Oversight Division

Committee On Legislative Research

PROGRAM EVALUATION

Review of the
Department of Health and Senior Services
Certificate of Need Program

2015

Program Evaluation

Department of Health and Senior Services
Certificate of Need Program

Prepared for the Joint Committee on Legislative Research
by the Oversight Division

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Committee on Legislative Research

THE COMMITTEE ON LEGISLATIVE RESEARCH, Oversight Division, is an agency of the Missouri General Assembly as established in Chapter 23 of the Revised Statutes of Missouri. The programs and activities of the State of Missouri cost approximately $26 billion annually. Each year the General Assembly enacts laws which add to, delete or change these programs. To meet the demands for more responsive and cost effective state government, legislators need to receive information regarding the status of the programs which they have created and the expenditure of funds which they have authorized. The work of the Oversight Division provides the General Assembly with a means to evaluate state agencies and state programs.

THE COMMITTEE ON LEGISLATIVE RESEARCH is a permanent joint committee of the Missouri General Assembly comprised of the chairman of the Senate Appropriations Committee and nine other members of the Senate and the chairman of the House Budget Committee and nine other members of the House of Representatives. The Senate members are appointed by the President Pro Tem of the Senate and the House members are appointed by the Speaker of the House of Representatives. No more than six members from the House and six members from the Senate may be of the same political party.

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Members of the General Assembly:

The Joint Committee on Legislative Research adopted a resolution on June 19, 2015 directing the Oversight Division to perform a program evaluation of the Department Health and Senior Services - Certificate of Need Program to determine and evaluate program performance in accordance with program objectives, responsibilities, and duties as set forth by statute or regulation.

The report includes Oversight's comments on the program, compliance with legal requirements, management practices, program performance and related areas. We hope this information is helpful and can be used in a constructive manner for the betterment of the state program to which it relates. You may obtain a copy of the report on the Oversight Division's website at www.legislativeoversight.mo.gov.

Respectfully,

Kevin Engler

Representative Kevin Engler
Chairman

EXECUTIVE SUMMARY

Missouri's Certificate of Need Program is administered by Missouri Health Facilities Review Committee (Committee) with administrative assistance from the Department of Health and Senior Services. Since 1979, the program has been tasked with restraining health care costs in the state through coordinated expenditures for the construction, purchase, expansion, or replacement of health care facilities, equipment, or services. Over the past three years, the Committee has acted on 210 applications with proposed capital costs of over $1.29 billion.

Certificate of Need (CON) applicants must submit a fee of one-tenth of one percent of the anticipated project costs, or $1,000, whichever is greater. Over the past three years, the application fee revenue collected through this program has averaged $462,731, while the appropriation for the program in FY 2016 is $116,522, which includes two FTE.

As part of the program evaluation, Oversight compared Missouri's program to that of our surrounding states, as well as Georgia and Ohio. Fourteen states have discontinued their CON programs, and for the other states, there is a big variance in how programs are administered and what services are included.

Once a Certificate of Need is issued, the applicant must keep the Committee informed about the project by filing progress reports every six months. Once a project has been completed, the applicant must submit a final progress report. In the report, Oversight listed fourteen projects that are more than five years old, but are still not considered complete, one dating back to 1986. Oversight recommends that the Department of Health and Senior Services and the Committee require applicants to more strictly adhere to the deadlines of completing projects and reporting back to the Committee.

During the last three years, only one (of over two hundred) project was effectively denied a Certificate of Need in Missouri. Also, numerous projects that were approved by the Committee were not able to document that a sufficient need existed for their service. The Committee considers numerous other factors besides the needs calculations, including the number of unavailable beds in the area, geographic boundaries, if the applicant intended to create a continuing care campus, the lack of opposition to a project, and others.

Oversight reviewed a sample of files and noted that some applicants were not timely in submitting their periodic progress reports to the Committee. Oversight recommends the Department of Health and Senior Services further develop an effective follow-up program to ensure applicants make timely progress on CON-issued projects.

Numerous arguments have been made addressing the question of the necessity of CON programs. Oversight has provided a listing of some of the common arguments for and arguments against the program's continuance.

Chapter 1

Purpose/Objectives

The General Assembly has provided by law that the Joint Committee on Legislative Research may have access to and obtain information concerning the needs, organization, functioning, efficiency and financial status of any department of state government or of any institution that is supported in whole or in part by revenues of the State of Missouri. The General Assembly has further provided by law for the organization of an Oversight Division of the Joint Committee on Legislative Research and, upon adoption of a resolution by the General Assembly or by the Joint Committee on Legislative Research, for the Oversight Division to make investigations into legislative governmental institutions of this state to aid the General Assembly.

The Joint Committee on Legislative Research directed the Oversight Division to perform an evaluation of the Certificate of Need Program administered by the Department of Health and Senior Services.

Oversight's review addressed, but was not limited to the following:

1. Review of Missouri's Certificate of Need Program as compared to other states.

2. How have the appropriation levels for the Certificate of Need / Missouri Health Facilities Review Committee changed?

3. Does the Certificate of Need Program help control health care costs as intended?

Scope

The scope of the evaluation concentrated on the period of July 1, 2012 through June 30, 2015, State Fiscal Years 2013 through 2015.

