	8	0	Any amount	-
Facilities/Buildings	Yes	14	0	\$0 – \$600,000+	-
Services	Yes	9	0	\$0 – \$15 million+	-
Emergency Medical Transport	No	-	-	-	-

⁷⁸ Available at <https://ij.org/wp-content/uploads/2020/06/VA-52.pdf>.

Virginia CONs in Detail

Category	Types of CONs	Citation
Hospital Beds An increase in beds or relocation of beds from an existing medical care facility to another medical care facility requires a CON. Va. Code § 32.1-102.1:3(B)(2), (3)	1. Hospital beds.	Va. Code §§ 32.1-102.1:3(A)(1), 31.1-123
	2. Hospital beds in which hospitals are licensed as a provider by the Department of Behavioral Health and Developmental Services.	Va. Code § 32.1-102.1:3(A)(2)
	3. Children's hospital beds.	Va. Code §§ 32.1-102.1:3(A)(1), 31.1-123
	4. Conversion of existing beds to medical rehabilitation beds.	Va. Code § 32.1-102.1:3(B)(6)
	5. Conversion of existing beds to psychiatric beds.	Va. Code § 32.1-102.1:3(B)(6)
	6. Conversion of psychiatric beds approved pursuant to a Request for Applications to nonpsychiatric inpatient beds.	Va. Code § 32.1-102.1:3(B)(9)
Beds Outside Hospitals An increase in beds or relocation of beds from an existing medical care facility to another medical care facility requires a CON. Va. Code § 32.1-102.1:3(B)(2), (3)	1. Nursing home beds.	§§ 32.1-102.1:3(A)(3), 31.1-123
	2. Beds in intermediate care facilities established primarily for the medical, psychiatric or psychological treatment and rehabilitation of individuals with substance abuse licensed by the Department of Behavioral Health and Developmental Services.	Va. Code § 32.1-102.1:3(A)(4)
	3. Beds in intermediate care facilities for individuals with developmental disabilities other than an immediate care facility established for individuals with intellectual disability (ICF/IID) that has no more than 12 beds and is in an area identified as in need of residential services for individuals with intellectual disabilities.	Va. Code § 32.1-102.1:3(A)(5)
	4. Beds in a specialized center or clinic or that portion of a physician's office developed for the provision of outpatient or ambulatory surgery. 5. Beds in a specialized center or clinic or that portion of a physician's office developed for the provision of cardiac catheterization.	Va. Code § 32.1-102.1:3(A)(6)

Virginia CONs in Detail

Category	Types of CONs	Citation
Beds Outside Hospitals	6. Intensive care beds. 7. Minimal or self-care beds. 8. Isolation beds. 9. Hospice beds. 10. Observation beds equipped and staffed for overnight use. 11. Obstetric beds. 12. Medical beds. 13. Surgical beds. 14. Psychiatric beds. 15. Substance abuse beds. 16. Medical rehabilitation beds. 17. Pediatric beds (including pediatric bassinets and incubators <i>not</i> located in a maternity department, labor or birthing room, recovery room, emergency room, anesthesia inductor room, diagnostic or treatment procedure rooms or on call staff rooms).	12 Va. Admin. Code § 5-220-10
	18. Conversion of existing beds to medical rehabilitation beds.	Va. Code § 32.1-102.1:3(B)(6)
	19. Conversion of existing beds to psychiatric beds.	
	20. Conversion of psychiatric beds approved pursuant to a Request for Applications to nonpsychiatric inpatient beds.	Va. Code § 32.1-102.1:3(A)(9)
Equipment	1. Cardiac catheterization. 2. Computed tomographic scanning. 3. Magnetic resonance imaging. 4. Open heart surgery equipment. 5. Positron emission tomographic scanning.	Va. Code § 32.1-102.1:2(B)

