

Amendment of Certificate of Need (CON) Applications

Effective date: 3/25/15

SUMMARY OF EXPRESS TERMS

Sections 600.3 and 710.5 of 10 NYCRR require that amendments to Certificate of Need (CON) applications that have been approved by the Public Health and Health Planning Council (PHHPC) be referred to the PHHPC and the regional Health Systems Agency (HSA), if applicable, for reevaluation and recommendations. An amendment is defined as:

- 1) a change in the method or terms of financing of the approved project in excess of ten percent of the approved project costs, or \$15 million, whichever is less; or
- 2) an increase in the total basic costs of construction of the project greater than \$6 million and in excess of ten percent of approved project costs, whichever is less; or
- 3) a substantial change in the terms of agreement for the land or building involved in the project; or
- 4) a reduction in the scope of the project accounting for 15 percent or more of approved project costs; or
- 5) an increase in the number and/or types of beds or services approved for the project; or

- 6) a change in the site of construction if outside the facility's planning area; or

- 7) a change in the applicant.

The proposed rule changes would delete subparagraphs (1), (2), (3) and (4) of paragraph (c) of section 600.3 and subparagraphs (1), (2), (3) and (4) of paragraph (b) of section 710.5 to remove from the definition of an amendment the above changes in the method or terms of a project's financing, increases in total basic project costs, changes in the terms of agreement for a project's land or building, and reductions in project scope accounting for more than 15 percent of approved costs. Approval of the proposed rule would remove the requirement that the affected changes be referred to the PHHPC (and where applicable, the regional HSA) for reevaluation and recommendation. Removal of the cited provisions would render the affected changes modifications, making them subject only to prior approval by the Commissioner, as set forth in sections 600.3(f) and 710.1(c)(3).

Pursuant to the authority vested in the Public Health and Health Planning Council, subject to the approval of the Commissioner of Health, by sections 2801-a(1) and 2802(1) of the Public Health Law, subdivision (b) of Section 600.3 and subdivision (b) of Section 710.5 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York are hereby amended, to be effective upon publication of a Notice of Adoption in the New York State Register, to read as follows:

Section 600.3 is amended to read as follows:

600.3 Amendments and modifications to applications. (a) A change to an application before the Public Health and Health Planning Council has approved or contingently approved the application is hereafter referred to as a [modification] revision; a change to an application which has been approved or contingently approved by the council but for which an operating certificate has not yet been issued shall be referred to as an amendment if it meets the criteria contained in subdivision (c) of this section, and shall be referred to as a modification approvable pursuant to subdivision (f) if it does not meet the criteria contained in subdivision (c) or does not meet the criteria in subdivision (e).

(b) An application made to the Public Health and Health Planning Council, pursuant to this Part, may be modified before the council has approved or contingently approved the application. Such modifications shall be made on appropriate forms supplied by the department and submitted to the council through the central office of the department in Albany and shall be governed by the following:

[(1) nine copies of a modification must be submitted;]

[(2) 1] any modification in the information contained in the original application must

be accompanied by a satisfactory written explanation as to the reason such information was not contained in the original application;

([3] 2) the department, when reviewing a competitive batch of applications, may establish deadlines pursuant to written notification for the submission of any modification to an application; and

([4] 3) if a modification is submitted after any such deadline(s), the application shall be removed from consideration within the competitive batch being reviewed.

(c) After the Public Health and Health Planning Council has approved or contingently approved an application but prior to the issuance of an operating certificate, any change as set forth in paragraphs (1) through ([7]3) of this subdivision shall constitute an amendment to the application, and the applicant shall submit [nine copies thereof] the proposed amendment to the department's central office together with appropriate documentation explaining the reason(s) for the amendment and such additional documentation as may be required in support of such amendment. The amended application shall be referred to the health systems agency having geographic jurisdiction and the [State Hospital Review] Public Health and Health Planning Council for their reevaluation and recommendations. The approval of the Public Health and Health Planning Council must be obtained for any such amendment. Each of the following shall constitute an amendment:

[(1) a change in the method or terms of financing which results in an increase in total project costs, unless the applicant can demonstrate, to the satisfaction of the commissioner, acting on behalf of the Public Health and Health Planning Council, that such change in the method or terms of financing: (a) will not result in a more expensive

project on a present-value basis for third-party payors when evaluated over the expected life of the project; or (b) will not result in an increase in the cost of the project, on a present value basis over its expected life, in excess of ten percent of approved project costs or \$15,000,000, whichever is less;

(2) an increase in the total basic costs of construction as originally approved which is in excess of ten percent or \$15,000,000, whichever is less, of the approved total basic costs of construction provided such increase exceeds \$6,000,000 and the cost increase is not a result of factors of an emergency nature, local zoning and planning issues or inflation, addressed below in subdivision (e) of this section.