Methodology

The methodology used by the Oversight Division included interviewing Department of Health and Senior Services personnel, reviewing the State of Missouri statutes, rules and regulations, reviewing a sample of Certificate of Need applications, analyzing budget and expenditure information, as well as gathering information regarding other states.

Background:

History of Certificate of Need:

Certificate of Need (CON) programs throughout the country are tasked with restraining health care costs by coordinating the construction, purchase, expansion, or replacement of health care facilities, equipment, or services in their state. New York was the first state (1964) to pass legislation granting the state government authority to determine if a 'need' existed for any new hospital or nursing home before it was approved for construction.[1] In 1974, the Federal Government (through the Health Planning Resources Development Act) required every state to have a structure in place with the ability to approve or disapprove any major health care related capital expenditure. Federal funding was available to states that established such programs.

By 1975, 20 states had enacted CON laws and by 1978, the number had grown to 36 states.[2] Eventually, all 50 states established CON programs, with Missouri establishing its program (§197.300 - §197.367, RSMo) in 1979.

The federal mandate (as well as the federal funding) was repealed in 1987. Since then, 14 states have discontinued their CON programs; however, most still have retained some mechanism(s) to regulate costs and the duplication of service.[3] Of Missouri's surrounding states, Kansas is the only one to have repealed its program. The other states that have discontinued their CON programs are Indiana, Pennsylvania, Texas, South Dakota, North Dakota, Colorado, New Mexico, Wyoming, Utah, Idaho, Arizona, Minnesota, and Colorado.[4]

Missouri's CON laws are administered by the Missouri Health Facilities Review Committee (Committee), with administrative support provided by the Department of Health and Senior Services, Division of Regulation and Licensure. The stated mission of the program is "to achieve the highest level of health for Missourians through cost containment, reasonable access, and public accountability."[5] The Committee's goals include:

- review proposed health care services;
- contain health costs;
- promote economic value;
- evaluate competing interests;
- prevent unnecessary duplications; and
- disseminate health-related information to affected parties.

Missouri Health Facilities Review Committee:

The Committee, established in §197.310, RSMo, is composed of nine members, two appointed from the Senate, two appointed from the House of Representatives, and five appointed by the Governor. Table 1 shows the members of the Committee at the time of this report.

Table 1: Missouri Health Facilities Review Committee members:

	Name	From	Terms began	Terms expire(d)
Member 1	Mr. Derek Hunter	Springfield	September 8, 2015	January 1, 2016
Member 2	Hon. Judith O'Connor	St. Charles	February 19, 2014	January 1, 2015
Member 3	Hon. Marsha Campbell	Kansas City	December 21, 2011	January 1, 2013
Member 4	Dr. T. Martin Vollmar	Frontenac	December 17, 2009	January 1, 2011
Member 5	Mr. William Krodinger *	Kirkwood	July 29, 2010	January 1, 2012
Senate 1	Sen. Michael Parson	28th district		
Senate 2	vacant			
House 1	Rep. Caleb Jones	50th district		
House 2	Rep. Penny Hubbard	78th district		

Source: Department of Health and Senior Services
* Current Chair
Note: the vacant Senate position was most recently held by Senator Paul LeVota

The Member 1 position, currently held by Mr. Derek Hunter, had been vacant from January 2011 until September 2015 (over four years). Also worth noting, of the five current non-legislative members, four are serving past their term expiration dates.

The Committee meets approximately every eight weeks in the state capitol to consider applications and administrative matters. Also, once per month the Committee considers expedited ballot measures by way of mail, fax, or e-mail for CON applications, post-CON requests, and administrative matters. Members of the Committee serve without compensation, but are reimbursed for necessary expenses.

When a CON is required:

Before applicants can build a new hospital, build or renovate an Assisted Living Facility (ALF), Residential Care Facility (RCF), Skilled Nursing Facility (SNF), or Intermediate Care Facility (ICF), or purchase certain major medical equipment, they must first receive approval from the Committee. Code of State Regulations (19 CSR 60-50.400) lists the thresholds that, if met, would trigger a Certificate of Need review. The thresholds include:

- the development of a new hospital, costing $1 million or more;
- the construction of a replacement hospital;
- the acquisition or replacement of medical equipment costing $1 million or more;
- the acquisition or replacement of major medical equipment for a health care facility licensed under Chapter 198 (Convalescent, Nursing and Boarding Homes) costing $400,000 or more;
- the acquisition of equipment or beds in certain long-term care hospitals at any cost;
- the project involves a capital expenditure for renovation or modernization, but not additional beds, for any Chapter 198 facility costing $600,000 or more;
- the project involves additional Long Term Care (licensed or certified RCF, ALF, ICF, or SNF) beds costing $600,000 or more; or
- the project involves the expansion of an existing health care facility that either:
    - costs $600,000 or more; or
    - exceeds 10 beds or 10 percent of that facility's existing licensed capacity, whichever is less.

