

SPECIAL

A Guide to Connecticut's Certificate-of-Need Process

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IN Connecticut, health-care facilities or physician groups seeking to acquire major medical equipment or start capital projects that exceed certain monetary thresholds, add or eliminate services or functions, submit a certificate of need (CON) to, and receive the approval of, the Office of Health Care Access (OHCA).

The technical and filing requirements for the CON process are well defined by complex and detailed statutes. (Conn. Gen. Stat. §§ 19a-638 to 639.) Those statutes make only a brief reference to the circumstances under which OHCA may be required to hold a public hearing as part of a CON application. In comparison with the detailed statutory and regulatory requirements for the CON application process, there is not a lot of information available to allow health-care facilities to prepare effectively for and navigate the public hearing component of the CON process. Because many public hearings are contested proceedings involving participation by outside advocates and competitors, the public hearing can be crucial to the success of the proposed application.

The purpose of this article is to provide health-care facilities with a roadmap to compliance with public hearing requirements in contested cases and to suggest strategies designed to enhance the prospects for obtaining OHCA approval for projects.

When is a Case Contested?

Not all CONs require a public hearing as part of OHCA's review and approval process. In fact, CON applications are not typically treated as "contested" until a

person or entity other than the CON applicant makes a request to OHCA to participate in the public hearing.

A person or entity that seeks to participate in the public hearing may do so by requesting party or intervenor status. These requests must be made to OHCA five calendar days in advance of the scheduled public hearing date. Party status is desirable because it gives the person or entity the right to seek court review of OHCA's CON ruling. In order to be designated as a party, it must be shown that the requestor's "legal rights, duties and privileges" are required to be determined by OHCA or will be specifically affected by its decision. As a practical matter, OHCA rarely exercises its discretion to grant party status. Instead, it is much more common to allow participation in the hearing process as an intervenor with rights to present testimony and to cross-examine the applicant's witnesses. In order to be granted intervenor status, a person or entity must persuade OHCA that participation in the hearing would "furnish assistance" in resolving the issues in the contested case and "will add evidence or arguments" that would not otherwise be available.

Prehearing Preparation

When intervenor status is granted, OHCA typically issues a written order requiring the applicant and intervenor to submit proposed witness testimony and other evidence in written form before the public hearing starts. Hearing participants who fail to comply with OHCA's order to submit testimony and evidence in advance of the hearing run a serious risk of being precluded from presenting that information at the public hearing. While the regulations do provide for some prehearing discovery such as seeking production of documents relevant to the hearing issues, these discovery procedures are rarely used as part of the OHCA hearing process. Unlike civil

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lawsuits, there is only a limited ability to find out much about the evidence supporting the other side's position.

Prehearing preparation is crucial to the success of presenting an effective case and making an adequate record at the public hearing. While OHCA public hearings are not the same as civil jury trials, the process of getting ready for the public hearing should be approached in a fashion similar to preparing for trial. Effective preparation typically includes meeting with witnesses before the hearing to review testimony, filing appropriate requests or motions before the start of testimony, and preparation for cross-examination of the other side's witnesses.

The Hearing

OHCA hearings are typically held at its offices in Hartford. In instances where a large number of people are expected to attend the hearing, OHCA may move the hearing to another location—most frequently a hearing room at the State Legislative Office Building. Public hearings are always audio recorded and sometimes may be taped for telecast on the state's public access television network.

OHCA encourages and expects hearing participants to be brief and efficient in their presentations. Typically, the CON applicant presents its case first, followed by the intervenor's presentation. OHCA hearings are usually presided over by the Commissioner, with the participation of OHCA staff who are intimately familiar with the technical and financial aspects of the application. It is not uncommon for each side's presentation to be limited to 10 to 20 minutes. After the conclusion of the main presentation, the CON applicant cross-examines the intervenor's witnesses and vice-versa. OHCA does not typically place any formal limitation on the time allowed for cross-examination. Often, cross-examination can be the most effective tool there is to make the points necessary to demonstrate the strength of your position or the weaknesses in the opponent's claims. A successful cross-examination often depends on diligent prehearing preparation, especially since participants are required to prefile any testimony they wish to introduce.

As an administrative procedure, the OHCA public hearing does not strictly follow the formal rules of evidence that would apply in a courtroom. Instead, OHCA's regulations allow the Commissioner, as the hearing officer, a great deal of discretion to determine what evidence will be allowed and to exclude "irrelevant, immaterial or unduly repetitious evidence." In addition, the hearing officer has the discretion to take "notice" of OHCA's prior decisions and orders, and to take notice of "generally recognized technical or scientific facts" within OHCA's expertise. Requesting OHCA to take notice of its prior actions or technical matters can be a powerful tool in making the hearing process more efficient and effective.

As in any proceeding, there may be issues that arise during the course of the hearing that were not anticipated or that require further clarification. When that occurs, hearing participants may request the opportunity to submit a "late file" with OHCA to address or respond to open items.

After the public hearing is closed, OHCA issues a written decision that includes findings of fact and conclusions regarding whether the proposed project satisfies the statutory criteria for meeting need and enhancing access to health care in a cost effective way. Written decisions are issued within 90 days after OHCA receives a complete CON application from the Applicant, but as a practical matter, decisions are usually issued approximately 30 days after the hearing.

Conclusion

CONs submitted by health-care facilities and physician groups typically involve proposals and projects that are crucial to the success and financial stability of the enterprise. As this article suggests, advance planning and preparation, familiarity with the technical requirements, and careful strategic planning pay significant dividends in making the public hearing a persuasive part of the CON process and not just an exercise in formality.