(3) a reduction in construction, renovation or modernization which accounted for 15 percent or more of the total basic costs of construction of the application as approved without a corresponding reduction in the total basic costs of construction, subject to consideration of fixed costs;

(4) a substantial change in the terms of any agreement to construct, renovate, or acquire, through a purchase, lease or other arrangement, any land or building related to the application;]

([5]1) a change in the number and/or type of beds and/or services, other than a reduction of service which would be subject to administrative review;

([6]2) a change in the location of the site of the construction if outside the facility's service area or adjacent service area; and

([7]3) any change in the applicant.

(d) For purposes of this section, the following terms shall have the following meanings:

(1) Total project cost means total costs for construction, including but not limited to

costs for demolition work, site preparation, design and construction contingencies, total costs for real property, for fixed and movable equipment, architectural and/or engineering fees, legal fees, construction manager and/or cost consultant fees, construction loan interest costs, and other financing, professional and ancillary fees and charges. If any asset is to be acquired through a leasing arrangement, the relevant cost shall be the cost of the asset as if purchased for cash, not the lease amount. (2) Total basic cost of construction means total project costs less the capitalized amount of construction loan interest and financing fees.

(e)(1) If the commissioner, acting on behalf of the Public Health and Health Planning Council, determines that increases in total project costs or total basic costs of construction are due to factors of an emergency nature such as labor strikes, fires, floods or other natural disasters or factors beyond the control of the applicant, or modifications to the architectural aspects of the application which are made on the recommendation of the department, the applicant may proceed without the need for the application to be referred back to the health systems agency[,the State Hospital Review and Planning Council] and the Public Health and Health Planning Council.

(2) If the applicant can document by evidence acceptable to the commissioner, acting on behalf of the Public Health and Health Planning Council, that increases in total project cost or total basic cost of construction were caused by delays in obtaining zoning or planning approvals which were beyond its control, the commissioner may permit review of the application to proceed without the need for the application to be referred back to the health systems agency[, the State Hospital Review and Planning Council]and the Public Health and Health Planning Council pursuant to this Part. The evidence shall

demonstrate clearly that the applicant had timely pursued the zoning or planning permits, has now obtained all such required permits and approvals, and is prepared to proceed with the project.

(3) If the applicant can document by evidence acceptable to the commissioner, acting on behalf of the Public Health and Health Planning Council, that increases in the total basic cost of construction were caused by inflation in excess of that estimated and approved in the application and that such inflation has affected the total basic cost of construction as a result of delays which were beyond the applicant's control, the commissioner may permit review of the application to proceed without the need for the application to be referred back to the health systems agency[, the State Hospital Review and Planning Council] and the Public Health and Health Planning Council pursuant to this Part. The evidence shall demonstrate clearly that the increase in inflation exceeds that estimated and approved in the application, and that any delays resulting in such inflationary cost increases were beyond the applicant's control.

(f) Any modification submitted subsequent to the issuance of any approval by the Council which does not constitute an amendment pursuant to the provisions of this section shall require only the prior approval of the commissioner.

(g) Failure to disclose an amendment prior to the issuance of an operating certificate shall constitute sufficient grounds for the revocation, limitation or annulment of the approval of establishment.

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Section 710.5 is amended to read as follows:

710.5 Amendments. (a) Subsequent to an approval or contingent approval of an application under this Part, any change, as set forth in paragraphs (b)(1) through ([7]3) of this section, shall constitute an amendment to the application, and the applicant shall submit appropriate documentation as may be required by the commissioner pursuant to this Part in support of such amendment. The amended application shall be referred to the health systems agency having jurisdiction and the [State Hospital Review] Public Health and Health Planning Council for their reevaluation and recommendations. The approval of the commissioner shall be obtained for any such amended application.

(b) Any of the following shall constitute an amendment:

(1) a change in the method or terms of financing unless the applicant can demonstrate, to the satisfaction of the commissioner, that such change in the method or terms of financing will not result in a more expensive project on a present-value basis for third-party payors when evaluated over the expected life of the project, or that such change will not result in an increase in the cost of the project, on a present value basis over its expected life, in excess of ten percent of approved project costs or \$15 million, whichever is less;

(2) an increase in the total basic costs of construction as originally approved which is in excess of ten percent, or \$15,000,000, whichever is less, of the approved total basic costs of construction, provided such increase exceeds \$6,000,000 and the cost increase is not a result of local zoning and planning issues addressed below in paragraph (2) of subdivision (c) of this section;

(3) a reduction in construction, renovation or modernization which accounted for 15 percent or more of the total basic costs of construction of the application as approved

without a corresponding reduction in the total basic costs of construction, subject to consideration of fixed costs;

(4) a substantial change in the terms of any agreement to construct, renovate or acquire, through a purchase, lease or other arrangement, any land or building;]

([5]1) a change in the number and/or types of beds and/or services, other than a reduction of service which would be subject to administrative review;

([6]2) a change in the location of the site of the construction if outside the facility's planning area as identified in Part 709. If the change in site, within the facility's planning area, impacts geographic accessibility in such planning area, the commissioner may before making any finding that such change is in the best interest of the planning area seek the recommendation of the [State Hospital Review] Public Health and Health Planning Council and the health systems agency having geographical jurisdiction. In addition, for applications to establish diagnostic and treatment centers which were not reviewed competitively within a batch, a change of site within a planning area shall not constitute an amendment pursuant to the provisions of this section and shall require only the prior approval of the commissioner; or

([7]3) any change in the applicant.