Some of the dollar amounts above have not changed since the inception of the program and others were added approximately 20 years ago. Most of the other states we looked at had similar thresholds; however, for comparison, Illinois' thresholds are $12.8 million for hospitals and $7.2 million for Long Term Care facilities. Illinois' thresholds are also adjusted annually for construction cost inflation. Several bills have been filed in recent years that would have made changes to some of Missouri's limits, including:

- SB 301, in 2015, proposed to raise the expenditure minimum for major medical equipment from $1million or more to $2 million or more; and
- SB 524, SB 847, as well as HB 1793, in 2014, proposed to raise the expenditure minimum from $600,000 to $1 million for long term care capital expenditures and from $1 million to $2 million for major medical equipment.

Not all services require CON approval in Missouri. Some examples of services that may require CON approval in other states, but not in Missouri, include Ambulatory Surgical Centers, Hospice, Substance/Drug Abuse Treatment, and Home Health.

Number of CON applications:

Table 2 below is a summary of the CON applications that have been processed by the Committee over the last three fiscal years. Table 3 below further breaks out the applications by type.

Table 2: CON applications FY 2013 - FY 2015:

	FY 2013	FY 2014	FY 2015
Number of applications	69	68	73
Proposed Capital Costs	$356,404,540	$392,764,372	$545,067,297
Approved	68	65	72
Withdrawn	1	3	0
Denied	0	0	1
Proposed, new or added ALF, RCF, SNF. ICF, or LTCH beds	1,390	2,067	3,258
Proposed beds purchased, replaced, or renovated/modernized	3,695	884	498

Source: Department of Health and Senior Services

Table 3: CON applications FY 2013 - FY 2015 by type:

Number of applications / proposed capital costs for...	FY 2013	FY 2014	FY 2015
Equipment	25 / $68,119,555	24 / $59,693,575	20 / $40,648,196
Hospital	3 / $37,800,433	2 / $12,632,855	3 / $13,969,204
ICF/SNF	14 / $57,690,009	5 / $24,697,944	12 / $103,052,241
ALF/RCF	27 / $192,794,543	32 / $212,859,549	33 / $247,402,697
Combination of Categories	0 / $0	5 / $82,880,449	5 / $139,994,959
TOTAL	69 / $356,404,540	68 / $392,764,372	73 / $545,067,297

Source: Department of Health and Senior Services
ALF - Assisted Living Facility
RCF - Residential Care Facility
SNF - Skilled Nursing Facility
ICF - Intermediate Care Facility
LTCH - Long-Term Care Hospital

Chapter 2

Revenue and Expenditures:

For consideration of a CON, the Missouri Health Facilities Review Committee charges an application fee of one-tenth of one percent of the anticipated project cost, or $1,000, whichever is greater. The fee is non-refundable and is deposited into the General Revenue Fund. Table 4 reflects the total amount of CON application fees that have been collected in each of the last three fiscal years.

Table 4: CON applications fees generated FY 2013 - FY 2015:

	FY 2013	FY 2014	FY 2015
CON application fees	$351,936	$409,341	$626,917
Number of CON applications	69	68	73

Source: Department of Health and Senior Services

To administer the program, the Committee has an appropriation of $116,522 (General Revenue), which includes two FTE. Adding approximately 51% ($55,000) to the personal service portion of the appropriation for fringe benefits (which is represented in other budget bills), would sum to an annual appropriation of approximately $171,500 for this program. This appropriation level has remained relatively constant for the last six years.

For comparison, Oversight reviewed the appropriation levels of the Committee in FY 2016 to prior years (without fringe benefits), all from the General Revenue Fund:

- For FY 2016, the Committee has an appropriation of $116,522 (2 FTE);
- For FY 2009, the Committee was appropriated 2.80 FTE and had expenditures of approximately $154,000;
- For FY 1995, the Committee had appropriations of $263,768 (8 FTE); and
- For FY 1989, the appropriation for the Committee was $353,000 (10 FTE).

The CON process:

The Certificate of Need process officially begins when an applicant files a Letter of Intent describing the project. The process ends when the applicant completes the project, receives any necessary licensing, and notifies the Committee of completion. Below are the various steps of a CON application:

- Letter of Intent - The applicant must file a Letter of Intent describing the project at least 30 days prior to submitting a formal CON application to the Committee.
- Application - The applicant must file the application with the Committee describing the project in greater detail and also, if required, present data from the Department of Health and Senior Services' (Department) Bureau of Vital Statistics and Division of Regulation and Licensure reflecting the existing 'need' for the service. The applicant must also submit the non-refundable application fee.
- Staff Review and Analysis - The Department reviews the application, performs a separate needs analysis and reports its findings to the Committee.
- Expedited Ballot - Under certain circumstances, some applications may be voted on by the Committee outside of a public hearing. Any Committee member may request that the decision be taken up at the next public hearing instead of the expedited e-mail or fax vote.
- Hearing - The Committee holds a public hearing every eight weeks to discuss and decide on numerous issues. The applicant, as well as supporters and opponents are allowed to testify on the project. After debate, the Committee takes a vote on the application. Motions to change the CON application can be approved by a majority of Committee members.
- Appeal - If a project is denied a CON by the Committee, the applicant can appeal the decision to either the Administrative Hearing Commission or the Circuit Court.
- Periodic Progress Reports - Every six months, the applicant must report to the Committee the progress of the project, including the expenditures and percentage of completion. Once the project is complete, the applicant must file a final Periodic Progress Report with the Committee.

