Illinois Hospital Association
Certificate of Need Reform Position
2008

Overview

There is a consensus among hospitals that the current Certificate of Need (CON) process is not working well in Illinois. The Board size is too small and has insufficient breadth of expertise. The Board should focus on the most important projects. State rules, criteria and standards need to be updated and streamlined. The process is often politicized, introducing agendas unrelated to health planning. And outcomes are often unpredictable.

Illinois hospitals support continuation of CON primarily because it functions as a check on unnecessary duplication of health care facilities and services, thereby promoting the availability of essential and safety net health care services for the public. Examples include 24/7 emergency department coverage, trauma services, inpatient and outpatient behavioral health services, health screenings and education, care for the uninsured, disaster planning and more. CON helps hospitals continue to provide these services that are poorly reimbursed or not reimbursed at all by enhancing hospitals' ability to cross-subsidize them. However, fundamental changes are needed so the program can benefit both the public and regulated entities.

Our overall recommendations are:

- Streamline the transactions subject to review and the review criteria;
- Simplify the decision-making and administrative processes;
- Improve the predictability and accountability of the process;
- Consider the of impact of transactions on safety net services; and
- Reconfigure the size and composition of the Illinois Health Facilities Planning Board.

The remainder of this document will summarize some of our specific concerns and provide more detail regarding our recommendations.

1. Focus the work of the Board by streamlining transactions subject to review and the review criteria.

Concerns: Because we view the primary purpose of CON as preventing unnecessary duplication of health care facilities and services in order to preserve access to essential safety net services, we are concerned that:

- Too many resources are expended to consider transactions that are not central to this purpose.
- Some recent updates to the rules represent improvements, but many are primarily a re-organization with changes that make them even more cumbersome and bureaucratic.
- Little consideration is being given to how health planning can be improved using the most current and relevant data. Decisions about planning area boundaries and adjustment factors need to be based on state-of-the-art data and sound planning policies that are based on how patients actually travel for health care services.

If the CON program is to be a valuable one, it needs to scale back, focus most of its work on preventing unnecessary duplication of health care facilities and services, and improve its capacity to support good planning.

Recommendations: The following recommendations are to streamline which transactions are subject to review, the review criteria, and review processes.

a. Define substantive projects to only include:

- **Any new facility or replacement facility.** Replacement facilities on the same site that are below the capital expenditure threshold would not be subject to a substantive review.

- **Any new category of service or substantial change in scope or functional operation that is not already considered a non-substantive project.**

- **The addition of beds beyond 20 beds or 10 percent of a facility's bed capacity, whichever is greater, over a two year period.**

- **Freestanding services offered by any provider if they are regulated when provided by or on behalf of a hospital (e.g. freestanding cardiac catheterization or proton therapy services).**

All other reviewable modernization projects should be considered non-substantive (a term of art under the Board's rules) and be reviewed based on a limited set of criteria that focus on need.

b. Re-evaluate the categories of service subject to review. The emphasis should be on whether a review of need for a service will benefit the public by constraining unnecessary duplication. If a category of service should continue to be subject to CON, the review criteria should reflect current practices and delivery system models.

c. Better define non-clinical services, which are not subject to review. The definition of non-clinical has become subject to broader interpretation, partially based on an interpretation of provisions in the rules regarding whether projects are "interrelated." The definition should be clarified consistent with the original intent, to exclude non-clinical projects from review because these projects are generally "infrastructure" improvements and hospitals don't spend capital on unnecessary "infrastructure" changes.

d. Clarify requirements regarding projects that are interrelated so that common financing does not lead to separate projects all having to be considered as part of the same Certificate of Need application. Interrelatedness should be determined by programmatic considerations and not by financing.

e. Streamline project review by:

- **Reducing the number of review criteria and standards such that the emphasis is on the need for a project and the size of the project, rather than the component costs.**

- **Requiring only the hospital to be the applicant when a hospital is part of a health system while allowing consideration of the health care system's financial performance when assessing the financial viability of a project.** The development of health systems has led to an increase in the number of parties to an application and the application has become unnecessarily cumbersome.

- **Focusing the financial review on overall cost rather than on individual line items.** Applicants should have flexibility to deviate from cost projections within individual line items as long as the total cost does not exceed the approved permit amount.

f. Increase the dollar threshold to $15 million. At $8 million, the Illinois capital expenditure threshold for construction and modernization is high. However, Virginia, Massachusetts and Maryland have higher thresholds at $15 million, $12.5 million, and $10 million, respectively. We view Illinois' high threshold as one of the strengths of its CON program since it focuses CON on significant projects and lets the market dictate smaller capital expenditure decisions. The current threshold also represents a "middle of the road" approach for Illinois considering that 29 states have CON for acute care hospital beds and services. Other states do not regulate hospitals or have no CON at all. Since the evidence is weak that CON has an impact on cost containment, and at the same time acknowledging that some public oversight over total cost is needed, a higher threshold for state oversight is reasonable. This change will also help to reduce the Planning Board staff's workload so they can devote their resources to the review of projects that could lead to unnecessary duplication of facilities and services.

