

February 18, 2025 Memo to House Health Care regarding CON Reform.

First, please accept GMCB's responses to certain questions that arose during Feb 14 committee discussion with leg counsel (Jen Carbee)

1. What is a Chronic Disease Facility?

A hospital or facility dedicated to treating specific chronic conditions, this can include palliative care.

2. How does the Board decide if a project serves the public good?

18 V.S.A. § 9437 states that a CON shall be granted if the applicant demonstrates that the project services the public good and the Board finds that the project meets the following criteria:

- a. The project serves the public good (factors found in rule- see below).
- b. The project aligns with statewide health care reform goals and principles
 - i. Health care payment and delivery system reform initiatives.
 - ii. Current and future community needs while balancing statewide needs.
 - iii. Consistent with Health Resource Allocation Plan (HRAP).
- c. The cost of the project is reasonable.
 - i. Applicant can sustain the financial burden.
 - ii. No undue increase in cost or undue impact on affordability.
 1. Examine financial impact on other hospitals and clinical settings.
 2. Determine whether impact on services, expenditures, and charges is outweighed by public benefit of project.
 - iii. Less expensive alternatives do not exist, would be unsatisfactory, or are not feasible or appropriate.
- d. There is an identifiable, existing, or reasonably anticipated need for the project.
- e. Appropriate energy efficiency measures have been incorporated
- f. The project will improve quality of health care or provide greater access to health care for Vermont residents.
- g. The project will not have an undue adverse impact on the applicant's existing services.
- h. The Applicant has considered availability of affordable, accessible transportation services to the facility.
- i. The project will support equal access to appropriate mental health care that meets standards of quality, access, and affordability equivalent to other components of health care as part of an integral, holistic system of care.
- j. If the project is a Health Information Technology project, it conforms with the Statewide HIT Plan.

To determine whether a project serves the public good, the Board may consider the following factors found in Green Mountain Care Board Rule 4.000, § 4.402(3):

- i. Whether the project will help meet the needs of medically underserved groups and the goals of universal access to health services.
- ii. Whether the project will help facilitate the implementation of the Blueprint.

- iii. Whether the applicant has demonstrated it has analyzed the impact of the project on the Vermont health care system and the project furthers effective integration and coordination of health care services.
 - iv. Whether the project is consistent with current health care reform initiatives, at the state and federal level.
 - v. Except where circumstances support approval of an emergency Certificate of need, whether the project was identified prospectively as needed at least two years prior to the time of filing in the hospital's four-year capital plan.
 - vi. Whether, and if so to what extent, the project will have an adverse impact on the ability of existing facilities to provide medically necessary services to all in need, regardless of ability to pay or location of residence.

- 3. Does the Board assert jurisdiction over projects that do not specifically fall within jurisdiction (i.e., does the Board view its jurisdiction authority as extending beyond the statutory categories and cost thresholds because the statute uses the word "includes" when it sets out definitions of a new health care project)?
 - a. The Board has not ever asserted jurisdiction over a project that was not contained in 18 V.S.A. § 9434's list of thresholds and categories. It would be difficult for the Board to do so without specific guidelines.
 - b. But what about projects that have a concerning track record of consumer protection issues or does not appear to be using evidence-based practices?
 - i. The Board has not asserted jurisdiction if the project does not meet cost thresholds or other statutory factors triggering jurisdiction.

- 4. Would the HCA's suggestions about timing reduce the development period for state-sponsored/funded project?/What is the Board's guidance on appropriate timing? What is the right timeline based on the resources given to the GMCB? What is a better way to do it? What is a better timeline?
 - i. Please see separate response below to HCA's proposals for more discussion of timelines
 - b. What are GMCB's recommendations on Reverse CON.
 - i. Answer.

- 5. What are the CON projects currently being reviewed as of February 18, 2025? Would they be reviewed under H.96?
 - a. RRCM Linear Accelerator Replacement
 - i. Cost \$4.0 million- would be exempt
 - ii. No Interested Parties
 - b. NVRH West Wing Expansion Project Request for Material Change
 - i. Original project cost was \$14.4 million
 - ii. Material change of 10%, would be reviewed
 - iii. No Interested Parties
 - c. UVMC Conceptual CON for Construction of Replacement Parking Garage

- i. Cost \$2.4 million for planning; anticipated Garage cost of more than \$36.8 million. Review is uncertain.
 - ii. No Interested Parties, 2 Amicus Curiae
 - d. SVMC Cancer Center
 - i. Cost \$21 million. Would be reviewed.
 - ii. No Interested Parties
 - e. UVMHC Interventional Radiology Equipment Replacement
 - i. Cost \$2.9 million. Would not be reviewed.
 - ii. Application Closed
 - iii. No Interested Parties
 - f. SVMC Creation of Inpatient Mental Health Unit for Adolescents
 - i. Project cost approximately \$10 million. Would be reviewed.
 - ii. Hearing held Feb. 12
 - iii. HCA and Brattleboro Retreat are Interested Parties, Disability Rights VT is amicus curiae.
- 6. How do people know that they need to file a letter of intent or request for jurisdictional determination?
 - a. Hospitals are already aware. Anecdotally, we understand that many independent entities learn of the requirement through their attorneys or through licensing divisions at Department of Health, etc.
 - b. Letters of Intent and Requests for Jurisdictional Determinations are not a mandatory step, people can go straight to filing an application. However, it is often beneficial to file the Request for Jurisdictional Determination in order to get an outline of what needs to be included in their application and which criteria need to be met.