Recent legislative changes and proposals:

No substantial legislative changes have been made to the program for approximately fifteen years. However, during recent legislative sessions, several bills were filed that would have changed certain aspects of the program, including:

- reducing the scope of the CON program (SB 53, in 2015, would have limited the CON laws by having them apply only to long-term care facilities and services - not to hospitals and/or equipment purchases.);

- limiting the service area used in CON bed need calculations (Several bills have been filed in the previous three years that would have limited the radius for "affected persons" to a five mile radius - instead of the current 15 mile radius.);
- prohibiting all ex parte communications between the members of the Committee and any interested party or witness regarding the subject matter of the hearing at any time prior to, during, or after the hearing;
- modifying the membership of the Committee by replacing the legislative members with non-legislative members, as well as requiring members to be experienced in the health care, economics, or commercial development professions;
- adding a rebuttable presumption of the need for additional medical services in a given region or community and placing the burden of proof to show otherwise on opposing parties;
- giving the Committee subpoena power;
- requiring all testimony and other evidence taken during the hearings to be under oath and subject to the penalty of perjury;
- removing or modifying the application fee;
- raising the minimum expenditure thresholds for projects to fall under the CON review;
- removing the CON requirement for projects if 10 or more Missouri jobs are created; and
- repealing the CON laws (SB 86, in 2011, appears to be the most recently filed bill that would have repealed the Certificate of Need statutes.)

As part of the program evaluation, Oversight asked the Department if there were any legislative changes that the agency feels are needed. The Department replied that they did not have any suggestions for legislative changes or updates at this time.

Others States:

Even though no longer a federal requirement, 36 states still maintain their CON programs. Each state developed their own mechanisms to regulate, approve and fund this program, including which services to regulate, the thresholds of expenditures that would require CON approval, committee structure, etc. Oversight conducted internet research on surrounding states and on states with similar demographics to determine how Missouri's CON program compares.

Oversight's research revealed that CON programs have a wide variation in structure across states. Although every CON state appears to have an entity with similar responsibilities, those entities may be much different organizationally. Oversight compared the CON program for the states listed below to Missouri, based on the regulatory agency supporting the program, services that require a CON certificate, filing fees and service areas. The summary of our findings are found in Tables 5 and 6.

Table 5: CON comparison with other states:

State	Regulating State Agency	Committee Makeup	Application Filing Fees	Service Area(s)
MO	Department of Health and Senior Services	Missouri Health Facilities Review Committee is a 9-member body that votes on the outcome of CON applications. The committee is comprised of two members from the House of Representatives, two from the Senate and five members appointed by the Governor.	1/10 of 1% of total project cost, with a min. of $1,000	Contiguous area for hospitals & equipment and geographic region (15 mile radius) for other projects
AR	Health Services Permit Agency	Arkansas Health Services Permit Commission is a 9-member body that votes on the outcome of CON applications. The committee is comprised of nine different health care professionals.	$3,000 fee	County of the proposed facility
IL	Department of Public Health	The Illinois Health Facilities and Services Review Board is a 9-member commission appointed by the Governor with Senate confirmation.	22/100 of 1% of total project cost, with a min. of $2,500 and a max. of $100,000	Areas of counties and the City of Chicago
IA	Department of Public Health	State Health Facilities Council is a 5-member body appointed by the Governor and confirmed by the Senate. Members should be a person who has demonstrated by prior activities an informed concern for health services. No more than three members can be affiliated with the same political party.	3/10 of 1% of total project costs with min. fee of $600 and max. of $21,000	County of the proposed facility or contiguous counties
KY	Cabinet of Health and Family Services	Office of Health Policy is part of the Cabinet of Health and Family Services who administers the CON. The Cabinet renders final decision.	5/10 of 1% with min. of $1,000 and a max. of $25,000	Pre-established development districts of specific counties
NE	Department of Health & Human Services	The Nebraska Department of Health and Human Services oversees and administers the CON.	$1,000 fee	Regions and districts (counties or groups of counties)
OK	State Department of Health	The State Commissioner of Health holds complete authority to render final decisions on CON applications. The DOH staff assist the director in all aspects of the CON application process.	$3,000 fee for LTC facilities and 0.75% of total project costs for psychiatric review with a min. fee of $1,500 and max. fee of $10,000	County of the proposed facility or combination of contiguous counties
TN	Health Services and Development Agency	The Health Services and Development Agency is responsible for administering the CON program.	225/100 of 1% of project costs with a min. of $3,000 and a max. of $45,000	County or counties in which a health care institute intends to provide services

Table 5: CON comparison with other states: (continued)				
GA	Department of Community Health	The Georgia Department of Community Health oversees and administers the CON.	1/10 of 1% of total project cost with a min. of $1,000 and max. of $50,000	County of the proposed facility or combination of contiguous counties
OH	Department of Health	The Director of the Department of Health holds complete authority to render final decisions on applications.	1.5% of total project costs with min. of $5,000 & max. of $20,000	County of the proposed facility

Table 6: CON services comparison with other states:

