

# Overview of Virginia's Certificate of Public Need Program

By Nathan Mortier

## Introduction

In Virginia, healthcare providers who wish to develop certain types of medical care facilities or introduce specific services must first obtain a Certificate of Public Need ("COPN") from the State Health Commissioner.

Derived from a set of policy assumptions and principles dating back to the 1970s, the stated purpose of Virginia's current COPN program is to constrain the development of excess capacity and underutilization of medical facilities, encourage cost effectiveness and quality, and promote geographic and economic accessibility to healthcare services. Owners who commence development of a project covered by the COPN program without approval will be denied a license for the project and are subject to financial penalties.

Proposed projects subject to a COPN are subject to a rigorous review process based on both general and specific criteria applied by the State Health Commissioner in determining whether a project has merit. Projects determined to meet a "public need" receive approval, while projects are frequently denied when the State Health Commissioner does not identify a public need.

## Medical Care Facilities and Services that Require a COPN

Virginia law requires an applicant to obtain a COPN prior to development of a "project" as defined by Va. Code § 32.1-102.1:3. A "Project" is defined as any of the following:

- Establishment of a "medical care facility," (hospitals, including an ambulatory surgery center, nursing home, licensed intermediate care facility, imaging center, radiation therapy center, etc.)
- An increase in the total number of beds or operating rooms in an existing medical care facility
- Relocation of beds from an existing medical care facility to another existing medical care facility
- Addition of any new nursing home service at an existing medical care facility
- Introduction into an existing medical care facility of any cardiac catheterization, computed tomographic (CT) scanning, magnetic resonance imaging (MRI), medical rehabilitation, neonatal special care, open heart surgery, positron emission tomographic (PET) scanning, psychiatric, organ or tissue transplant service, radiation therapy, stereotactic radiotherapy other than radiotherapy performed using a linear accelerator or other medical equipment that uses concentrated doses of high-energy X-rays to perform

external beam radiation therapy, proton beam therapy, or substance abuse treatment when such medical care facility has not provided such service in the previous twelve months

- Conversion of beds in an existing medical care facility to medical rehabilitation beds or psychiatric beds
- The addition by an existing medical care facility of any new medical equipment for the provision of cardiac catheterization, CT, MRI, open heart surgery, PET scanning, radiation therapy, stereotactic radiotherapy other than radiotherapy performed using a linear accelerator or other medical equipment that uses concentrated doses of high-energy X-rays to perform external beam radiation therapy, or proton beam therapy, other than replacement of existing equipment
- Any capital expenditure above an annual, inflation adjusted threshold (\$20,961,758 in 2021)
- Conversion in an existing medical care facility of psychiatric inpatient beds approved pursuant to a Request for Applications (RFA) to nonpsychiatric inpatient beds

Despite the specificity of the above criteria, there are situations where it may be unclear whether a COPN is necessary for a specific project. Applicants should consult with an attorney with experience with the COPN process to help address whether a COPN is required for a given project.

## Review Criteria

The COPN statute provides eight criteria used to determine if a project warrants COPN approval.<sup>1</sup> Not all criteria apply to each project and the Commissioner has wide discretion to weight criteria differently.

Of particular importance to the Commissioner is a project's compliance with the State Health Services Plan ("SHSP"), also called the State Medical Facilities Plan ("SMFP"). The SHSP regulations provide detailed criteria for various specific types of COPN-reviewable projects. Many of the provisions of the SHSP provide specific formulas used in identifying a projected need for a given service based on historical population statistics and utilization data for existing similar services.

## The COPN Application Process and Timing

The process of obtaining a COPN is lengthy. COPN applications are considered during a "batch cycle process," meaning that there are only two opportunities per year to apply for each type of COPN project. Filing deadlines during the process are tightly structured and can lead to a delay of six months if missed.

