

# LEGISLATIVE RESEARCH SERVICES

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## Certificate of Need

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*You asked for a brief history of certificate of need (CON). You also wished to know the status of CON in Alaska, and if there has been recent legislation on the topic in the state.*

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Certificate of need (CON) laws are state-level measures that require healthcare institutions to obtain approval from state officials before moving forward on large capital expenditure projects, such as the construction of a new facility or the purchase of expensive new equipment.<sup>1</sup> When a new project is proposed, state officials evaluate whether there is a public need for the project before either approving or rejecting the proposal. The approval document is typically called a certificate of need. The laws are designed to prevent healthcare institutions from building too many facilities and buying unnecessary expensive devices.<sup>2</sup>

### **Brief History of CON**

The first national law related to this issue was the Hill-Burton Act in 1946, which was intended to control the supply of medical facilities in the country.<sup>3</sup> In 1964, New York became the first state to enact a statute granting the state government power to determine whether there was a need for any new hospital or nursing home before it was approved for construction. In 1974 Congress passed the National Health Planning Resources Development Act (P.L. 93-641), which required states to adopt certain health planning functions—and create and implement CON programs—or face financial penalties. Alaska initiated its CON program on July 1, 1977. The federal mandate was repealed in 1987, along with the associated federal funding, but as of April 2016, 35 states—including Alaska—still maintain certificate of need programs.

States that have retained CON programs currently tend to concentrate activities on outpatient facilities and long-term care. This is largely due to the trend toward free-standing, physician-owned facilities that constitute an increasing segment of the health-care market.

### **Pros and Cons**

Generally, supporters contend that CON laws help contain rising healthcare costs and financially protect hospitals that provide charity care. Critics, however, say the laws create a barrier to entry that limits competition and contributes to rising healthcare costs. Below we list the primary arguments for and against CON laws.<sup>4</sup>

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<sup>1</sup> We found information for this report from a number of sources including the National Conference of State Legislatures (<http://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx>), the website Ballotpedia ([https://ballotpedia.org/Certificate\\_of\\_need\\_laws](https://ballotpedia.org/Certificate_of_need_laws)), and previous reports from our agency. In some instances, we use material from these sources nearly verbatim.

<sup>2</sup> While CON laws themselves are state-level, the federal government also has its own regulations for capital expenditure review. These regulations pertain to the Medicare and Medicaid public healthcare programs and allow the U.S. Department of Health and Human Services to deny reimbursement under the programs for large capital expenditures that are not approved by a state health planning agency.

<sup>3</sup> Information on this act is accessible at <https://www.hrsa.gov/gethealthcare/affordable/hillburton/>.

<sup>4</sup> The pros and cons list comes from the National Conference of State Legislatures at <http://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx>.

### Arguments in Favor of CON Laws

- Healthcare cannot be considered as a “typical” economic product;
- Most health services (like an x-ray) are “ordered” for patients by physicians, patients do not “shop” for these services the way they do for other commodities;
- The American Health Planning Association (AHPA) argues that CON programs limit health-care spending;
- CON programs can distribute care to areas that could be ignored by new medical centers; and
- CON requirements do not block change, they mainly provide for an evaluation, and often include public or stakeholder input.

### Arguments against CON Laws

- By restricting new construction, CON programs may reduce price competition between facilities and keep prices high;
- Some changes in the Medicare payment system (such as paying hospitals according to Diagnostic Related Groups – “DRGs”) may make external regulatory controls unnecessary by sensitizing healthcare organizations to market pressures;
- CON programs are not consistently administered;
- Health facility development should be left to the economics of each institution rather than being subject to political influence;
- Some evidence suggests that lack of competition encourages construction and additional spending;
- Potential for CONs to be granted on the basis of political influence, institutional prestige or other factors apart from the interests of the community; and
- It is not always clear what the best interests of the community entail.

### ***Alaska’s CON Program and Proposed and Enacted Legislation in the State, since 1993***

Again, Alaska implemented its CON program in 1977 and still maintains one. The state’s CON program is housed within the Department of Health and Social Services. Its program summary webpage includes the following:

The Certificate of Need (CON) program is a review process used to promote responsive health facility and service development, rational health planning, health care quality, access to health care, and health care cost containment. Project reviews help ensure that the public will be able to comment on the project during its development, that it fits well within the continuum of care, and that the project will meet the public need while preventing excessive, unnecessary, or duplicative development of facilities or services. . . The State of Alaska has a vested interest in new health care construction projects and equipment purchases because of the large amount of money the state expends for Medicaid.

We encourage you to review the Alaska’s CON webpage at <http://dhss.alaska.gov/dhcs/pages/certificateofneed/default.aspx>. This page provides a wealth of information on the state’s program, including relevant statutes and regulations, CON activities, utilization data, and annual reports.

We reviewed the Legislature’s Bill Action and Status Inquiry System (BASIS) from 1993 to the present for measures pertaining to CON. We identified the following bills that have been considered. Copies of the measures along with how they fared with lawmakers are accessible at the BASIS links provided below each bill’s long title. You will notice that since 1993 there have been three CON bills enacted (in 2004, 1999, and 1996), and that there has been no proposed CON legislation since 2007.