State	Services that Require a CON
MO	Initial establishment of a hospital, acquisition or replacement of medical equipment, establishment, renovation, modernization, replacement or expansion of a healthcare facility
AR	Nursing home construction, additional beds or expansion of bed capacity for Long Term Care, Home Health Services expansion and Hospices programs
IL	Licensed or state operated: hospitals, Long Term Care facilities, dialysis centers, ambulatory surgery centers, alternative health care delivery models, free standing emergency centers and birthing centers
IA	A new or changed institutional health service includes: hospitals, nursing homes, outpatient surgery centers, or purchasing of medical equipment
KY	Establishment of new hospitals, treatment facilities, chemical dependency programs, health care facilities, outpatient clinics, ambulatory surgery centers, emergency care centers, ambulance providers, hospice, home health agencies, and acquisition of major medical equipment
NE	Initial establishment, increase, relocation or conversion of long-term care beds or rehabilitation beds
OK	Long Term Care facilities and Psychiatric and Chemical Dependancy Treatment Facilities
TN	Acute Care bed need services, ambulatory surgical centers, birthing centers, burn units, cardiac catheterization services, inpatient rehabilitation services, home health and hospice services, habilitation services, medical equipment, Long Term Care beds, neonatal nursery services, treatment centers, nursing homes, outpatient diagnostic centers and psychiatric services
GA	Initial establishment and renovations of a hospital, new or expanding nursing homes and home health agencies, ambulatory surgery centers, providers of radiation therapy, positron emission tomography, open heart surgery and neonatal services, major medical equipment purchases or leases
OH	Development, replacement, renovation, and increase in beds of a Long Term Care facility

Some services that are not under the CON review in Missouri that appear to be in a majority of other states include ambulatory surgical centers, hospital expansions, hospice, and rehabilitation. Of note, of the surrounding states with a commission tasked with overseeing and administering the CON, Missouri is the only state to specifically designate a position on the commission, council or review board to State Senators or Representatives.

Also of note, both Arkansas and Illinois have rules and regulations regarding ex parte contacts between the applicant and members of the commission. An ex parte contact by an applicant or a person representing the applicant may be grounds for the withdrawal of the application from review.

Projects that remain incomplete:

Once a project is complete and has obtained the necessary licensure from the Department, the applicant must notify the CON staff that the project has been completed. Until the project is considered complete, the applicant must provide updates on the status of the project through Periodic Progress Reports (PPRs) every six months.

FINDING: The Department provided the listing of the 148 CON projects that were considered incomplete as of July 2015. Most of the projects are recent, having been approved by the Committee in 2013 or later. However, below is list of projects that are still considered incomplete more than five years after receiving initial Certificate of Need approval:

Table 7: Incomplete CON projects more than five years old:

Project number and description	CON Approval Date	Project cost	Status of project as reported on Periodic Progress Reports
1011 - Garden View of Chesterfield - establish 240-bed SNF	6/26/86	$11,735,000	120 beds are licensed. Construction is 79% complete. In a 1993 letter, the applicant cited problems with the local government in progressing with phase 2 of the project. The PPR amounts have not changed since January 1992.
3321 - The Oaks - replace 36-bed RCF II in Kansas City	10/25/02	$200,000	32 of 36 beds are licensed. Progress to license the last 4 beds has been halted. Construction is 88% complete. The last change to the PPR percentage was April 2007.
3500 - Community Care Center of Lemay - LTC bed expansion of 45 SNF beds	10/24/03	$1,230,000	26.6 % of project costs have been incurred. The last PPR change was April 2015.
3630 - HCA, Inc. - establish 257-bed acute care hospital in Independence	09/21/05	$242,054,059	Hospital is licensed, open, and operating. Applicant states waiting for a final decision on the scope of services before submitting final report. The PPR amounts haven't changed since January 2008.

Project # and description	CON Approval	Project cost	Status of project as reported on Periodic Progress Reports
3711 - Lee's Summit Hospital - establish 64-bed acute care hospital	01/24/05	$88,387,286	The hospital is licensed, open, and operating. Applicant states waiting on final bills before submitting final PPR report; however, this same comment has been on all PPRs since July 2008.
3765 - Frene Valley Geriatric & Rehab Center - replace 30 SNF beds in Hermann	06/21/05	$2,000,000	5% of construction is complete. 8 of the 30 beds have been licensed. Completion percentages haven't changed since June 2007.
3815 - Crescent Care, LLC - replace 264-bed SNF in St. Louis County	09/21/05	$18,140,000	24% of total approved project amount has been expended. Above-ground construction began in 2009.
4050 - Chateau Girardeau - add 18 ALF beds/renovate facility in Cape Girardeau	06/04/07	$2,629,629	11 of 18 beds are licensed. 50% of project costs have been incurred. This percentage hasn't changed since 2009.
4170 - MH-Brookview, LLC - establish 44-bed ALF in Maryland Heights	06/01/09	$7,300,000	The last PPR filed (2012) reported 2.3% of the construction is complete. Applicant is behind on PPR filings.
4189 - Reavis Assisted Living - establish 104-bed ALF in St. Louis	08/11/08	$15,566,809	Facility is licensed and operating. Project appears to be complete; however, the last PPR was filed April 2013
4191 - St. Mary's Health Center - establish 167-bed acute care hospital in Jefferson City	06/02/08	$209,500,000	Hospital is open and commenced operations in November 2014. Applicant states closing out all remaining commitments before filing final PPR.
4243 - Shriners Hospitals for Children St. Louis - establish 12-bed acute care children's hospital	10/06/08	$53,654,898	Hospital is open and commenced operations in June 2015. Applicant needs to file final PPR report.
4307 - The Gardens at Barry Road - add 148 ALF beds in Kansas City in Platte Co.	02/02/09	$27,000,000	40 beds have been licensed. Latest PPR reports 16% of total approved cost has been expended. This has not changed since February 2013.
4479 - Columbia Manor Care Center - LTC expansion of 102 SNF beds in Columbia	03/24/10	$2,924,500	Only 0.34% of approved costs have been incurred. The PPR percentages have not changed since December 2011.

