

3701-12-23

**Long-term care facilities and beds.**

(A) Except as otherwise specifically provided in this rule or in another rule of this chapter, the director shall apply all of the criteria prescribed by this rule when reviewing an application for a certificate of need that relates to an existing or proposed long-term care facility, including an application for:

(1) The establishment, development, or construction of a new long-term care facility;

(2) The replacement of an existing long-term care facility;

(3) The renovation of a long-term care facility that involves a capital expenditure of two million dollars or more, not including expenditures for equipment, staffing, or operational costs;

(4) Any of the following changes in long-term care bed capacity:

(a) An increase in bed capacity; or

(b) A relocation of beds from one physical facility or site to another, excluding the relocation of beds within a long-term care facility or among buildings of a long-term care facility at the same site.

(5) Any change in the health services, bed capacity, or site, or to conduct a reviewable activity that is not in substantial accordance with the approved application for which a certificate of need concerning long-term care beds was granted, if the change is made within five years after the implementation of the reviewable activity for which the certificate was granted; or

(6) The expenditure of more than one hundred ten per cent of the maximum expenditure specified in a certificate of need concerning long-term care beds.

~~(1) The addition of long-term care beds. When reviewing the application, the director may consider:~~

~~(a) The establishment, construction, or development of a new long-term care facility, other than through relocation of existing or approved long-term care beds;~~

~~(b) The addition of long-term care beds to an existing facility;~~

~~(c) The recategorization of hospital beds from another registration category to long-term care beds, except that a recategorization application reviewed under rule 3701-12-233 of the Administrative Code shall not be subject to any of the criteria prescribed by this rule; or~~

~~(d) The replacement of one or more existing long-term care facilities, to the~~

~~extent that the replacement facility contains more long-term care beds than the total of the existing facilities; or~~

~~(2) The renovation or replacement of an existing long-term care facility, the relocation of long-term care beds from an existing long-term care facility to another existing long-term care facility, or the establishment of a new long-term care facility through relocation of long-term care beds from an existing long-term care facility.~~

(B) Subject to the restrictions imposed under division (E) of section 3702.68 of the Revised Code, the director shall utilize the following formula to determine the number of long-term care beds needed for each county for each year:

(1)  $[(\text{Population} \times .163) \times \text{risk adjustment ratio}]$

- net migration  $\times .5 \div .9$  = total bed need;

(2)  $(\text{Total bed need}) - (\text{existing and approved beds}) - (.5 \times \text{passport placements})$  = new bed need or bed excess;

Population - the director's estimate of the most recent county population of persons aged seventy-five and over based on the most recent Ohio department of development projections.

.163 - ratio of existing and approved beds to population aged seventy-five and over statewide as of December 31, 1980.

Risk adjustment ratio - the county-specific measure of the risk of a county resident entering a long-term care facility, as set forth in the appendix to this rule, based upon presence of factors influencing the utilization of long-term care beds. These factors are the county's designation by the United States department of commerce, bureau of the census, as rural or metropolitan, the number of employed women aged thirty-five to fifty-four, the number of medicare and medicaid hospital patient days for persons sixty-five or more years of age (rural counties) and the number of persons seventy-five or more years of age living alone (metropolitan counties).

Net migration  $\times .5$  - adjustment to the bed-to-population ratio to account for fifty per cent of the portion of the county's population that uses long-term care beds in other counties, based upon data for the most recent year for which complete data are available from the "Annual Survey of Long Term Care Facilities" and the "Annual Hospital Registration and Planning Report" for patient migration by county. Net migration shall be calculated by subtracting the number of patients in long-term care beds in the county who came from elsewhere (in-migration) from the number of patients from the

county who are in long-term care beds in other counties (out-migration).

.9 - occupancy factor based on the average occupancy of long-term care beds statewide.

Existing and approved beds - presently licensed, registered, or certified long-term care beds located in long-term care facilities that are existing health care facilities as defined in paragraph ~~(K)~~ (L) rule 3701-12-01 of the Administrative Code and long-term care beds for which a certificate of need or a determination of nonreviewability has been granted but that are not yet licensed, registered, or certified. Existing and approved beds shall not include any hospital skilled nursing beds for which a certificate of need was granted under rule 3701-12-233 of the Administrative Code.

.5 x PASSPORT placements - fifty per cent of the number of clients projected to be served in the county by the PASSPORT homecare program established by Chapter 5101:3-31 of the Administrative Code in the calendar year following the year in which the application for a certificate of need is submitted. Projected PASSPORT placements shall be considered only for counties in which the program is serving clients at the time the director issues a decision on the application for a certificate.