Virginia CONs in Detail

Category	Types of CONs	Citation
Equipment	6. Radiation therapy equipment.	Va. Code § 32.1-102.1:2(B)
	7. Stereotactic radiotherapy equipment other than radiotherapy performed using a linear accelerator or other medical equipment that uses concentrated doses of high-energy X-rays to perform external beam radiation therapy.	
	8. Proton beam therapy equipment.	
Facilities/Buildings	1. Hospitals.	Va. Code § 32.1-102.1:3(A)(1)
	2. Hospitals licensed as a provider by the Department of Behavioral Health and Developmental Services.	Va. Code § 32.1-102.1:3(A)(2)
	3. Nursing homes.	Va. Code § 32.1-102.1:3(A)(3)
	4. Intermediate care facilities established primarily for the medical, psychiatric or psychological treatment and rehabilitation of individuals with substance abuse licensed by the Department of Behavioral Health and Developmental Services.	Va. Code § 32.1-102.1:3(A)(4)
	5. Intermediate care facilities for individuals with developmental disabilities other than an immediate care facility established for individuals with intellectual disability (ICF/IID) that has not more than 12 beds and is in an area identified as in need of residential services for individuals with intellectual disabilities.	Va. Code § 32.1-102.1:3(A)(5)
	6. Any specialized center or clinic or that portion of a physician's office developed for the provision of outpatient or ambulatory surgery.	Va. Code § 32.1-102.1:3(A)(6)
	7. Any specialized center or clinic or that portion of a physician's office developed for the provision of cardiac catheterization.	
	8. Any specialized center or clinic or that portion of a physician's office developed for the provision of computed tomographic scanning.	

Virginia CONs in Detail

Category	Types of CONs	Citation
Facilities/Buildings	9. Any specialized center or clinic or that portion of a physician's office developed for the provision of magnetic resonance imaging. 10. Any specialized center or clinic or that portion of a physician's office developed for the provision of positron emission tomographic scanning. 11. Any specialized center or clinic or that portion of a physician's office developed for the provision of radiation therapy. 12. Any specialized center or clinic or that portion of a physician's office developed for the provision of stereotactic radiotherapy other than radiotherapy performed using a linear accelerator or other medical equipment that uses concentrated doses of high-energy X-rays to perform external beam radiation therapy.	Va. Code § 32.1-102.1:3(A)(6)
	13. 13. Any specialized center or clinic or that portion of a physician's office developed for the provision of proton beam therapy.	Va. Code § 32.1-102.1:3(A)(6)
	14. 14. The acquisition of an existing medical care facility costing \$600,000 or more <i>may</i> require a CON.	Va. Code § 31.1-102.6(A)
Services	1. Diagnostic procedure services. 2. Therapeutic procedure services. 3. Rehabilitative procedure services. 4. Preventative procedure services. 5. Palliative procedure services.	Va. Code § 32.1-102.1
	6. A new neonatal special care a facility has not provided in the previous 12 months.	See 12 Va. Admin. Code § 5-220-200 Batch Group A(4)
	7. A new obstetrical service that a facility has not provided in the previous 12 months.	See 12 Va. Admin. Code § 5-220-200 Batch Group A(4)
	8. Addition of new nursing home service at an existing facility.	Va. Code § 32.1-102.1:3(B)(4)
	9. Any capital expenditure, other than for a general hospital, that exceeds \$15 million., as updated annually.	Va. Code § 32.1-102.1:3(B)(8)
Emergency Medical Transport	No CONs in this category.	

Virginia CONs in Detail

No CON Required For:	Citation
A CON is not required for nursing facilities or nursing homes which meet all of the following criteria: 1. A facility which is operated as a nonprofit; 2. A facility which is licensed jointly by the Department as a nursing facility or nursing home and by the Department of Social Services as an assisted living facility and 3. A facility which observes the following admissions restrictions: a. Admissions are only allowed pursuant to the terms of a "life care contract." b. Admissions are restricted to individuals defined as ambulatory. c. Admissions are restricted to those individuals who are residents of the assisted living facility unit.	Va. Code § 32.1-102.1:3(C)

WASHINGTON

Washington requires CONs within four broad categories—hospital beds, beds outside hospitals, facilities and services. Washington maintains 27 specific CON requirements. Like nine other states, Washington excludes equipment from its CON program. Although most healthcare facilities in Washington only require a CON when they are first constructed, nursing homes must obtain a CON for any renovations or alterations that will cost more than \$2,834,165, as updated annually. *See* Wash. Rev. Code § 70.38.105(4)(d).

