

LEGISLATIVE AUDIT COMMISSION



Program Audit
ILLINOIS HEALTH FACILITIES PLANNING BOARD

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PROGRAM AUDIT
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SEPTEMBER 2001

RECOMMENDATIONS - 7

Background

The Illinois Health Facilities Planning Board was created in 1974 to establish a procedure designed to reverse the trends of increasing costs of health care resulting from unnecessary construction or modification of health care facilities. The Board issues permits or certificates of need (CON). These permits allow health facilities to modify or construct facilities and to acquire major medical equipment.

The Board is composed of 15 voting members appointed by the Governor with Senate confirmation. The Board's members include eight consumer representatives and seven industry members. Pam Taylor of Danville has been the chair since 1980. The Department of Public Health provides administrative and staff support for the Board.

The Health Facilities Planning Act details the types of projects requiring review. A transaction is subject to review and requires a permit if the transaction meets one of the following criteria:

- Requires a total capital expenditure in excess of \$6 million (as of June 2000);
- Substantially changes the scope or functional operation of a facility;
- Results in the establishment of a health care facility;
- Increases the bed capacity or distributes beds among various categories of service or by relocating beds from one site to another by more than 10 beds or more than 10%;
- Involves a change of ownership; or
- Results in the discontinuation of an entire health care facility or category of services.

The Board approved 111 of 130, or 85% of projects it reviewed during FY2000 for a total of \$853 million. Applicants also pay a fee between \$700 and \$100,000 for project review.

Legislation passed in June 2000 required this audit and made several other changes as follows:

- Raised the dollar threshold for review;
- Excluded non-clinical service areas from review;
- Included a provision to sunset the Health Facilities Planning Board Act on July 1, 2003;
- Included ethics laws requirements; and
- Prohibited ex parte communications.

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Summary

This audit was conducted pursuant to PA 91-0782, which directed the Auditor General to conduct an audit of the Health Facilities Planning Board to determine the following:

- Whether the certificate of need (CON) process is successful in controlling health care costs, allowing public access to necessary health services, and guaranteeing the availability of quality health care to the general public;
- Whether the Board is following its adopted rules and procedures;
- Whether the Board is consistent in awarding and denying certificates of need; and
- Whether the Board's annual reports reflect a cost savings to the State.

Determining whether a certificate of need (CON) program is effective is a difficult task. The Board has done a number of studies and reports that consider elements of effectiveness, but has not done an overall evaluation of the program's effectiveness. The only tangible cost savings the Board has identified in its annual reports is the difference between dollars proposed and dollars approved. Studies did not consider or showed little evidence that CON programs have positive effects on access or quality of care.

The auditors identified a few instances when criteria were not applied consistently. Some project review criteria in the administrative rules relate closely to one another, so that one negative criteria may domino or carry over into other criteria causing them to be negative as well.

The majority of FY2000 projects analyzed by the auditors complied with the timeliness standards in the Board's administrative rules. When an application is submitted, State agency staff must first determine whether the application is complete or incomplete and notify the applicant of their decision within 10 working days. DPH met this requirement in 128 out of 130 cases. If the application is deemed incomplete, the applicant has 90 days to complete the application. Once an application is deemed complete, applications must be acted upon between 60 and 210 days. Only one project was not scheduled for initial action within 120 days.

Illinois' review period was the eighth lengthiest compared to the 33 other states for which data was available. Thirty-seven states including the District of Columbia have the Certificate of Need program.

The Board did not consistently follow the administrative rules related to deferrals. Some projects were deferred beyond what was allowable in the rules, and other projects were deferred even though nothing in the rules allowed the Board to defer them. Some seemingly similar projects were treated inconsistently but then were all eventually approved without changes. The Board does not issue a statement of findings that documents why a project is approved or denied. Therefore, it is sometimes difficult to determine why a decision was made.

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As part of their work, auditors met with representatives of the health care industry to get their opinions on the Planning Board and its effectiveness. Some issues raised may be important for the Board or the General Assembly to consider.