(3) Annual bed need. For each calendar year, 1989 through 1993, and for each county, the director shall recalculate new bed need or bed excess under paragraphs ~~(C)(1)~~ (B)(1) and ~~(C)(2)~~ (B)(2) of this rule. For counties with new bed need, the director then shall determine annual bed need for each calendar year in the following manner:

(a) By dividing the recalculated new bed need for that year by the number of years between that year and 1993, both inclusive.

(b) By adding to the number of beds calculated under paragraph ~~(C)(3)(a)~~ (B)(3)(a) of this rule the number of beds, if any, for which there was annual bed need in the immediately preceding calendar year and for which a certificate of need has not been granted.

(c) Reducing the annual bed need for the year to a number equal to the recalculated new bed need, if the sum obtained under paragraph ~~(C)(3)(b)~~ (B)(3)(b) of this rule exceeds the recalculated new bed need.

In reviewing applications relative to which the director issues a decision in a particular calendar year, the director shall consider annual bed need, if any, for the calendar year in question, less any beds for which a certificate of need has been granted since that year's annual bed need

was calculated.

(C) ~~For~~ Subject to the restrictions imposed under division (E) of section 3702.68 of the Revised Code, a county with a bed excess or annual bed need of less than the total number of long-term care beds included in any application reviewed under this rule, both as calculated under paragraph (B) of this rule, or in the case of a renovation, replacement, or bed relocation project, if the excess is greater than the number of beds included in the application, a presumption is created that the beds are not needed. The director shall not grant the certificate of need unless the applicant successfully bears the burden of establishing that:

(1) The project will result in renovation or replacement of one or more existing long-term care facilities, relocation of long-term care beds, or addition of long-term care beds in existing space, and:

(a) The application for the certificate of need does not propose addition of long-term care beds or proposes:

(i) Addition of a number of long-term care beds for which there is annual bed need; or

(ii) Addition of the number of beds, not to exceed five beds, sufficient to enable the long-term care facility to comply with the criterion prescribed in paragraph (G) of this rule, if addition of the beds will not affect the quality of care or life for the facility's residents such as through overcrowding;

(b) The renovation, replacement, relocation, or addition project is needed because:

(i) The existing facility or facilities are seriously substandard with respect to physical plant, as evidenced by copies of reports of deficiencies cited by building, fire, health, or safety inspectors, by other adequate documentation, or by the existence of a restriction on placing nonambulatory patients in a portion of the facility; or

(ii) The project will result in a demonstrable improvement in the efficiency of facility operations;

(c) The project will result in the long-term care facility being in compliance with current applicable building and safety codes without waivers; and

- (d) The certificate of need may be granted under all applicable criteria prescribed by this rule, rules 3701-12-20 and 3701-12-232 of the Administrative Code, and any other applicable rules of this chapter;
  - (2) The project will serve a special need that otherwise will go unserved, taking into account resources that are or will become available in the county or other relevant larger area; or
  - (3) The average annual occupancy rate for long-term care beds in the county in which the project will be located and in each contiguous county was at least ninety-five per cent during the two most recent years for which complete data are available from the "Annual Survey of Long-Term Care Facilities" and the "Annual Hospital Registration and Planning Report." In determining whether to allow a waiver under this paragraph, the director shall consider whether the relevant counties' occupancy rates otherwise would continue to be at least ninety-five per cent taking into account changes in the population of persons seventy-five and over, as projected by the Ohio department of development, and the number of long-term care beds for which certificates of need have been granted but which are not licensed, registered, or certified yet. The director shall not grant certificates of need under this paragraph for more than fifty beds or ten per cent of the county's existing and approved beds, whichever is less, in any calendar year.
- (D) ~~If~~ Subject to the restrictions imposed under division (E) of section 3702.68 of the Revised Code, if there is annual bed need for at least the number of long-term care beds proposed in an application, the director nonetheless may determine that the project is not needed, based upon consideration of:
- (1) The existence of significant community resources serving elderly or disabled individuals that are demonstrably effective in providing alternatives to placement in long-term care facilities;
  - (2) The effects of preadmission screening of potential long-term care facility residents and alternative disposition of long-term care facility residents under section 1919 of the Social Security Act, 49 Stat. 620 (1935), 42 U.S.C. 301, as amended (1981), enacted by the Omnibus Budget Reconciliation Act of 1987;
  - (3) Whether the occupancy rate for the county's long-term care beds, as reflected in the most recent available year's "Annual Survey of Long-Term Care Facilities" and "Annual Hospital Registration and Planning Report," was below eighty-five per cent; or

