

11. No certificate of need application will be approved for any applicant with existing non-waiverable violations of licensure standards at the time of filing, or before final disposition of the application or for an applicant with a history of noncompliance with licensing, statutory or regulatory standards which, as determined by the Department, threaten the life, safety or quality of care of patients. An exception shall be made in the case of applications submitted for the purpose of correcting recognized major licensure deficiencies. An exception to this provision may also be granted for applications submitted for the closure of a general hospital.

Amended by R.1993 d.442, effective September 7, 1993.

See: 25 N.J.R. 2171(a), 25 N.J.R. 4129(a).

Amended by R.1996 d.101, effective February 20, 1996.

See: 27 N.J.R. 4179(a), 28 N.J.R. 1228(a).

Amended by R.2002 d.243, effective August 5, 2002.

See: 34 N.J.R. 458(a), 34 N.J.R. 2814(a).

Rewrote the section.

Petition for Rulemaking.

See: 34 N.J.R. 3652(b), 34 N.J.R. 4475(b).

Petition for Rulemaking.

See: 35 N.J.R. 2751(c), 5621(b).

Petition for Rulemaking.

See: 36 N.J.R. 223(b).

#### Case Notes

Where a private nursing home applied for a special use variance when it sought to expand its facilities, the issuance, under N.J.S.A. 26:2H-7, to the home of a Certificate of Need by the State bore directly upon the applicant's status as an inherently beneficial use (citing former N.J.A.C. 8:33-2.7). *Baptist Home of South Jersey v. Riverton*, 201 N.J. Super. 226, 492 A.2d 1100, 1983 N.J. Super. LEXIS 1099 (Law Div. 1983).

Lack of sufficient record precludes finding certificate of need application's disapproval reasonable. *Rolling Hills of Hunterdon Care Center, Inc. v. State Health Planning Center*, 97 N.J.A.R.2d (HLT) 3.

Denial of hospital's application to provide home health agency services was unreasonable when alleged shortcomings were also present in other approved applications. *Burdette Tomlin v. State Health Planning Board*, 95 N.J.A.R.2d (HLT) 13.

Denial of Certificate of Need for construction of new long-term care facility was not arbitrary and capricious. In *Matter of Application of Mediplex of Voorhees for Certificate of Need*, 93 N.J.A.R.2d (HLT) 37.

#### 8:33-4.11 (Reserved)

Repealed by R.2002 d.243, effective August 5, 2002.

See: 34 N.J.R. 458(a), 34 N.J.R. 2814(a).

Section was "Notification of review cycles".

#### 8:33-4.12 (Reserved)

Repealed by R.2002 d.243, effective August 5, 2002.

See: 34 N.J.R. 458(a), 34 N.J.R. 2814(a).

Section was "Functions of local advisory boards".

#### 8:33-4.13 Role of the State Health Planning Board

(a) The State Health Planning Board shall review applications for certificates of need subject to full review and make recommendations to the Commissioner in accordance with all applicable health planning regulation.

(b) A member of the State Health Planning Board shall not vote on any matter before the board concerning an individual

or entity with which the member has, or within the last 12 months has had, any substantial ownership, employment, medical staff, fiduciary, contractual, creditor or consultative relationship. A member who has or has had such a relationship with an individual or entity involved in any matter before the board shall make a written disclosure of the relationship before any action is taken by the board with respect to the matter and shall make the relationship public in any meeting in which action on the matter is to be taken. Board members with a conflict of interest shall remove themselves from the table and shall not participate in the discussion of the relevant application(s).

(c) The State Health Planning Board shall furnish written decisions to the Commissioner which provide the explicit basis for any recommendations made by the Board on certificate of need applications. Such written decisions shall be forwarded to the Commissioner within 90 days after the application is deemed complete for processing unless the application has been deferred pursuant to N.J.A.C. 8:33-4.7 or because of the conduct of an administrative hearing regarding one of the batched applications. These written decisions may take the form of minutes of the State Health Planning Board.

Amended by R.1993 d.442, effective September 7, 1993.

See: 25 N.J.R. 2171(a), 25 N.J.R. 4129(a).

Amended by R.1996 d.101, effective February 20, 1996.

See: 27 N.J.R. 4179(a), 28 N.J.R. 1228(a).

Amended by R.2002 d.243, effective August 5, 2002.

See: 34 N.J.R. 458(a), 34 N.J.R. 2814(a).

In (a), inserted "subject to full review" following "certificates of need".

#### Case Notes

Appeal from denial of certificate of need. *St. Joseph's Hospital and Medical Center v. Finley*, 153 N.J. Super. 214, 379 A.2d 467 (App.Div.1977), certification denied 75 N.J. 595, 384 A.2d 825 (1978). *St. Vincent's Hospital v. Finley*, 154 N.J. Super. 24, 380 A.2d 1152 (App.Div.1977). *Irvington General Hospital v. Dept. of Health*, 149 N.J. Super. 461, 374 A.2d 49 (App.Div.1977). *National Nephrology Foundation v. Dougherty*, 138 N.J. Super. 470, 351 A.2d 392 (App.Div.1976).

No private right of action. *Delaware Valley Transplant Program v. Coye*, D.N.J.1989, 722 F.Supp. 1188.

Res judicata did not preclude federal district court from considering claim of Delaware organ procurement agency that decision to authorize as sole statewide procurer was impermissible. *Delaware Valley Transplant Program v. Coye*, D.N.J.1989, 722 F.Supp. 1188.