2. Focus the work of the Board by simplifying the decision-making and administrative processes.

Concerns: There has been debate about re-configuring the roles and responsibilities of the Board, the Chairman, and the staff. Some thought was given to a greater role for staff in making permit decisions. IHA believes that it would be premature to consider transferring this responsibility from the Board to Agency staff given dissatisfaction with the current regulations that are intended to govern decision-making. However, the Executive Secretary could approve a limited subset of projects and could also approve administrative requests in order to expedite the process for applicants and reduce costs.

Recommendations:

a. Allow the Executive Secretary to approve projects that satisfy all of the state's review criteria and are unopposed. This reform would also encourage applicants to find ways to meet the Board's criteria.

b. Authorize the Executive Secretary to approve all administrative requests for extensions and alterations that are allowable under the Board's rules. The Executive

Secretary can inform the Board of these administrative actions and can seek input from the Chairman or the entire Board if necessary. Major alterations would require a new permit and would be considered by the Board. No approval should be required if a project will be completed at up to 10 percent below the approved permit amount.

c. Streamline administrative processes by:

- **Eliminating the letter of intent requirement.** A recent change to the Act led to a new requirement for a letter of intent prior to submitting an application. This was an unintended consequence of the change and should be corrected.

- **Improving the State Agency Report (SAR).** The SAR should be a vehicle for staff to present relevant information, more than a rote assessment of whether criteria are met. The staff should be able to communicate freely with the applicant to improve the accuracy of the SAR. The staff should answer questions at Board meetings and not present new information, which should be included in the SAR.

- **Eliminating reporting requirements for reductions of service of more than 50 percent.** Requiring reports of reductions in service of more than 50 percent has become less valuable since rules now require a permit prior to discontinuing a facility or service.

- **Minimizing the post permit requirements.** The Board's interest in tracking whether an approved project is progressing toward completion can be satisfied with fewer post permit requirements. Permit holders should only be required to submit annual progress and final cost reports.

- **Establishing timeframes for staff to respond to requests for clarification of rule applicability.** When IDPH will not review a project for compliance with construction codes without a letter from the IHFPB stating that the project does not need a CON, the IHFPB should not hold up IDPH review. Often requests are straightforward.

- **Requiring staff to inform applicants at least seven days in advance of the State Board meeting that their project will be considered at that Board meeting.** This would not prevent state staff from adding a project to the agenda for the next meeting after the seven day timeframe at the applicant's request.

- **Limiting the introduction of new information in support of or in opposition to the findings of the State Agency Report.** A new requirement has been enacted that allows the applicant and members of the public to submit written comments on a State Agency Report up until two days prior to a Board meeting. The Board can also accept additional written comments at the Board meeting. Because

late comments cannot be evaluated, they result in deferrals and project delays. If there are facts in the State Agency Report that are incorrect, the Agency staff should be notified, correct the error and inform the Board prior to the Board vote. With respect to broader public comments, there is already ample time through the public hearing process for the public to express opinions regarding a project.

3. Improve the predictability and accountability of the process

Concerns: The prohibition on ex parte communications that applies to both staff and the Board has stifled the ability of Planning Board staff to provide information that will support applicants as they develop their applications and navigate the Certificate of Need process. Other concerns have been raised about whether settlement agreements on compliance matters are appropriate and about the lack of transparency regarding the IHFPB's budget.

Recommendations:

a. The Act should be amended to allow applicants to communicate with staff throughout the Certificate of Need process. The prohibition on ex parte communications should continue to apply to communications between applicants and the members of the Illinois Health Facilities Planning Board since Board members are the decision-makers.

b. Settlement agreements that are reached regarding compliance issues should be made transparent. Public information will allow interested parties to evaluate whether changes are needed and will allow those negotiating settlements to have better information to expedite the compliance process.

c. The Illinois Health Facilities Planning Board should publish an annual report of fees, fines and any other revenue collected as well as expenses incurred. It is important for the Illinois Health Facilities Planning Board to have adequate resources to fulfill its responsibilities. However, regulated health care providers provide financial support for the program and ought to receive an annual report.