Washington's COVID-19 Response

On March 30, 2020, Governor Inslee suspended CON requirements for nursing homes and assisted living facilities to provide surge capacity for the state's COVID-19 response. Wash. Proclamation 20-38 (Mar. 30, 2020); *see also* Wash. Procs. 20-38.2. (May 11, 2020), 20-38.3 (May 29, 2020) (extending CON suspension through June 17, 2020). After the expiration of the temporary suspension, healthcare facilities must stop operating at surge capacity or apply for a full CON to continue using additional beds.

Application Process

In Washington, the CON application process takes between 15 and 90 days. Wash. Admin. Code §§ 246-310-140(1), -160(1). There are rolling applications for regular and expedited review. *See* [General Timelines for Certificate of Need Application](#). The fee for a CON application depends on the project type, and can range from \$770 to \$46,253. Wash. Admin. Code § 246-310-990. Competitors can intervene in the application process and can offer “reasonable questioning” during a public hearing as to why an application should be denied. Wash. Admin. Code § 246-310-180(5).

Types of CONs in Washington

	CON?	Number of CONs	Moratoria	CON required when expenditure exceeds:	Temporary COVID-19 response:
Hospital Beds	Yes	2	0	Any amount	-
Beds Outside Hospitals	Yes	6	0	Any amount	Suspended
Equipment	No	-	-	-	-
Facilities/Buildings	Yes	8	0	\$0 – \$2,834,165+	-
Services	Yes	11	0	Any amount	-
Emergency Medical Transport	No	-	-	-	-

Washington CONs in Detail

Category	Types of CONs	Citation
Hospital Beds	- Hospital beds. - Psychiatric hospital beds.	Wash. Rev. Code § 70.38.025(6)
Beds Outside Hospitals	- Acute care beds. - Assisted living facility care beds.	Wash. Admin. Code § 246-310-020(1)(c)
	- Hospice beds. - Nursing home beds. - Kidney disease treatment center beds. - Ambulatory surgical facility beds.	Wash. Rev. Code §§ 70.38.025(6), 70.38.105(e)
Equipment	No CONs in this category.	
Facilities/Buildings	The construction, development or other establishment of the following facilities, regardless of cost, requires a CON: - Hospices. - Hospice care centers. - Hospitals. - Psychiatric hospitals. - Nursing homes. - Kidney disease treatment centers. - Ambulatory surgical facilities.	Wash. Rev. Code §§ 70.38.105(4)(c), § 70.38.025(6)
	Any capital expenditure for construction, renovation or alteration of a nursing home that exceeds \$2,834,165, as updated annually.	Wash. Rev. Code § 70.38.105(4)(d); See Wash. Dep't of Health, Nursing Home Capital Expenditure Minimum Dollar Threshold for Nursing Home Projects (2019–20) ⁷⁹
Services	Specialty burn services.	Wash. Admin. Code § 246-310-020(1)(d)(i)(A)
	Intermediate care nursery and/or obstetric services level II.	Wash. Admin. Code § 246-310-020(1)(d)(i)(B)
	Neonatal intensive care nursery and/or obstetric services level III.	Wash. Admin. Code § 246-310-020(1)(d)(i)(C)
	Home health agencies.	Wash. Rev. Code §§ 70.38.105(4)(c), 70.38.025(6)