- **Level Playing Field**—The CON process covers services that are provided in hospitals and certain other health facilities, but may not cover some of the same services in another setting such as radiological equipment for use in a physician's practice apart from a hospital. Further, assisted living facilities are exempt from the CON process, even though they compete directly with nursing homes.
- **Financial Viability**—By law, a person establishing, constructing or modifying a health care facility must have the financial resources to adequately provide a proper service for the community. However, in the projects approved by the Board that the auditors analyzed, less than one-third of the projects, where the financial viability criteria applied, received a positive rating. In other words, financial viability criteria did not appear to affect the Board's decision when awarding a CON.
- **Redundancy with Licensing**—Requiring a CON for closing a facility or ending a service, such as a nursing home, is required and it is redundant. The Nursing Home Care Act requires facilities to notify Public Health, residents and patients' representatives of the closing of a facility or portion of a facility and to assist the resident and notify Public Health of residents who will need relocation assistance.
- **Reviewing Discontinuation**—Concerns were also raised about the effectiveness of the statutorily required Board review of discontinuation projects.
- **Permits with Conditions**—Questions were raised related to the Board's authority to approve permits with conditions, especially if the conditions are not closely related to the application being considered.

If the State does not have a CON program or phases out coverage of some services, it may be necessary to develop other compensating standards or requirements which would allow for the public health to be protected such as a regulatory procedure that requires that a minimum number of procedures be done.

Recommendations

- 1. The Health Facilities Planning Board should assure that when conditions are required of applicants, that those conditions relate to the projects being considered and comply with the Health Facilities Planning Act.**

Findings: Requiring applicants to meet conditions related to their projects' approval may help the Board to meet its objectives, but some conditions imposed may be excessive. Industry representatives expressed concern about permits that are approved with conditions, and questions were raised related to the authority to approve permits with conditions and whether the Board follows up on permits that are subject to conditions.

The auditors identified a scenario with conditions that did not seem closely related to the application being considered by the Board. The permits were requesting to consolidate health corporations, and a settlement agreement which eventually granted the

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consolidations placed conditions that required the applicant to provide concessions to physicians of one of the associated hospitals. The conditions included:

- Including physicians on the hospital board selected from a list of nominations by the medical staff;
- Having the medical staff bylaws constitute binding contracts;
- Banning exclusive physician contracts;
- Working to allow physicians in the county to participate in a managed care entity partially controlled by the applicants; and
- Requiring applicants to make contributions totaling \$600,000 over four years to two free clinics—one in Danville and one in Joliet.

HFPB Response: While the State Board agrees that conditions required of applicants relate to projects being considered and should comply with the Planning Act, it does not concur or agree that the cited case should serve as a basis for this recommendation. The State Board notes that the report did not find the use of conditions beyond the scope of the State Board’s authority and that there was only a single case cited as an example of “conditions that do not seem closely related to the application being considered by the Board.”

The “conditions” relating to this case were the result of a negotiated settlement agreement that was agreed to by the applicant, as well as the State Board and other parties. It was court approved and involved litigation between the State Board and an applicant. This particular case was unique in the history of the Illinois CON program, and because of the settlement agreement, the application was not processed or reviewed in accordance with established procedures. Furthermore, the applicant at all times has the legal right to pursue resolution of the dispute through the courts. The State Board believes the conditions were appropriate, and does not believe this unique case is indicative of the use of conditions nor similar to instances where applicants have agreed to comply with certain performance requirements as conditions for maintaining a valid permit. Nonetheless the State Board will review and analyze whether procedures or regulations should be adopted that provide a process for demonstrating that conditions comply with the Planning Act and that they relate to the type of project being reviewed.

The detailed background of the cited case and the Agreed Consent Order and settlement agreement are appended to the original audit report. (See Appendix H)

Auditor Comment: Although the conditions were part of a negotiated settlement agreement, it is not clear how some of the conditions were related to the consolidation of health care corporations.