RECOMMENDATION: Oversight recommends the Department and the Committee require CON applicants to timely complete projects more strictly adhere to the deadlines for reporting back to the Committee. The above projects were issued Certificates of Need more than five years ago, have incurred at least some construction costs, but are still considered incomplete. The Committee has the authority to enforce an involuntary forfeiture of a CON. The State of Arkansas has fairly rigid deadlines for construction and licensure after the CON is issued, and if the deadlines are not met the CON is automatically terminated (but the decision can be appealed to their committee).

Very few projects are denied a Certificate of Need:

During the scope of our review (July 1, 2012 through the July 2015 Committee meeting), there were 218 Certificates of Need issued for Missouri projects. During this same period, only two projects were denied a CON by the Committee:

1. Autumn Leaves Senior Community: Project 5163 applied to establish a 54 bed, $11.1 million, Assisted Living Facility in Lee's Summit, but was denied a CON on May 4, 2015 by a 1-5 vote. The applicant (The LaSalle Group, Inc.) then appealed the Committee's decision to the 19th Judicial Circuit (Cole County) as allowed in Section 197.335, RSMo. The court ruled in favor of the applicant and ordered the Committee to issue a certificate to the applicant. At the July 13, 2015 meeting, the Committee voted to not appeal the court's decision and issued a CON to the applicant.

2. Fulton Medical Center: Project 5160 applied to establish a 10 bed, $36.2 million, hospital in Boone County, but was denied a CON on July 13, 2015 by a 2-5 vote. The applicant did not appeal the decision.

FINDING: The large majority (99%, or 218/220) of the applications during the scope of our review were approved and issued a CON. Obviously, this does not account for any deterrent effect the program may have had on potential projects - those that perhaps may have either not filed an application for fear of being rejected or made changes to their project to improve their chances of being approved by the Committee.

This does not mean that 99 percent of the projects were able to meet the DHSS standards proving that there was a pressing need for the service. Quite often, the applicant is issued a CON by the Committee even though the need for the service is not documented by the applicant using the appropriate criteria and standards, as discussed in the next section.

A large number of approved projects do not meet the stated needs criteria:

During the CON process, an applicant must demonstrate that a 'need' exists for the service. The applicant must follow specific criteria and guidelines in calculating the level of need in the service area. The types of projects for which a demonstration of need must be documented include:

- establishing a new long term care health facility;
- establishing a new hospital; or
- acquiring major medical equipment

Missouri's Code of State Regulations (CSR) 19 CSR 60-50.450 lists the criteria and standards for long-term care health facilities that applicants must utilize in demonstrating a need for additional beds. The formula is population-based for the fifteen (15) mile radius surrounding the applicant's address. The formula calculating the unmet need is (S x P) - U where:

P = Projected Year 2020 estimated population age 65+ in the 15 mile radius;
U = Number of existing licensed and approved beds in the 15 mile radius; and
S = Service-specific need rate of number beds per 1,000 population aged 65+, as follows;

ICF/SNF	53 beds per 1,000 population (65+)
RCF/ALF	25 beds per 1,000 population (65+)
LTC hospital beds	0.1 beds per 1,000 population

For example, the unmet need for new ALF beds in a service area where:

P = projected (2020) population of 50,000 aged 65+ in the 15 mile radius;
U = 1,000 already existing licensed and approved beds in the 15 mile radius; and
S = 25 beds per 1,000 population (65+).

would calculate to 250 beds: (25/1,000 x 50,000) - 1,000 = 250 beds

The following criteria and standards for equipment and new hospitals (in 19 CSR 60-50.440) are used as the threshold for unmet need: The formula for unmet need = (R x P) - U where:

P = Year 2020 estimated population in the service area;
U = Number of beds in the service area;
R = Community need rate of one bed per population in the service area as follows:

• Medical/Surgical bed	570
• Pediatric bed	8,330
• Psychiatric bed	2,080
• Substance abuse / chemical dependency bed	20,000
• Inpatient rehabilitation bed	9,090
• Obstetric bed	5,880

For example, the unmet need for a new Medical/Surgical hospital in a service area where:

- R = 1 medical/surgical bed per 570 population;
- U = 100 already existing licensed and approved beds in the service area; and
- P = population of 100,000 in the service area.

would calculate to 75 beds: (1/570 x 100,000) - 100 = 75

The 'service area' for the two sample projects above could be vastly different. Long term care facility applicants must utilize a 15 mile radius area around where the proposed facility will be built, while new hospital applicants and major medical equipment applicants are allowed to define their service area.