79 Available at <https://ij.org/wp-content/uploads/2020/06/Wash-2019-20.pdf>.

Washington CONs in Detail

Category	Types of CONs	Citation
Services	5. Organ transplantation services (service for each separate organ is a separate tertiary service).	Wash. Admin. Code § 246-310-020(1)(d)(i)(D)
	6. Open heart surgery and/or elective therapeutic cardiac catheterization including elective percutaneous transluminal coronary angioplasty.	Wash. Admin. Code § 246-310-020(1)(d)(i)(E)
	7. Inpatient physical rehabilitation services level I.	Wash. Admin. Code § 246-310-020(1)(d)(i)(F)
	8. Specialized inpatient pediatric services.	Wash. Admin. Code § 246-310-020(1)(d)(i)(G)
	9. Alcoholism services. 10. Drug abuse services. 11. Mental health services.	Wash. Rev. Code § 70.38.025(8)
Emergency Medical Transport	No CONs in this category.	

Washington CON Exceptions

No CON Required For:	Citation
1. Expansion of the number of CON-approved operating rooms.	Wash. Admin. Code § 246-310-020(1)(iii)
2. Offering an inpatient institutional health service, the acquisition of major medical equipment for the provision of an institutional health service, or the obligation of a capital expenditure in excess of the expenditure minimum for the provision of an inpatient institutional health service.	Wash. Admin. Code § 246-310-040
3. For the construction, development or other establishment of a nursing home, or the addition of beds to an existing nursing home, that is owned and operated by a continuing care retirement community.	Wash. Admin. Code § 246-310-041(1)
4. Increasing the bed capacity in a rural hospital.	Wash. Admin. Code § 246-310-042(1)
5. Replacing of existing nursing home beds by a nursing home.	Wash. Admin. Code § 246-310-044(1)
6. A change in bed capacity at a residential hospice care center.	Wash. Admin. Code § 246-310-045 1)
7. Offering an inpatient tertiary health service by a health maintenance organization if: » The organization (or the service area) has an enrollment of at least 50,000 individuals; » The facility is reasonably accessible to such enrolled individuals; and » At least 75% of the patients who will receive the service are enrolled with such organization.	Wash. Rev. Code § 70.38.111(1)(a)
8. A health care facility if: » It primarily provides (or will provide) inpatient health services; » The facility (or the service area) has an enrollment of at least 50,000 individuals; » The facility is reasonably accessible to such enrolled individuals; and » At least 75% of the patients who will receive the service are enrolled with such organization.	Wash. Rev. Code § 70.38.111(1)(b)
9. A health care facility if: » The facility will be, or is, leased by a health maintenance organization which has, or the service area of the organizations has, an enrollment of 50,000 individuals; » At least 15 years remain on the lease; » The facility is or will be geographically located so that the service is reasonably accessible to such individuals; and » At least 75% of the patients will be enrolled in such organizations.	Wash. Rev. Code § 70.38.111(1)(c)

WEST VIRGINIA

West Virginia requires CONs within five broad categories—hospital beds, beds outside hospitals, equipment, facilities and services. Overall, West Virginia maintains 44 CON requirements and an additional five moratoria. West Virginia's moratoria prohibit: (1) opioid treatment programs; (2) adding beds in intermediate care facilities; (3) adding beds in intermediate care facilities for individuals with intellectual disabilities; (4) adding beds in skilled nursing homes; and (5) building or replacing skilled nursing facilities. West Virginia is the only state that maintains a moratorium on opioid treatment programs. W.Va. Code § 16-2D-9(4). West Virginia further maintains a catch-all CON. If no other CON applies to a specific project, this catch-all CON applies to expenditures of \$5,508,217, as updated annually, for nearly any purpose. W.Va. §§ 16-2D-2(24), 16-2D-8(a)(3)(A).

West Virginia's COVID-19 Response

As of May 15, 2020, West Virginia had not suspended any CON requirements in response to COVID-19.