2. **The Planning Board and State agency staff at Department of Public Health should take every effort to analyze their effectiveness and to make changes to improve effectiveness. This may include working with consumers, health care payors, health research in groups, health care providers, health care**

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associations, and members of the General Assembly to be certain that the Illinois health planning process serves the needs of the people of Illinois.

Findings: One area where the CON programs can be effective is in requiring applicants to document that they will be able to do a sufficient number of procedures to assure that they are done competently. According to many medical studies, this is particularly important for applicants that are doing some specialized procedures such as open heart surgery, cardiac catheterization, non-hospital based ambulatory surgery, kidney transplants, and intraoperative magnetic resonance imaging. The Board has administrative rules to help assure that sufficient volume of these types of procedures can be obtained.

The auditors identified a project which was approved when volumes were not sufficient and without being subject to conditions. Also, three projects were approved even though it appeared that they might have an adverse impact on an existing service and make it fall below the target volume.

The CON program has been in place for over 25 years. For nursing homes, overall excess capacity is 14,835 beds, or 15%. For hospitals, excess capacity is 17,927 beds, or 91%.

HFPB Response: The State Board agrees with the recommendation to analyze and to make changes to improve the effectiveness of the CON program. The State Board will develop a plan or strategy by the end of the calendar year to address methods of evaluating CON's impact upon controlling health care costs, allowing public access to necessary health services, and guaranteeing the availability of quality health care to the general public. The State Board has already established work groups representing both consumers and providers and will seek input from health care associations, other State agencies, members of the General Assembly and the Governor's office.

DPH Response: The Department is committed to assisting the State Board through the provision of administrative and staff resources in efforts to achieve this recommendation. As always, the Department staff is prepared to assist and work with the State Board, consumers, providers, and legislators in efforts to analyze the effectiveness of and to recommend changes to the certificate of need program. The Department notes, however, that the authority to make changes to any standards, criteria, and administrative procedures are under the jurisdiction of the State Board.

- 3. State agency staff at the Department of Public Health should assure that evaluation criteria are applied consistently in the projects that they review and the State Agency Reports that they prepare.**

Findings: State Agency Reports generally provide an objective evaluation of proposed projects by applying administrative rules. The auditors identified a few instances when criteria were not applied consistently. While these inconsistencies were by and large

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minor in nature, State Agency Reports are one of the primary sources that the Board uses in making its decision and all criteria should be applied consistently.

HFPB Response: This recommendation pertains to the Department of Public Health. The State Board concurs with the Report's findings that "inconsistencies were by and large minor in nature" and notes that these discrepancies did not affect the State Board's assessment of need or outcomes.

DPH Response: The Department concurs with the Auditor General's finding that any inconsistencies in the State Agency Reports were "by and large minor in nature." The audit team reviewed the Department's State Agency Reports (SAR) on 130 certificate of need applications containing findings on approximately 2,000 review criteria and identified 21 instances where the findings appeared inconsistent among similar applications. The Department notes the following with respect to these 21 cases:

- The vast majority (17 of the 21 findings) of these cases involved the staff analyzing and submitting findings on information provided by the applicant for review criteria that should have been reported as "not applicable."
- In two of the remaining four cases that were cited, the Department believes that staff utilized appropriate judgment in evaluating unique circumstances pertaining to the applications being reviewed and in arriving at the findings contained in the SAR. The audit team has been advised of our rationale concerning these two instances.
- Nearly all of the identified instances appeared to concern review criteria that were tangential to an applications' primary focus of justifying the need for a project (i.e. compliance or noncompliance with these criteria would not have a substantial impact upon an applicant's overall justification of the need for a project).
- The State Board noted in its comments concerning this recommendation that the 21 cited instances did not affect the outcome pertaining to the issuance of a certificate of need.