Second, Corrections. In the course of listening to testimony, we noted that the Committee at some points received incorrect or misleading information and we would like to take this opportunity to correct these points.

First, there have been several times that national reports on CON were referenced. While it is beyond our resources to review all of these reports, we will note that the Mercatus Institute Report from George Mason University presented to the Committee on Wednesday, February 12, had some inaccuracies.

- It states that Vermont has 51 CON laws, the most of any state. We are unaware of the source of the statement that we have 51 CON laws. We have one statute that governs what types of projects and one statute setting forth exclusions from CON Review.
- The Report states that Vermont requires a CON for 30 different services, but the report's own state profile lists only 25 services. The report appears to miss the nuance that most services are excluded if they are under the jurisdictional cost threshold. For example, an MRI machine might need a CON, or it might not, depending on the cost.

- The Report also lists Air Ambulance as requiring CON; however, states are preempted from regulating air ambulances.
- The HCA stated that the SVMC hearing took place a year and a half after the application. It was 11 months. Application filed 2/28/2024; Hearing 2/23/2024.
- The HCA stated that the UVMC OSC CON proceeding took over 2 years and involved almost 20 rounds of questions.

The entire proceeding took under a year and a half. Application filed 2/10/2023; CON was issued 7/29/2024.

There were 9 rounds of prehearing questions plus a request for a clarification. There were 1 round of post-hearing questions.

- The testimony in support of birthing centers stated that the GMCB told the independent birthing center that wanted to open in Southern VT that it had to go through CON even though it was below the threshold.

The Board stated the birthing center was not eligible for an exemption and that we needed more information to understand whether review was required.

<https://gmcboard.vermont.gov/sites/gmcb/files/files/certificate-need/2018.04.16%20Birthing%20Center.%20Req%20for%20Additional%20Info.pdf>

- The HCA's testimony on Wednesday, February 12, may have caused some misunderstanding about how the CON program works. The HCA suggested a Tier 1 review for projects between the current threshold and the new threshold with a 6-month deadline and 1 round of questions but noted that the clock would be stopped and additional rounds of questions would be allowed if the applicant's responses were incomplete or unhelpful.

In fact, the CON review process already has time limits. For example, the Board has 30 days to review Letters of Interest and Requests for Jurisdictional Determinations. The Board has 90 days to review and close an application. After the application is closed, the Board has 120 days to make a final decision. Within these deadlines, the clock stops while an applicant responds to questions, and there are some provisions for extensions of time.

Third, GMCB response to the HCA's proposal is as follows:

The HCA suggests a two-tier review of CON projects. Tier 1 projects would be those between the current threshold and the new thresholds. Tier 1 would require expedited decisions within 6 months and GMCB would be limited to one round of questions. Tier 2 would be for projects above the threshold; they would also require GMCB decisions within 6 months with the possible extension to 9 months, and be limited to 2 rounds of questions.

GMCB does not agree with setting calendar limits on entire CON reviews and arbitrarily restricting the rounds of questions. The HCA's own testimony reflects the unworkable nature of the calendar limit proposals. Sam Peisch acknowledged that if responses to questions are incomplete, that wouldn't count toward the calendar or question limit. That possibility is accounted for in the current statutory timeframes, which are appropriate and should not be changed.

The HCA has not presented an approach to Tier 1 that is practical or lawful. They seem to envision an enhanced Jurisdictional Determination process because those are handled promptly, within 30 days as required by statute. However, Jurisdictional Determinations do not involve value judgments by the Board. They are a legal and financial review of the details of a program to determine whether they meet the cost thresholds or are subject to jurisdiction for another reason. A Tier 1 review, however, would involve deciding in some way that the project serves the public good. However, without sufficient time to review the application and clearly articulated standards by which to make the determination, those decisions would be arbitrary. If the project must be shown to meet the statutory criteria and serve the public good, the Board may require additional information and time to deliberate and reach such a judgment. Conversely, without clear standards, CON decisions risk being made on an arbitrary basis, subjecting the decisions to appeal by either the applicant or Interested Parties, whose participation would be severely constrained under Tier 1.

All other projects would be considered under Tier 2, which also sets a 6-month time limit, extending to 9 months under extraordinary circumstances. This time limit is unworkable. First, if GMCB required a new consultant to review an application, a 6 month limit would not allow for state-required contracting procedures, such as a RFP and negotiations of the terms of the contract, before the consultant begins their review. Second, the Board has two regulatory processes (Insurance Rate Review and Hospital Budgets) that already adhere to severe statutory time frames. Insurance Rate Review must be completed within 90 days, from May to August. Hospital Budgets are presented in August with votes in September, and written decisions by October 1. These processes absorb all the Board's attention from July to October and prevent the Board and staff from giving sustained serious consideration to other matters during this interval.

We believe that the best approach to CON reform is to adjust the monetary thresholds in the manner we have recommended and maintain the review process already in place. We believe that these changes, in addition to streamlining some internal administrative processes, will result in shorter time frames for review and will allow the Board to focus on projects presenting significant financial impacts to Vermont's healthcare system.