Application Process

In West Virginia, the CON application process takes 60 days after the date that the application is batched, and if a hearing is conducted, the state renders a decision within 45 days of the closing of the file in the administrative proceedings. *See* W. Va. Code § 16-2D-14; W. Va. Code R. § 65-32-8.32. Applications must be submitted based on a review cycle, W. Va. Code R. § 65-32-21, *e.g.*, **2020 Review Cycles**.⁸⁰ Fees for the CON application range from \$1,500–\$35,000, W. Va. Code § 16-2D-13(b)(2). Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied. *See* W. Va. Code R. § 65-32-8.25; § 65-32-8.26.

Types of CONs in West Virginia

	CON?	Number of CONs	Moratoria	CON applies with expenditure of:	Temporary COVID-19 response:
Hospital Beds	Yes	1	0	Any amount	-
Beds Outside Hospitals	Yes	6	3	Any amount	-
Equipment	Yes	5	0	\$0 – \$5,508,217+	-
Facilities/Buildings	Yes	10	1	Any amount	-
Services	Yes	22	1	\$0 – \$5,508,217+	-
Emergency Medical Transport	No	-	-	-	-

⁸⁰ Available at <https://ij.org/wp-content/uploads/2020/06/WV-Review-Cycles.pdf>.

West Virginia CONs in Detail

Category	Types of CONs	W. Va. Code
Hospital Beds	1. Hospital beds	§§ 16-2D-2(21), 16-20-8(5)
Beds Outside Hospitals	1. Moratorium on adding intermediate care beds to any health care facility except for nonhealthy related projects. 2. Moratorium on adding skilled nursing beds to any health care facility except for non-health related projects.	§ 16-2D-9(1)
	3. Moratorium on adding beds in an intermediate care facility for individuals with an intellectual disability except as approved under court order in <i>E.H. v. Matin</i>, 284 S.E. 2d 232 (W. Va. 1981).	§ 16-2D-9(3)
	1. Acute care beds.	§ 16-2D-8(b)(16)
	2. Ambulatory health care facility beds.	§ 16-2D-2(2)
	3. Ambulatory surgical facility beds.	§ 16-2D-2(3)
	4. Rehabilitation facility beds.	§ 16-2D-2(37)
	5. Skilled nursing facility beds.	§ 16-2D-2(40)
	6. Intermediate care beds.	§ 16-2D-2(22)
Equipment	1. A single unit of medical equipment or a single system of components with related functions which is used for the provision of medical and other health services and costs in excess of \$5,508,217, as updated annually.	§§ 16-2D-2(24), 16-20-8(9)
	2. Medical equipment, at any cost, in which functional and technological capabilities are similar to the equipment being replaced; and the replacement equipment is to be used for the same or similar diagnostic, therapeutic, or treatment purposes as currently in use.	§ 16-2D-2(23)
	3. Radiation therapy equipment. 4. Magnetic resonance imaging equipment. 5. PET scanners.	W. Va. Code R. § 65-32-2.1.j.9