Of the 218 applicants that were issued a CON within the scope of our review, only 116 (53%) were required to submit a needs calculation. The other 102 (218 - 116) applicants requested approval for services that did not require a needs calculation, such as replacing medical equipment or renovating/modernizing a LTC facility. Of the 116 applicants required to show that a need existed for their service, 53 (45%) calculated that either the need for the service was not as large as the amount requested or that there already existed a surplus for that service.

As stated earlier, there were only two projects during the scope of our review that were denied a CON. Therefore, with the high level of approval (99%) of CON applications in Missouri despite the relatively high percentage of projects that failed to meet the community need criteria and standards, the Committee must take into consideration factors other than the needs formula calculations. Below are some additional factors that Committee members may potentially consider when evaluating a project application:

- Number of "unavailable" beds - part of the formula for documenting the need for long term care services is to determine how many beds at similar facilities already exist within the 15 mile radius service area. This information is provided by the Department. Unavailable beds refer to those that are licensed but are not being offered for service by the owner. Examples given include rooms that received a CON and were licensed as semi-private; however, the rooms are being used as private, so the other bed is considered unavailable. Other examples include rooms that may have been converted into meeting space or administrative offices and the 'beds' for those rooms are now considered unavailable because they are still on the list, but are not available for use.

- Number of "approved" but unlicensed beds - once an applicant has been issued a CON, the number of beds approved for that project gets counted into all future applications of other facilities that fall within the 15 mile radius of the new applicant's facility. As shown earlier, some projects take years from the time they receive their CON to actually being built, licensed, and opened. The 'approved'

beds are added to the 'licensed' beds to come to the number of existing beds in the service area as described in the (SxP) - U formula described earlier.

- Department of Mental Health - certain Mental Health beds are licensed and included in the calculation (bed count).

- Geographic boundaries - if an applicant is proposing to place a long term care facility within 15 miles of a geographic boundary, such as the Missouri River, then including the facilities that are on the other side of that natural barrier may be overstating the number of available beds. Applicants state that patients and family members will want to remain close and will not choose a facility that is on the other side of a natural barrier.

- Bordering States - if the 15 mile radius includes part of a bordering state, the calculation does not include the portion of the radius that has another state included (neither the population nor the number of beds).

- Continuing care campus (or continuing care retirement community) - even though there may already be a surplus of ALF or SNF beds in the radius area, the applicant may state a goal of having the various stages of living facilities (ILF - ALF - SNF) available on one campus so that residents can transition from one to another as needed and not have to move to another location.

- Occupancy rates of other facilities - DHSS states "the Committee's practice has been to consider the occupancy of all other long-term care beds of the same licensure category in the proposed service area." The applicant provides, from information provided by the Department, the average licensed and available bed occupancy rate for all of the facilities within the 15 mile radius area. If the occupancy rate for similar facilities is relatively high, then perhaps a sufficient demand exists.

- Lack of opposition - opponents have the opportunity to voice opposition to projects during CON meetings. If no opposing opinions are expressed during the meeting, a Committee member may assume that there is no opposition to a project.

- The formulas and percentages used in the calculations may be dated.

- Smaller radius - a 15 mile radius service area is used by the applicant and the Department to determine if a need exists; however, at least one of the applicants (project 5154) argued that if a five mile radius was used instead, the bed need calculation would be vastly different, reflecting a bed need instead of a bed surplus.

RECOMMENDATION: Oversight recommends the Legislature and the Department consider updating the needs calculation used in the CON process to incorporate some of the additional factors that the Committee considers when deciding whether or not to issue a CON.

Sample of files reviewed by Oversight:

As part of the program evaluation, Oversight also reviewed a sample of the Department's Certificate of Need project files.

FINDING: Oversight noted a number of occurrences in which the applicant failed to timely file a Periodic Progress Report with the Department. Once a CON is issued, the applicant must begin construction within six months, or request an extension. The applicant may be granted the first six-month extension if requested; however, for each subsequent extension, the applicant must come before the Committee stating why the extension is needed. There are numerous reasons why a project may take years to begin construction, including delays relating to:

- getting financing approved and finalized;
- getting necessary local planning/zoning approval;
- finalizing or changing ownership or ownership agreements;
- poor weather;
- etc.

Once construction has begun (or the project is considered capitalized), the applicant must file a PPR with the Department every six months to inform the Committee of the project development. Among other things, the PPR will list the amount of construction costs incurred, as well as the percentage of project completion. If the applicant fails to file the PPR, the Department sends a reminder notifying the applicant that it is past due. In reviewing the sample of files, Oversight noted several instances where the PPRs were not timely filed and the Department failed to timely notify the applicant of the missing PPR. Reminders were sometimes not sent until several months after the due date of the PPR. For example, the applicant for project 4801 failed to submit a PPR due March 15, 2015, and the Department did not send a reminder to the applicant until August 25, 2015, over six months late. In two other projects (4838, and 4865), the Department failed to notify the applicant of a late PPR more than five months after the due date of the PPR.