4. Consider the of Impact of Transactions on Safety Net Services

Concerns: Recently, concern about the impact of limited service providers has grown. Federal law and regulation intended to stem proliferation of limited service providers by limiting physician self-referrals to specialty hospitals is being implemented in phases. However, the federal requirements do not affect some health care services and facilities, such as ambulatory surgery centers, that can have a negative impact on hospitals' ability to provide essential and safety net services for their communities.

The concept, set forth in P.A. 95-0005, of a Safety Net Impact Statement to describe the project's impact on safety net services in the community is a legitimate one but also raises the potential for unintended consequences. It will require the IHFPB to exercise judgment regarding how it uses the information and to exercise caution so the Statement is not used as a vehicle simply to stifle competition or further agendas unrelated to the proposed project.

Recommendations: **IHA is doing further work to develop this concept. In the interim, we suggest some preliminary principles:**

- A Safety Net Impact Statement would be required for applicants who propose new facilities as defined in the Illinois Health Facilities Planning Act.

- A Safety Net Impact Statement may incorporate a broad understanding of the types of services that may comprise safety net services in a given service area or community. The statement may allow for the inclusion of services for which the provider incurs costs which are not reimbursed.

- A Safety Net Impact Statement may describe what material impact, if any, the proposed facility or service would have on essential community services, and may include the impact of a project on the ability of another provider or health system to cross-subsidize a safety net service in the community.

- A Safety Net Impact Statement may address the impact of the discontinuation of a service on the remaining providers of the same service.

- In developing parameters for submission and review of Safety Net Impact Statements, there should be opportunities for interested parties to have input so any new requirements do not create a cumbersome new process with unpredictable outcomes.

5. Reconfigure the size and composition of the Illinois Health Facilities Planning Board

Concerns: The current five member Board is too small. Meetings have been cancelled due to lack of a quorum and the Board has not met its statutory obligation to meet at least quarterly. Delays contribute to construction cost increases and postpone access for patients. The small Board size can also prevent the Board from voting when a quorum of three is present and one of the three members has a conflict.

Another concern relates to the composition of the State Board. Under the Act, Board members, their spouses, their children or their parents cannot be on the Board of, have a financial interest in, or have a business relationship with a health care facility. This constraint has hindered the ability of the Board to function as well as it could. The expertise on the Board should align with the decisions the Board is asked to make. Otherwise, the Board is too reliant upon Agency staff.

Recommendations: A larger Planning Board with direct health care experience and expertise is needed. Both the November 2006 recommendations of the Senate Republican Task Force on Certificate of Need and the February 2007 recommendations of the Lewin Group on the Certificate of Need Program, come to the same conclusion. The IHA recommends the following:

a. Increase the size of the IHFPB from five to at least nine members.

b. Reinstate categorical appointments to the Board. Board decisions should be grounded in an understanding of the operations of the various health care providers that it

regulates as well as an understanding of their roles in the health care delivery system. Including regulated providers on the Board does not burden decision-making with conflicts of interest. If Board members have a direct conflict, they will declare the conflict and recuse themselves from the discussion and the vote as already required under the Act. The health care delivery system is complex and better decisions could be made if knowledgeable providers are allowed to debate the merits of a project and to participate in decision-making.

c. Improve the conflict of interest provisions in the Act and apply them to members of the Illinois Health Facilities Planning Board. Staff members are not decision-makers so these policies are less relevant to them. They need to be able to assist all applicants. New provisions should recognize that a conflict can arise for a Board member because of a relationship to either a hospital or a health system. Applicants should also have the opportunity to challenge whether a Board member has a conflict and ask a Board member to recuse him or herself.

Conclusion

The primary purpose of Certificate of Need should be to prevent unnecessary duplication of health care facilities and services in order to preserve access to safety net services across Illinois. Because of the myriad of factors that contribute to health care cost increases, the role of the Planning Board in cost containment is secondary. The purposes set forth in the Act should be amended to reflect this evolution in the Planning Board role. Also consistent with its primary purpose, the sunset of the Illinois Health Facilities Planning Act should be extended so the program can achieve the level of stability it needs to institute recommended reforms and continually improve its ability to serve the public good.

To achieve this goal, the Board needs to be reconfigured to include experts, including provider representatives, who can more completely inform the decision-making process. To accommodate additional experts and to minimize delays due to the lack of a quorum, the Board should be expanded to include additional members.

Finally, this report makes a number of recommendations intended to focus project review consistent with an emphasis on a more narrowly defined purpose. In addition, recommendations are made to streamline the process and to improve the operations of the program. We consider these specific recommendations to be important ones. But we also consider them to be a starting point for discussion of further reforms that will improve CON in Illinois. There is strong consensus among Illinois hospitals that the state's Task Force on Health Care Reform should not lose an opportunity to improve the Certificate of Need process for both providers and the communities they serve.