West Virginia CONs in Detail

Category	Types of CONs	W. Va. Code
Facilities/Buildings A CON is required for the construction, development, acquisition, or other establishment of the following facilities. W.V. Code § 16-2D-8(a)(1)	1. Moratorium on developing, constructing, or replacing a skilled nursing facility except in the case of facilities replacing existing beds in existing facilities that may soon be deemed unsafe.	§ 16-2D-9(2)
	1. Ambulatory health care facility.	§ 16-2D-2(2)
	2. Ambulatory surgical facility.	§ 16-2D-2(3)
	3. A publicly or privately owned facility, agency or entity that offers or provides health services, whether a for-profit or nonprofit entity and whether or not licensed, or required to be licensed, in whole or in part.	§ 16-2D-2(16)
	4. Hospitals.	§ 16-2D-2(21)
	5. Rehabilitation facility.	§ 16-2D-2(37)
	6. Skilled nursing facility.	§ 16-2D-2(40)
	7. Intermediate care facilities.	§ 16-2D-2(22)
	8. Kidney disease treatment centers.	§ 16-2D-8(b)(12)
	9. Establishing no more than six four-bed transitional intermediate care facilities.	§ 16-2D-8(b)(24)(A)
	10. The closure of a health care facility with which a capital expenditure is associated.	§ 16-2D-8(a)(2)
Services	1. Moratorium on opioid Treatment programs.	§ 16-2D-9(4)
	1. Radiation therapy services.	§ 16-2D-8(b)(2)
	2. Computed tomography services.	§ 16-2D-8(b)(3)
	3. Positron emission tomography services.	§ 16-2D-8(b)(4)
	4. Cardiac surgery services.	§ 16-2D-8(b)(5)
	5. Fixed magnetic resonance imaging services.	§ 16-2D-8(b)(6)
	6. Comprehensive medical rehabilitation services.	§ 16-2D-8(b)(7)
	7. Ambulatory care center services.	§ 16-2D-8(b)(8)
	8. Ambulatory surgical center services.	§ 16-2D-8(b)(9)
	9. Diagnostic imaging services.	§ 16-2D-8(b)(10)
	10. Cardiac catheterization services.	§ 16-2D-8(b)(11)
	11. Megavoltage radiation therapy services.	§ 16-2D-8(b)(13)

West Virginia CONs in Detail

Category	Types of CONs	W. Va. Code
Services	12. Surgical services.	§ 16-2D-8(b)(14)
	13. Operating room services.	§ 16-2D-8(b)(15)
	14. Intellectual developmental disability services.	§ 16-2D-8(b)(17)
	15. Organ and tissue transplant services.	§ 16-2D-8(b)(18)
	16. Services for individuals with intellectual disabilities at intermediate care facilities.	§ 16-2D-8(b)(19)
	17. Inpatient services.	§ 16-2D-8(b)(20)
	18. Hospice services.	§ 16-2D-8(b)(21)
	19. Home health agency services.	§ 16-2D-8(b)(22)
	20. Personal care services.	§ 16-2D-8(b)(23)
	21. Ventilator services by a hospital.	§ 16-2D-8(a)(6)
	22. Any capital expenditure above \$5,508,217, as updated annually.	§ 16-2D-8(a)(3)(A); see <i>generally</i> , W.V. Health Care Authority, <i>Certificate of Need</i> ⁸¹
Emergency Medical Transport	No CONs in this category.	

81 Available at <https://hca.wv.gov/certificateofneed/Pages/default.aspx>.

West Virginia CON Exceptions

No CON Required For:	W. Va. Code
1. The acquisition and utilization of one computed tomography scanner with a purchase price up to \$750,000 that is installed in a private office practice where at minimum seventy-five percent of the scans are performed on the patients of the practice.	§ 16-2D-11(b)(1)
2. A birthing center established by a nonprofit primary care center that has a community board and provides primary care services to people in their community without regard to ability to pay.	§ 16-2D-11(b)(2)
3. A health care facility acquiring major medical equipment, adding health services or obligating a capital expenditure to be used solely for research.	§ 16-2D-11(b)(3)
4. The obligation of a capital expenditure to acquire, either by purchase, lease or comparable arrangement, the real property, equipment or operations of a skilled nursing facility.	§ 16-2D-11(b)(4)
5. Shared health services between two or more hospitals licensed in West Virginia providing health services made available through existing technology that can reasonably be mobile.	§ 16-2D-11(b)(5)
6. The acquisition, development or establishment of a certified interoperable electronic health record or electronic medical record system.	§ 16-2D-11(b)(6)
7. The addition of forensic beds in a health care facility.	§ 16-2D-11(b)(7)
8. A behavioral health service selected by the Department of Health and Human Resources in response to its request for application for services intended to return children currently placed in out-of-state facilities to the state or to prevent placement of children in out-of-state facilities is not subject to a certificate of need.	§ 16-2D-11(b)(8)
9. The replacement of major medical equipment with like equipment, only if the replacement major medical equipment cost is more than the expenditure minimum.	§ 16-2D-11(b)(9)
10. Renovations within a hospital, only if the renovation cost is more than the expenditure minimum.	§ 16-2D-11(b)(10)
11. Renovations to a skilled nursing facility.	§ 16-2D-11(b)(11)
12. The donation of major medical equipment to replace like equipment for which a certificate of need has been issued and the replacement does not result in a substantial change to health services. This exemption does not include the donation of major medical equipment made to a health care facility by a related organization.	§ 16-2D-11(b)(12)
13. A person providing specialized foster care personal care services to one individual and those services are delivered in the provider's home.	§ 16-2D-11(b)(13)
14. A hospital converting the use of beds except a hospital may not convert a bed to a skilled nursing home bed and conversion of beds may not result in a substantial change to health services provided by the hospital.	§ 16-2D-11(b)(14)