Either transcript or minutes of state health board's meeting could serve as required "written decision" regarding recommendations on certificate of need (CON) applications, so long as document in question contained particularized explanation of reasons for grant or denial of CON. *Application of Holy Name Hosp.*, 301 N.J. Super. 282, 693 A.2d 1259 (1997).

State Health Planning Board required to explain its recommendations regarding certificate of need applications. In *Re Hospital Home Care, Inc.*, 96 N.J.A.R.2d (HLT) 50.

Denial of certificate of need on basis of low priority ranking of local advisory board was not unreasonable. *Alternative Health Care of Gloucester v. State Health Planning Board*, 95 N.J.A.R.2d (HLT) 33.

Denial of Certificate of Need for construction of new long-term care facility was not arbitrary and capricious. In *Matter of Application of Mediplex of Voorhees for Certificate of Need*, 93 N.J.A.R.2d (HLT) 37.

**8:33-4.14 (Reserved)**

Repealed by R.2002 d.243, effective August 5, 2002.

See: 34 N.J.R. 458(a), 34 N.J.R. 2814(a).

Section was "Procedures for review by local advisory boards and the State Health Planning Board".

**8:33-4.15 Procedures for Commissioner review**

(a) The Commissioner may approve or deny an application for a certificate of need if the approval, or denial is consistent with all applicable health planning rules. The Commissioner shall issue a written decision on his or her determination of a certificate of need application which shall specify the reasons for approval or disapproval. The decision shall be sent to the applicant and to the State Health Planning Board, and shall be available to others upon request.

(b) Pursuant to N.J.S.A. 26:2H-9, if the Commissioner denies a certificate of need application, the applicant may request a hearing pursuant to the Administrative Procedure Act, P.L. 1968, c.410 (N.J.S.A. 52:14B-1 et seq. and 52:14F-1 et seq.) and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

(c) A request for a hearing shall be made to the Department within 30 days of receipt of notification of the Commissioner's decision. The hearing shall be conducted according to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and 52:14F-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1, and the record shall be limited to the documentary evidence presented to the reviewing agencies below. The Department shall arrange within 60 days of a request, for a hearing and after such hearing the Commissioner and or his or her designee shall furnish the applicant in writing the hearing examiner's recommendations and reasons therefor. The Commissioner within 30 days of receiving all appropriate hearing records shall make his or her determination, which shall be a final agency decision.

(d) After the commencement of a hearing pursuant to (c) above, and before a decision is made, there shall be no ex parte contacts between any person acting on behalf of the applicant or holder of a certificate of need, or any person opposed to the issuance of a certificate of need, and any person in the Department who exercises any responsibility for reviewing the application. Ex parte communication is defined as an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given. It shall not include requests for status reports on any matter or proceeding. Any communications made after commencement of the fair hearing that are placed in the record of the proceedings are made available to all parties are not ex parte and are not prohibited.

(e) The Department shall notify, upon their request, providers of health services and other persons subject to certificate of need requirements of the status of the review of certificate of need applications, findings made in the course of such

review, and other information respecting such review after the certificate of need is deemed complete for processing.

(f) If the Department determines that the holder of an unimplemented certificate is not making a good faith effort to implement the project, the Commissioner may null and void the certificate. Prior to such a determination, the Department shall notify the holder of the certificate of its intent to initiate the nullification process. The holder of the Certificate shall have 30 days from the date of such notice to submit written documentation of the substantial progress which has been made, and which will continue, in implementing the Certificate. If, after the review of the documentation submitted, a notice of nullification is nevertheless issued, the holder may request a hearing pursuant to (c) above.

Amended by R.2002 d.243, effective August 5, 2002.

See: 34 N.J.R. 458(a), 34 N.J.R. 2814(a).

Rewrote the section.

**Case Notes**

Commissioner of Health's conclusory determinations were not sufficient to show that certificate of need was properly granted. In re Valley Hosp., 240 N.J.Super. 301, 573 A.2d 203 (A.D.1990), certification denied 126 N.J. 318, 598 A.2d 879.

State Health Planning Board's decision not to forward health care provider's certificate of need application to Commissioner of Health not reasonable. In the Matter of VNA of Central Jersey, 96 N.J.A.R.2d (HLT) 63.

**8:33-4.16 Conditions on approval/monitoring**

(a) Conditions may be placed on certificate of need approval by the Commissioner if they relate to material presented in the application itself, are prescribed in State rules, relate to the criteria specified in N.J.A.C. 8:33-4.9 and 4.10 or promote the intent of the Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 et seq., as amended. The State Health Planning Board shall not recommend the inclusion of conditions in a certificate of need approval which are not consistent with the provisions of this subchapter.

(b) Any conditions placed on a certificate of need approval shall become part of the licensure requirements of the approved facility. Failure to comply with conditions of approval may result in licensure action by the Department and may constitute an adequate basis for denying certificate of need applications by an applicant who is out of compliance with conditions on previous approvals. The applicant must contest any condition, if at all, within 30 days of receipt of notice. The applicant shall vacate his right to oppose said condition(s) if he fails to submit written notice that he contests any condition to the Department within this time. If the applicant contests a condition, the Commissioner shall suspend his or her approval of the certificate of need in order to consider the objection. Furthermore, the Commissioner has the right to nullify the approval of the certificate of need. The Commissioner may, at his or her discretion, consult with the State Health Planning Board to obtain its recommendation on the contested condition(s).