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To: Chair Bill Lippert
Rep. Anne Donahue

Please find below preliminary comments from the Office of the Health Care Advocate (HCA) on proposed changes to the Green Mountain Care Board Certificate of Need statute:

General Rate of Inflation for CON Thresholds - 18 V.S.A. § 9434(e)

The HCA supports indexing the CON thresholds to the rate of general inflation, but not medical inflation. The rate of medical inflation should not be used as an index for health care projects as the state is actively trying to curtail health care spending, not perpetuate the current cost increases. Further, many certificate of need applications propose projects, such as building construction, that should not increase in cost at the medical inflation rate. **(No change to current statutory language.)**

Urgent Care Centers and Similar Facilities should not be Excluded - 18 V.S.A. § 9435(a)

The HCA believes projects that would add new urgent care centers should be subject to CON review as should all facilities that offer same-day care and are not associated with Vermont hospitals or ongoing patient-practitioner relationships. We suggest the following changes to the current proposed statute: **(a) Excluded from this subchapter are offices of physicians, dentists, or other practitioners of the healing arts, meaning the physical places that are occupied by such providers on a regular basis in which such providers perform the range of diagnostic and treatment services usually performed by such providers on an outpatient basis unless they are subject to review under subdivision 9434(a)(4) of this title. Notwithstanding the preceding exclusions, freestanding walk-in clinics are subject to CON review. For the purposes of this subchapter, “freestanding walk-in clinics” are defined as medical facilities, including urgent care centers, that are not associated with a Vermont hospital or federally qualified health center, and where the primary source of revenue in Vermont comes from medical services, offered in person or remotely, which are scheduled less than 24 hours in advance and where there is not an intent to develop an ongoing care relationship between the patient and the medical practice.**¹

Definition of Non-Medical Equipment Excluded from Review - 18 V.S.A. § 9435(f)

The HCA supports excluding routine replacements of non-medical equipment from CON review if “routine replacement” is clearly defined (as it is elsewhere in the Board’s proposed changes) and “non-medical equipment and fixtures” is clearly defined or the types of non-medical equipment that will be excluded are listed in the entirety. We note that the term “medical equipment” is generally narrowly defined,² leaving a

¹ See New Hampshire’s definition of non-emergency walk-in centers (NEWCCs).

² The World Health Organization defines “medical equipment” as, “Medical devices requiring calibration, maintenance, repair, user training and decommissioning – activities usually managed by clinical engineers. Medical equipment is used

wide range of items that could be considered non-medical equipment. Renovations and equipment upgrades, especially those that might be attractive to potential patients but may not improve quality of care and are not necessary to the hospital's functioning, should remain subject to CON review. This would allow the GMCB and stakeholders to weigh in on the value versus cost of the proposal. It would also help to ensure that hospitals are interpreting this exclusion appropriately when they assess whether or not a project needs to be reviewed by the Board. After discussing our concern with the Board, we suggest the following changes to the Board's proposed statutory language, with the understanding that there will be further clarification in the Board's rules: **(f) Excluded from this subchapter are routine replacements of nonmedical equipment and fixtures, including furnaces, refrigeration units, kitchen equipment, heating and cooling units, and similar items. These replacements purchased by a hospital shall be included in the hospital's budget and may be reviewed in the budget process set forth in subchapter 7 of this chapter. A replacement is considered routine if the technology and capability of the new equipment is comparable to that of the replaced equipment.**

Transparent Process for Expedited Review - 18 V.S.A. § 9440 (c)(5)(B)&(C)

The HCA is concerned that expedited CON review has lacked transparency and is now being expanded. The statute should include specific procedures for expedited CON reviews, with a clear role for the HCA and other interested parties and for public comment, so parties and the public can follow the process. At a minimum the statute should require the Board to disclose publically its plan for any projects that are granted expedited review. In addition, the HCA and the public should have the opportunity to comment after an expedited application is complete. All interested parties, including the HCA, should be copied on all communications. Whenever the expedited timeline allows, the HCA and any other interested parties should have the opportunity to ask written questions of the applicant and to request additional materials. We recommend the following language be added: **18 V.S.A. § 9440 (c)(5)(B) - Any order granting expedited status shall include the procedures and timelines that the Board will follow for the expedited review. If practicable, expedited proceedings will include accepting public comment until at least 10 days after an expedited application is complete.**

18 V.S.A. §9440 (c)(9) - The Office of the Health Care Advocate established under chapter 229 of this title or, in the case of nursing homes, the Long-Term Care Ombudsman's Office established under 33 V.S.A. 7502, is authorized but not required to participate in any administrative or judicial reviews of an application under this subchapter and shall be considered an interested party in such proceedings upon filing a notice of intervention with the Board. Once either office files a notice of intervention under this subchapter, the Board shall provide the relevant office with the information necessary to participate in the review process, including information about procedures, copies of all written correspondence, and copies of all entries in the application record for all certificate of need proceedings, regardless of expedited status.

for the specific purposes of diagnosis and treatment of disease or rehabilitation following disease or injury; it can be used either alone or in combination with any accessory, consumable or other piece of medical equipment. Medical equipment excludes implantable, disposable, or single-use medical devices.” World Health Organization, Medical Devices, available at http://www.who.int/medical_devices/definitions/en/.