West Virginia CON Exceptions

No CON Required For:	W. Va. Code
15. The construction, renovation, maintenance or operation of a state owned veterans skilled nursing facilities established pursuant to the provisions of article (1)(b) of this chapter.	§ 16-2D-11(b)(15)
16. To develop and operate a skilled nursing facility with no more than thirty-six beds in a county that currently is without a skilled nursing facility.	§ 16-2D-11(b)(16)
17. A critical access hospital, designated by the state as a critical access hospital, after meeting all federal eligibility criteria, previously licensed as a hospital and subsequently closed, if it reopens within ten years of its closure.	§ 16-2D-11(b)(17)
18. The establishing of a health care facility or offering of health services for children under one year of age suffering from Neonatal Abstinence Syndrome.	§ 16-2D-11(b)(18)
19. The construction, development, acquisition or other establishment of community mental health and intellectual disability facility.	§ 16-2D-11(b)(19)
20. Providing behavioral health facilities and services.	§ 16-2D-11(b)(20)
21. The construction, development, acquisition or other establishment of kidney disease treatment centers, including freestanding hemodialysis units but only to a medically underserved population.	§ 16-2D-11(b)(21)
22. The transfer, purchase or sale of intermediate care or skilled nursing beds from a skilled nursing facility or a skilled nursing unit of an acute care hospital to a skilled nursing facility providing intermediate care and skilled nursing services.	§ 16-2D-11(b)(22)
23. The construction, development, acquisition, or other establishment by a health care facility of a non-health related project, only if the non-health related project cost is more than the expenditure minimum.	§ 16-2D-11(b)(23)
24. The construction, development, acquisition or other establishment of an alcohol or drug treatment facility and drug and alcohol treatment services unless the construction, development, acquisition or other establishment is an opioid treatment facility or programs as set forth in subdivision (4) of section nine of this article.	§ 16-2D-11(b)(24)
25. Assisted living facilities and services.	§ 16-2D-11(b)(25)
26. The creation, construction, acquisition or expansion of a community-based non-profit organization with a community board that provides or will provide primary care services to people without regard to ability to pay and receives approval from the Health Resources and Services Administration.	§ 16-2D-11(b)(26)
27. The acquisition and utilization of one computed tomography scanner and/or one magnetic resonance imaging scanner with a purchase price of up to \$750,000 by a hospital.	§ 16-2D-11(b)(27)

WISCONSIN

Wisconsin does not maintain a traditional CON program. Instead, it maintains an approval process similar to a CON program that applies mainly to nursing homes. For this reason, some have deemed Wisconsin a “quasi-CON” state. The state maintains approvals within three broad categories—beds outside hospitals, equipment and facilities. Wisconsin also maintains a moratorium prohibiting hospitals from increasing beds, even temporarily, anywhere in the state. Wis. Stat. § 150.93.

Wisconsin's COVID-19 Response

As of May 15, 2020, Wisconsin had not suspended any approval requirements or moratoria in response to COVID-19.