The Department noted they use a database to identify reports that are past due and then contacts the applicant by letter, email or phone. The Committee does not regard a PPR as being past due until one month following the last day of the six-month reporting period. After at least 30 days notice, the Committee may order the forfeiture of the CON upon failure of the applicant to file a PPR. Oversight notes there have been no involuntary forfeitures during the last three fiscal years.

RECOMMENDATION: Oversight recommends the Department make efforts to further develop an effective follow-up program to ensure applicants make timely progress on CON-issued projects. Another recommendation would be to place all of the responsibility of reporting progress upon the applicants. Oversight notes that none of the other states' programs reviewed provided for a fine for failure to submit timely PPRs; however, some states, such as Arkansas, can require an applicant to appear before their commission to justify why a CON should not be terminated for failure to submit timely updates.

Chapter 3

'Hoarding' of beds by applicants:

An issue that was discussed at the July 13, 2015 Committee meeting was the possibility that the number of beds approved for a project could be purposefully elevated by an applicant. The situation occurs when an application is submitted with a number of beds designated as semi-private (two beds per a single room) but once approved and built, the applicant then utilizes some of the rooms as private (single bed). The applicant may state that once additional demand materializes, the private rooms could be converted into semi-private rooms. There seemed to be an accusation of applicants "hoarding" bed counts to keep the approved bed counts under control of the applicant.

As stated earlier, the total number of CON-approved beds in a given service area is used in the calculation to determine if a need exists for future projects/applications. A large number of beds that have CON certification, but are not available for use, skews the calculation and must be taken into consideration separately by the Committee.

Transitional Hospitals:

At the September 14, 2015 Committee meeting, the agenda items included projects 5210 & 5209 - Landmark Hospital Transitional Recovery Centers (of Columbia and of Joplin).

Much discussion was given to these two projects because the Committee currently does not have a CON category or a classification for 'transitional hospitals'. Therefore, by default, Landmark Hospital Transitional Recovery Centers applied for a Skilled Nursing Facility CON, but that classification was argued to be not entirely accurate. Both projects were approved. It appears that it would require legislative action to create a new classification for CON purposes.

Chapter 4

The Pros and Cons of Certificate of Need:

Numerous reports have been written addressing the question of the necessity of CON programs and whether or not they help control the costs of health care. In Table 8, Oversight lists some of the common arguments for and against states' CON programs.

Table 8: Pros and Cons of Certificate of Need

Certificate of Need proponents' views	Certificate of Need opponents' views
CON laws can help control health care spending by promoting appropriate competition while maintaining lower cost for treatment services, avoiding duplicate services.	CON laws limit consumer choice and weakens the market's ability to contain health care costs by creating barriers to entry as well as expansion.
Vested interest - with substantial government spending on health care (Medicare and Medicaid), CON laws allow the government to have reasonable control over capital expenditures and prevent unnecessary spending.	It is not clear that CON programs actually control health-care costs. In fact, a 2004 study by the Federal Trade Commission and the Department of Justice stated that CON laws may actually increase health care costs by creating barriers for new providers.
A repeal of CON laws could result in a reduction or elimination of certain services - limiting patient access to care, especially for certain segments of the population and those living in rural areas.	CON laws favor incumbents by prohibiting new health care providers from entering the market.
Hospital protection - new hospitals and/or ambulatory surgical centers could specialize in attracting more profitable patients and leave traditional community hospitals with a less profitable overall mix of patients and services.	There does not appear to be an increase in health care costs within those states that have repealed or modified their CON programs.
Assurance of quality for specific services - more providers performing the same population (volume) of procedures could result in less experienced providers.	With more providers, new creative efficiencies may be utilized, reducing healthcare costs for patients.
Limiting the number of facilities in a given area helps prevent diluting the health care workforce.	The original health care reimbursement formulas (cost of production based) that necessitated CON programs have been replaced (with cost of treatment).

Numerous arguments have been made on both sides of the issue of whether CON laws are needed. One of the arguments for CON laws is that it helps protect hospitals that rely on more profitable services to offset the losses incurred in treating the poor and uninsured or for offering other, less profitable, services. This argument was made during the July 2015 Committee meeting discussion on Project 5160 - Fulton Medical Center. The applicant wanted to build a 10 bed hospital in Boone County, however, opponents argued that allowing a new hospital to focus on specific profitable services would harm existing hospitals in the area. The Committee denied the CON for this applicant. One of the arguments against CON laws is the belief that free market forces should be the deciding factor of whether additional capital costs are incurred for medical services. Basically, if a provider is willing to incur the investment risk of providing the service, they should be allowed to do so.

Oversight is unable to make a recommendation for either the continuance of the CON program or for its removal. The traditional arguments for continuance of the CON program remain weak and difficult to measure; however, harm could possibly come to certain segments of the health care system if this program were not in place. Over the last three fiscal years, only one of Missouri's CON applicants has effectively been denied the ability to build, expand, or equip their service as applied.

Oversight would like to thank the Department of Health and Senior Services for their assistance during this program evaluation.

REFERENCES:

1.Certificate of Need: State Health Laws and Programs - National Conference of State Legislators from http://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx

2. Ibid

3. Ibid

4. Ibid

5. Missouri Department of Health and Senior Services - Certificate of Need web page http://health.mo.gov/information/boards/certificateofneed/