**BILL:** HB 4

**SHORT TITLE:** MEDICAL FACILITY CERTIFICATE OF NEED

**BILL VERSION:**

**CURRENT STATUS:** (H) HES

**STATUS DATE:** 01/16/07

THEN L&C, FIN

**TITLE:** "An Act amending the certificate of need requirements to apply only to health care facilities that are nursing homes or residential psychiatric treatment centers or that are located in a borough with a population of not more than 25,000, in the unorganized borough, or in a community with a critical access hospital."

[http://www.legis.state.ak.us/basis/get\\_bill.asp?session=25&bill=HB4](http://www.legis.state.ak.us/basis/get_bill.asp?session=25&bill=HB4)

**BILL:** HB 511

**SHORT TITLE:** CERTIFICATE OF NEED PROGRAM

**BILL VERSION:** SCS CSHB 511(FIN)

**CURRENT STATUS:** CHAPTER 48 SLA 04

**STATUS DATE:** 06/04/04

**TITLE:** "An Act relating to the certificate of need program for health care facilities; and providing for an effective date."

[http://www.legis.state.ak.us/basis/get\\_bill.asp?session=23&bill=HB511](http://www.legis.state.ak.us/basis/get_bill.asp?session=23&bill=HB511)

**BILL:** HB 407

**SHORT TITLE:** CERTIFICATE OF NEED PROGRAM

**BILL VERSION:**

**CURRENT STATUS:** (H) FIN

**STATUS DATE:** 04/16/02

**TITLE:** "An Act relating to the certificate of need program."

[http://www.legis.state.ak.us/basis/get\\_bill.asp?session=22&bill=HB407](http://www.legis.state.ak.us/basis/get_bill.asp?session=22&bill=HB407)

**BILL:** HB 485

**SHORT TITLE:** CERTIFICATE OF NEED/MENTAL HEALTH

**BILL VERSION:**

**CURRENT STATUS:** (H) HES

**STATUS DATE:** 02/19/02

THEN FIN

**TITLE:** "An Act relating to the certificate of need program; establishing a temporary moratorium on the issuance of certificates of need for additional acute care psychiatric beds until July 1, 2003; establishing a working group to study and issue a report about psychiatric care services; and providing for an effective date."

[http://www.legis.state.ak.us/basis/get\\_bill.asp?session=22&bill=HB485](http://www.legis.state.ak.us/basis/get_bill.asp?session=22&bill=HB485)

**BILL:** SB 256

**SHORT TITLE:** CERTIFICATE OF NEED PROGRAM

**BILL VERSION:**

**CURRENT STATUS:** (S) FIN

**STATUS DATE:** 03/18/02

**TITLE:** "An Act relating to the certificate of need program; and providing for an effective date."

[http://www.legis.state.ak.us/basis/get\\_bill.asp?session=22&bill=SB256](http://www.legis.state.ak.us/basis/get_bill.asp?session=22&bill=SB256)

**BILL:** HB 187

**SHORT TITLE:** CERTIFICATES OF NEED FOR HEALTH FACILITY

**BILL VERSION:** CSHB 187(FIN)

**CURRENT STATUS:** CHAPTER 55 SLA 99

**STATUS DATE:** 06/04/99

**TITLE:** "An Act removing a requirement that a certificate of need is needed before elimination of a category of health services provided by a health care facility; prohibiting a person from converting a building or part of a building to a nursing home that requires licensure unless authorized by a certificate of need; setting a standard of review for applications for certificates of need relating to nursing homes and nursing home beds and relating to that standard of review; providing that the standard of review for applications for certificates of need for beds other than nursing home beds or for a health care facility other than a nursing home is the availability and quality of existing health care resources or the accessibility to those resources compared to the current or projected requirement for health services required to maintain the good health of citizens of this state; defining the term 'nursing home bed'; eliminating statutory references to the office of planning and research in the Department of Health and Social Services; and providing for an effective date."

[http://www.legis.state.ak.us/basis/get\\_bill.asp?session=21&bill=HB187](http://www.legis.state.ak.us/basis/get_bill.asp?session=21&bill=HB187)

**BILL:** HB 528

**SHORT TITLE:** NURS.HOME MORATORIUM/CERTIFICATES OF NEED

**BILL VERSION:** SCS CSHB 528(RLS)

**CURRENT STATUS:** CHAPTER 84 SLA 96

**STATUS DATE:** 06/20/96

**TITLE:** "An Act relating to applications for certificates of need and licensing of nursing homes; establishing a moratorium with respect to acceptance of new applications for a certificate of need or for a license for additional nursing home capacity in the state until May 1, 1998; establishing a working group to study and issue a report about long-term care; and providing for an effective date."

[http://www.legis.state.ak.us/basis/get\\_bill.asp?session=19&bill=HB528](http://www.legis.state.ak.us/basis/get_bill.asp?session=19&bill=HB528)

We hope this is helpful. If you have questions or need additional information, please let us know.