Application Process

In Wisconsin, the approval process takes up to 135 days. Wis. Stat. § 150.35(3). Applications to increase beds at a facility can only be submitted within 60 days after the department publishes notice that beds are “available” because another facility closed. Wis. Stat. § 150.33(3). The fee for an approval application is equal to 0.37% of the estimated project cost, but no less than \$1,850 and no more than \$37,000. Wis. Stat. § 150.13.

Separately, Wisconsin maintains a certificate of public advantage program, which is a voluntary program between healthcare providers to share programs, services, personnel, facilities, etc. Wis. Stat. § 150.85(1), (2). Agreements are one way healthcare providers can add flexibility in an otherwise strictly regulated state. Although the agreements are made between healthcare providers, they must be approved by the Department. The Department of Health Services, which approves the agreements, may hold public meetings in certain circumstances upon request of an affected party before deciding whether to grant an application for public advantage. See Wis. Stat. §§ 150.35; 150.85.

Types of Approvals in Wisconsin

	Approval Required?	Number of Approvals	Moratoria	Approval required with expenditure of:	Temporary COVID-19 response:
Hospital Beds	No	0	3	Any amount	-
Beds Outside Hospitals	Yes	1	0	Any amount	-
Equipment	Yes	1	0	\$0 – \$600,000+	-
Facilities/Buildings	Yes	4	0	\$0 – \$1 million+	-
Services	No	-	-	-	-
Emergency Medical Transport	No	-	-	-	-

Wisconsin Approvals in Detail

Category	Moratoria/Type of Approval	Wis. Stat.
Hospital Beds	1. Moratorium on new hospital beds.	§ 150.93
	2. Moratorium through July 1, 1996 on licensed psychiatric hospital beds.	§ 150.95
	3. Moratorium through July 1, 1996 on licensed chemical dependency hospital beds.	
Beds Outside Hospitals	1. Any increase in nursing home beds.	§ 150.21(2)
Equipment	1. Clinical equipment for a nursing home that costs more than \$600,000.	§ 150.21(4)
Facilities/Buildings	1. The construction of a new nursing home regardless of cost.	§ 150.21(1)
	2. The partial or total conversion of a nursing home to a facility primarily serving the developmentally disabled regardless of cost.	§ 150.21(5)
	3. The partial or total conversion of a facility primarily serving the developmentally disabled to a nursing home.	
	4. A capital expenditure, other than a renovation or replacement, that exceeds \$1 million on behalf of a nursing home.	§ 150.21(3)
Services	No CONs in this category.	
Emergency Medical Transport	No CONs in this category.	

Wisconsin Approval Exceptions

Approval Required For:	Wis. Stat.
1. A Wisconsin veterans home including an in home hospital operated by the State Department of Veterans Affairs.	§§ 150.46(1), 150.93 (5)
2. Noninstitutional residential facilities run by the Department of Health Services for persons who are relocated from any center for the developmentally disabled.	§§ 150.46(2), 46.047

CONCLUSION

There is no debate—CON laws must go. For patients, they are all burden and no benefit. To give patients the greatest access to medical care, this report recommends repealing all CON programs in their entirety, as 12 states have done. Alternatively, lawmakers should:

1. Make all temporary CON suspensions permanent.
2. Repeal all moratoria or allow them to expire.
3. Sunset CON laws, as Florida did in 2019. Sunsetting laws gives providers time to adjust to a new landscape.
4. Repeal some CON requirements without repealing the entire program. Repeals should prioritize CONs that apply to low-cost beds, equipment and services.
5. Raise expenditure minimums across all CON categories, as Alaska has done. This would mean CONs are never required unless an applicant proposes a high capital expenditure, such as \$10 million or \$20 million.
6. Reduce CON application burdens by lowering costs, prohibiting competitors from objecting to applications and requiring agencies to decide pending CON applications within 30 days.

To give patients the greatest access to medical care, this report recommends repealing all CON programs in their entirety, as 12 states have done.



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