### Letter of Intent

Each COPN application begins with the filing of a Letter of Intent ("LOI") with the Virginia Department of Health's Division of Certificate of Public Need ("DCOPN") Staff (and, in some cases, a separate regional Health Planning Agency). The LOI must identify the owner of the project, the type of project, and the scope and location of the project. Applicants must meet specific LOI deadlines to be considered during the upcoming batch review cycle.

### COPN Application

A COPN application is due on the deadline set in the batch cycle calendar. All COPN applications must be submitted on specific forms provided by DCOPN. The application form requires the gathering and presentation of a significant scope of data, information, documentation, and narrative necessary to describe and support the need for the project. Applicants frequently rely on consultants and law firms to help gather the necessary information and to prepare applications. The COPN application must be submitted with an application fee of 1% of the proposed capital cost of the project. The minimum fee is \$1,000 and the maximum fee is \$20,000.

### Completeness Review

DCOPN assigns a staff reviewer to review each application and to determine if it is complete. DCOPN staff have 10 days to review the application for completeness. The DCOPN staff may ask clarifying questions or request more information of the applicant at this stage. The applicant has 30 days to respond to any completeness review questions. Once the application is deemed complete, a 120-day

review cycle begins. If the project requires an Informal Fact Finding Conference ("IFFC") (discussed below), the review cycle is extended to 190 days. Assuming there is no need for an IFFC, the entire process from the LOI to the Commissioner's Decision spans about six months.

### Public Hearing

The general public is given 45 days to submit comments regarding each project accepted for review. In addition, DCOPN or a regional health planning agency (currently only in northern Virginia) may schedule a public hearing at the request of the applicant, a locality, another service provider, or any other person. Public hearings include a structured presentation by the applicant and the opportunity for members of the public to state their opinions about the project. If a regional health planning agency is involved, the agency may hold a board meeting following the public hearing to consider the merits of the application and to issue a recommendation.

### DCOPN Staff Report

DCOPN is required to issue a staff report on each application on or before the 70th day of the review cycle. The staff report includes analysis of the application, review and application of the relevant need and planning criteria, and a recommendation to the Commissioner on the merits of the applications. If DCOPN recommends approval of a project and no person opposes the application through a "good cause" petition (discussed below), the favorable staff report is sent to the Commissioner for a final decision, typically resulting in the issuance of the requested COPN.

### Informal Fact Finding Conference

If DCOPN recommends denial of a project, the applicant may request an opportunity to be heard at an IFFC, an administrative proceeding held before an Adjudication Officer. An IFFC will also be held if any person (such as a competing service provider) submits a petition to be recognized as a "good cause" party to the proceedings. IFFCs involve the presentation of witnesses, documents, and information and legal arguments. Legal counsel is typically engaged to prepare for and present arguments on behalf of the applicant at the IFFC and to develop closing arguments and rebuttal arguments following the IFFC. Following the close of the IFFC record, the Adjudication Officer submits a report and recommendation to the Commissioner.

### Commissioner's Decision and Appeal

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## Conclusion

The COPN process is highly structured and technical. Applicants wishing to pursue COPN approval should engage counsel with deep experience with the process to assess the merits and likelihood of success of a potential application and navigate all stages of the process.

For over a decade, Nathan Mortier has assisted dozens of COPN applicants through all phases of the application and adjudication process. Together with the Sands Anderson healthcare team, Nathan counsels clients in accessing the competitive marketplace, guides the formation of strategy and legal arguments, coordinates the development of compelling applications and supporting information, and provides experienced advocacy before administrative agencies at all levels of the COPN process. Please contact the Sands Anderson healthcare team if you require experienced guidance through Virginia's COPN process.



**Nathan Mortier**  
*Attorney*  
nmortier@sandsanderson.com  
Direct: (757) 276-8092



**William "Scott" Daisley, III**  
*Attorney*  
sdaisley@sandsanderson.com  
Main: (757) 208-0301

4801 Courthouse Street, Suite 203, Williamsburg, VA 23188  
Main: (757) 208-0301 | sandsanderson.com