(c)(1) If the commissioner determines that increases in total project costs or total basic costs of construction are due to factors of an emergency nature such as labor strikes, fires, floods or other natural disasters, or factors beyond the control of the applicant, or modifications to the architectural aspects of the application which are made on the recommendation of the department, the commissioner may permit review of the application to proceed without the need for the application to be referred back to the

health systems agency and the council pursuant to this Part. However, failure of the applicant to obtain financing or appropriate environmental and zoning permits or approvals shall not be deemed to be beyond the control of the applicant.

(2) If the applicant can document by evidence acceptable to the commissioner that increases in total project costs or total basic costs of construction were caused by delays in obtaining zoning or planning approvals which were beyond its control, the commissioner may permit review of the application to proceed without the need for the application to be referred back to the health systems agency and the council pursuant to this part. The evidence should clearly demonstrate that the applicant had timely pursued the zoning or planning permits and in addition that the applicant has now obtained all such required permits and approvals and is prepared to proceed with the project.

(3) If the applicant can document, by evidence acceptable to the commissioner, that increases in the total basic cost of construction were caused by inflation in excess of that estimated and approved in the application and that such inflation has affected the total basic cost of construction as a result of delays which were beyond the applicant's control, the commissioner may permit review of the application to proceed without the need for the application to be referred back to the health systems agency[, the State Hospital Review and Planning Council] and the Public Health and Health Planning Council pursuant to this Part. The evidence shall demonstrate clearly that the increase in inflation exceeds that estimated and approved in the application, and that any delays resulting in such inflationary cost increases were beyond the applicant's control.

(d) The applicant must obtain the prior approval of the commissioner for any change relating to the program scope or functional space concept of the project, total project

costs or increase in total basic costs of construction, a change in the ownership interest in the land, building or equipment relating to the proposal, a change in the location of the site of the construction, or interest rates relating to the financing of any aspect of the project, regardless of whether such change constitutes an amendment under this section.

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NOTICE OF CONSENSUS RULEMAKING

Statutory Authority:

Pursuant to the authority vested in the Public Health and Health Planning Council, subject to the approval of the Commissioner of Health, by sections 2801-a(1) and 2802(1) of the Public Health Law, the Department proposes to amend subdivision (b) of Section 600.3 and subdivision (b) of Section 710.5 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York.

Basis:

The proposed rule changes would revise provisions of section 600.3 and section 710.5 that require review by the Public Health and Health Planning Council (PHHPC) of certain changes to Certificate of Need (CON) applications for projects awaiting approval or already approved by the PHHPC but which have not yet proceeded to actual establishment or construction. These amendments to the rules would reduce the processing time for amended CON applications, which would result in cost savings for the applicants and in more timely access to the services to be delivered by proposed new entities or through construction activities proposed by established providers. Because of these benefits to hospitals, nursing homes, diagnostic and treatment centers (clinics) and other entities regulated by Article 28 of the Public Health Law, the Department anticipates no objection to the proposed rule changes. On the contrary, representatives of various health care provider associations have expressed support for these changes as part of a larger effort by the Department and the PHHPC to streamline the CON review process.

The Department also anticipates no objection to the technical changes being undertaken in the proposed rules. The first of these changes is to substitute reference to the Public Health and Health Planning Council for the former State Hospital Review and Planning Council and the former Public Health Council in sections 600.3 and 710.5. The second is to change the term “modification” to “revision” in section 600.3 where it refers to applications not yet acted upon by the Council. This is because the term “modification” in 600.3 also refers to applications acted upon by the Council for which subsequent proposed changes do not constitute amendments. The proposed change in terminology would resolve this ambiguity in the use of the term “modification” and do away with the confusion it sometimes causes for applicants in proposing changes to their CON applications, whether before or after Council approval. A third technical amendment would remove the provision in section 600.3 that requires applicants to submit nine copies of any proposed revision of an application. This change reflects the Department’s implementation of an electronic system for the submission and processing of CON applications, which eliminates the costs associated with the paper copies currently required of applicants.

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JOB IMPACT STATEMENT

The proposed rules simplify the process for the approval of amendment of approved CON applications for the establishment and construction of hospitals, nursing homes, clinics and other health care facilities subject to Article 28 of the Public Health Law. Because these rules represent only a change in application procedures, they will have no impact on jobs and employment opportunities, in the health care sector or elsewhere.