- (4) Whether the application proposes to reduce alternatives to placement in long-term care beds by converting rest home or other alternative beds to long-term care beds, particularly if the alternative beds were included in an earlier certificate of need and have not been constructed. For the purposes of this paragraph, the director shall not consider conversion of alternative beds to long-term care beds to be a reduction in alternatives to placement in long-term care beds if:
- (a) The beds are proposed to be converted to serve current residents of a retirement community to whom the community has a contractual obligation to provide long-term care and who now require long-term care. This exception shall be applicable only if the application contains documentation and a certification by an authorized representative of the community that the community currently provides and will continue to provide preference in admissions to contractual residents of the community, consistent with applicable law. The application also shall contain documentation that no more than ten per cent of the admissions to the long-term care beds during the six months preceding the month of application originated from outside the community;
  - (b) The alternative beds that are proposed to be converted have been in operation for at least two years before the conversion application is filed and there is documented lack of demand in the county for alternative facilities providing a substantially equivalent level of care, as indicated by significant countywide underutilization during the two years preceding the date of application; or
  - (c) The alternative beds proposed to be converted were included in an earlier certificate of need application which specifically stated that an application for conversion of the beds to long-term care beds would be filed when sufficient bed need became available and the previous application did not receive any advantage in a comparative review because the alternative beds were proposed.
- (E) The director shall not grant a certificate of need under this rule unless the application contains the following items:
- (1) A copy of an agreement with an existing state or county-sanctioned preadmission screening program that provides that the entire facility will participate in the program. If no program exists in the relevant county at the time of application, the applicant shall ~~document~~ state in the application that the facility will participate in any program that becomes available within eighteen months after services begin to be offered as the result of the project;

- (2) Documentation that the project will comply with the following requirements, as applicable:
- (a) For homes required to be licensed under Chapter 3721. of the Revised Code, the requirements for licensure under Chapter 3721. of the Revised Code and Chapter 3701-17 of the Administrative Code;
  - (b) For hospital long-term care beds, ~~and~~ beds in county homes as defined in section 5155.31 of the Revised Code that are long-term care facilities as defined in this chapter, and long-term care beds in a long-term care facility, the requirements for certification as a nursing facility or skilled nursing facility under Title XVIII or XIX of the Social Security Act. 49 Stat. 620 (1935), 42 U.S.C. 301, as amended.
- (F) The director shall not grant certificates of need for establishment, construction, or development of new long-term care facilities, including replacement facilities, other than hospitals that are long-term care facilities, with a long-term care bed capacity of less than fifty beds. The director may waive the criterion prescribed by this paragraph if the applicant demonstrates that the proposed facility of less than fifty beds can be operated in a cost-effective manner, and:
- (1) The proposed facility's size is essential to serve a special health care need that otherwise will not be served, or will serve a special health care need in accordance with current, evidence-based standards of care; or
  - (2) ~~Is~~ The proposed facility is the only feasible alternative for cost-effective correction of physical plant deficiencies ~~for a project that complies with the criteria prescribed in paragraphs (C)(1)(b)(i), (C)(1)(c), and (C)(1)(d) of this rule; or~~
  - (3) The proposed facility is part of a continuing care retirement or life care community and the application demonstrates the following:
    - (a) The applicant will be contractually obligated to provide long-term care to current residents of the continuing care retirement or life care community; and
    - (b) The continuing care retirement or life care community currently provides and will continue to provide preference in admission to contractual residents of the community.
- (G) The director shall not grant certificates of need for:

- (1) New or replacement long-term care facilities of more than one hundred fifty beds or for bed additions to existing long-term care facilities if the resulting facility will have more than one hundred fifty beds, except for a facility to replace a single, existing long-term care facility. The director may waive the criterion prescribed by this paragraph if the applicant demonstrates that a facility of more than one hundred fifty beds is essential to serve a special health care need that otherwise will not be served and that the facility can be operated in an efficient manner without sacrificing quality care for its patients; or
  - (2) An application accepted under division (C)(2) of section 3702.68 of the Revised Code unless all requirements for accepting the application under that division will continue to be met after project completion.
- (H) In reviewing a certificate of need application under this rule, the director may examine and consider, in accordance with this paragraph, any state or federal records relating to the licensure under Chapter 3721. of the Revised Code or, if applicable, the participation as a provider under Title XVIII or XIX of the Social Security Act, 49 Stat. 620 (1935), 42 U.S.C. 301, as amended, of any long-term care facilities owned, operated, or managed by the applicant, the owner or the operator of the long-term care facility to which the application relates, or by any principal participant, as defined in paragraph ~~(H)(3)~~ (H)(4) of this rule, in an entity which is or will be the applicant, owner, or operator. The application shall contain a list of all relevant long-term care facilities with dates of ownership, operation, or management. The director also may consider records pertaining to ownership or operation by these persons of long-term care facilities in other states.
- (1) The director may deny the certificate of need if the records reveal that a relevant long-term care facility's license has been revoked or its certification involuntarily denied, terminated, or not renewed, that a state licensing, survey, or medicaid agency or the United States department of health and human services has issued written notice proposing to take such an action or has imposed other sanctions, or that the facility has or had serious deficiencies that jeopardize the life, health, safety, or welfare of the residents or seriously limit the facility's capacity to provide adequate care, particularly if governmental action was based upon repeated citation of the same or similar deficiencies.
  - (2) The director also may deny the certificate of need if the applicant, owner, operator, or any principal participant has been the subject of a final determination of medicare or medicaid fraud or abuse.
  - (3) The director shall not approve an application for a certificate of need for



addition of long-term care beds to an existing health care facility by relocation of beds or for the development of a new health care facility by relocation of beds unless all of the following conditions are met:

- (a) The existing health care facility to which the beds are being relocated has no life safety code waivers, no state fire code violations, and no state building code violations;
- (b) During the sixty month period preceding the filing of the application, no notice of proposed revocation of the facility's license was issued under section 3721.03 of the Revised Code to the operator of the existing facility to which the beds are being relocated or to any health care facility owned or operated by the applicant or any principal participant in the same corporation or other business; and
- (c) Neither the existing health care facility to which the beds are being relocated nor any health care facility owned or operated by the applicant or any principal participant in the same corporation or other business has had a long-standing pattern of violations of this chapter or deficiencies that caused one or more residents physical, emotional, mental, or psychosocial harm.

~~(3)~~(4) For the purposes of this paragraph, "principal participant" means:

- (a) Any person who has an ownership or controlling interest of five per cent or more in the applicant, the facility, or its owner or operator;
- (b) An officer, director, trustee, or general partner of the applicant or of the owner or operator of the facility.

(I) In reviewing applications that propose addition of long-term care beds for which there is sufficient annual bed need, as determined under paragraph (B) of this rule, and that are batched together for comparative review under rule 3701-12-09 of the Administrative Code, the director shall consider, in conjunction with all other applicable criteria prescribed by this chapter, whether:

- (1) One or more of the applications propose renovation or replacement of one or more existing long-term care facilities, particularly if the facility or facilities ~~serves~~ serve and will serve a medically underserved population, instead of any other type of project, and meets the criteria prescribed by paragraph (C)(1) of this rule. If more than one application in a comparative review meets the criteria prescribed by paragraph (I)(1) of this rule, the director shall consider the applications under the criteria prescribed by paragraph (I)(2) of this rule.

- (2) One or more of the projects, as described in the applications, include delivery of alternatives to inpatient long-term care, such as adult day care, home health care, beds dedicated exclusively to a respite care or hospice care program, mobile or congregate meals, a residential care or adult care facility, or facilities for independent, congregate or assisted living, instead of any other type of project except for a project covered by paragraph (I)(1) of this rule. This paragraph shall not apply to an application which states that conversion of the alternative beds to long-term care beds is contemplated in the future.
- (a) The alternative services shall be available to the residents and potential residents of the long-term care facility.
  - (b) If the alternative services involve facilities for rest home care, independent or congregate living, or any other type of facility or beds that are not long-term care facilities or beds as defined in this chapter:
    - (i) Appropriate agreements shall exist between the long-term care facility and the alternative facility for transfer of residents;
    - (ii) The applicant shall certify that the capital expenditure for the alternative facility will be obligated, within the meaning of paragraph (A)(1)(a) of rule 3701-12-18 of the Administrative Code, at the same time as the capital expenditure for the portion of the project involving the long-term care facility; and
    - (iii) The applicant shall certify that no application will be filed by any person for a certificate of need for conversion of the alternative beds to long-term care beds for at least two years after the alternative beds are occupied by residents.
  - (c) The application shall contain a certification that if for any reason the alternatives to inpatient long-term care cannot be developed or provided, development of the portion of the project involving the long-term care facility will be discontinued and the director will be notified immediately.
  - (d) The application shall contain documentation of how the long-term care facility and the alternative services proposed will be integrated into the existing and projected community system for caring for elderly and disabled individuals. This documentation shall include at least:
    - (i) A thorough inventory of existing and projected alternatives to

inpatient long-term care within the county;

- (ii) A description of the planning process leading to selection of the alternatives proposed in the application, including discussions with appropriate community groups such as local aging agencies regarding the community's needs for alternative services; and
  - (iii) An analysis of the need in the community for the proposed alternative services, taking into account the needs of the target population, the existing and projected alternative services in the community, the ability of the target population to pay for the alternative services, and the expected effect of the alternative services on utilization of long-term care facilities. The application also shall contain a demonstration of the economic viability of the proposed alternative services.
- (J) If an application for a certificate of need to conduct a reviewable activity relating to a long-term care facility that is not yet existing and that proposes to reduce or eliminate any alternatives to inpatient long-term care that were included in a previous, approved certificate of need application, the director shall review the application under all applicable criteria established by this rule and by other rules of this chapter as if the earlier certificate had not been granted.

Effective:

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Certification

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Date

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