Review of Projects to Repair, Renovate, or Replace Infrastructure - 18 V.S.A. § 9440 (c)(5)

The HCA does not support the inclusion of “(D)(i) repair, renovation and replacement of building infrastructure” in the projects presumed to be eligible for expedited review. Building replacement and renovation projects have been some of the most significant CON projects and often include large monetary investment and detailed architectural reviews. **We suggest no changes to the current statute or the following modification to the Board’s proposed language:**

18 V.S.A. § 9440 (c)(5)(D)(i) – repair, renovation and replacement of building infrastructure, or a combination thereof, that does not involve new construction, is unlikely to significantly increase the cost of medical services to patients, and will not impact the provision of medical services to patients.

Interested Party Application Deadline - 18 V.S.A. § 9440 (c)(7)

The HCA opposes the removal of the 20-day period following the close of the application for interested parties to enter CON proceedings. We understand that people find the system of having two periods of time when parties can enter to be challenging. However, we believe it is important to have the opportunity to enter once all applicable materials are available. We can easily envision a scenario in which we or another interested party would want to intervene after information comes to light in the Board’s review process. We therefore ask that the statute allow for interested party applications up until 20 days after the application is closed. After discussing our concerns with the Board, we suggest the following changes to the current statute: **(7) For purposes of this section, "interested party" status shall be granted to persons or organizations representing the interests of persons who demonstrate that they will be substantially and directly affected by the new health care project under review. Persons able to render material assistance to the Board by providing nonduplicative evidence relevant to the determination may be admitted in an amicus curiae capacity but shall not be considered parties. A petition seeking party or amicus curiae status must be filed ~~within 20 days following public notice of the letter of intent, or within no later than 20-5~~ days following public notice that the petition is complete...**

Energy Efficiency Requirements - 18 V.S.A. §9440

The HCA supports strengthening the energy efficiency reviews involved in the CON process. Increasing energy efficiency can save significant amounts of money, reduce pollution, and improve patient experience, a win-win-win for Vermonters. Currently, the only requirements for energy efficiency in the CON process come from the most recent HRAP, which states in CON standard 1.10, “Applicants proposing new health care projects requiring construction shall show such projects are energy efficient. As appropriate, applicants shall show that Efficiency Vermont, or an organization with similar expertise, has been consulted on the proposal.” This requirement to consult with an energy efficiency expert appears to have no real impact on energy efficiency in the CON projects, because there are no requirements for the applicant to consider the energy efficiency recommendations. The process could be improved by a statutory requirement that states each CON proposal requiring construction must include an independent written report by Efficiency Vermont or an organization with similar expertise. This independent report shall be submitted directly from the efficiency expert to the GMCB. The report would evaluate ways to maximize the cost savings of the project through energy efficiency measures. The applicant would then have the opportunity to submit a written response to the report, outlining which recommendations they plan to incorporate and justifications for adjusting or rejecting other parts of the recommendation. The Board should be required to consider the energy efficiency report in its final decision on the CON application. The Board would have the power to require the applicant to incorporate any or all of energy efficiency recommendations into the CON plan if the Board believes this would be in the best interest of Vermonters, balancing affordability and quality of care.

Suggested Energy Efficiency language:

18 VSA §9437 – Criteria – A certificate of need shall be granted if the applicant demonstrates and the board finds that...(2)the cost of the project is reasonable, because...

(D) If applicable, the applicant has appropriately incorporated energy efficiency measures recommended by Efficiency Vermont to maximize the project’s affordability and return on investment, while taking into consideration any positive or negative impact on quality of care and patient access to care.

18 VSA §9440

(d) The review process shall be as follows:

(1) The Board shall review:

(A) the application materials provided by the applicant; ~~and~~

(B) any information, evidence, or arguments raised by interested parties or amicus curiae, and any other public input; ~~and~~

(C) for proposed construction projects, an independent written report by Efficiency Vermont or an organization with similar expertise. The applicant must cooperate with information requests from the efficiency expert but not attempt to influence the contents of the report. The report shall evaluate how the applicant could reasonably maximize the cost savings of the project through energy efficiency measures and provide an analysis of the costs and benefits of the efficiency measures recommended. The applicant shall be provided with an opportunity to respond in writing to the recommendations prior to the Board’s consideration of the report.