While the Department is functioning with 99.9% accuracy for the State Agency Reports, the Department nonetheless believes improvement can be made. The Department will strive to assure that there are no inconsistencies in the SAR findings. To accomplish this objective, additional checks and balances have been implemented including greater supervisory oversight in the initial development of draft reports and an additional administrative review to assure both continued quality in the substance of the reports as well as technical consistency in the application of the review criteria.

Auditor Comment: *During the course of the audit, we provided the Department with examples of instances where State Agency findings were inconsistent. There were additional instances of inconsistencies among similar applications that we identified. While our testing showed that over 10% of the*

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projects had at least one inconsistency, all inconsistencies were by and large minor in nature.

- 4. The Health Facilities Planning Board should examine their review criteria and make adjustments to the existing criteria or eliminate duplicative criteria to minimize the domino effect.**

Findings: Several review criteria in the administrative rules relate closely to one another. If one section receives a negative in the State Agency Report, the negative will carry over into other criteria causing them to be negative. One example is the target utilization of 80% as a specific review criteria for a proposed Ambulatory Surgical Treatment Center (ASCT). If utilization is less than 80% for an ASCT in the geographical area where a new ASCT is being proposed, then that criterion is judged negatively along with the three other criterion that follow because all are judged on the 80% utilization rule.

HFPB Response: The State Board will examine its review criteria to address the “domino effect.” Although the Report expresses a concern that Department findings “look better or worse than it (State Agency Report) really is,” the State Board does not believe that the “domino effect” has adversely affected the outcome of projects with respect to demonstrating need and justifying approval. Nonetheless, the State Board recognizes the sensitivity of the provider community to “negative” findings and believes that this concern can be addressed by the end of the year.

- 5. The Health Facilities Planning Board should assure that deferrals are used consistently. The Board should assure that the administrative rules are followed and that applicants are given consistent and fair consideration.**

Findings: The administrative rules currently state that the applicant has the opportunity to defer initial consideration of a project, but not beyond a scheduled meeting date that is more than one calendar year from the date the application was deemed complete. Previous to this rule change, effective April 7, 2000, the applicant was allowed to defer only once.

The auditors noted five projects that were deferred beyond what was the allowable rules, which stated that the applicant may defer one time the initial consideration of the project. As a result of the rule change, applicants may defer initial consideration of their project multiple times; however, noncompliance may still arise if the Board allows deferrals past the allotted time period of one year.

HFPB Response: The report correctly noted that the State Board has recently revised its rules in order to address the issue of deferrals and has attempted to provide a procedure that is easily understood and utilized by applicants. The State Board has always attempted to be responsive by affording ample opportunities to correct deficiencies in applications. The State Board will monitor the use of deferrals as well as adherence to other procedural rules during the remainder of this year and will implement additional

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changes as quickly as possible if it appears that applicants are not given consistent and fair consideration.

- 6. The Board should assure that all applications are treated consistently. This may require reviewing how similar projects were treated and may require comparing similar projects to choose the best one.**

Findings: Of eight denied projects, auditors questioned whether some were treated consistently by the Board.

In the first scenario, an applicant proposed to construct a 56-bed sheltered care facility for Alzheimer's patients. The State Agency Report stated that there were four underutilized facilities in the planning area. Although the applicant provided referrals that could fill the proposed facility, it did not appear that these patients were currently inappropriately placed. The Board denied the project in August 1995.

A similar project proposed a 120-bed facility with 24 units for Alzheimer's patients in the same area as the project above. The State Agency Report stated again that four facilities in the planning area were underutilized. The Board approved the project in January 1997.

A second scenario involving two applications for Ambulatory Surgical Treatment Centers in the same area ended in the same result with one application being denied in June 1996 and the other being approved in January 1997.

In a third scenario, three substantially similar proposals for ASTCs in the same area were presented to the Board in 1998. There was one hospital in the community but no ASTC. Project C was the third application submitted but the first to appear before the Board. Project C, with eight Agency Report negatives was denied at its first appearance in February 1998, denied again in June 1998 and approved in August 1999. Project B, with 12 Agency Report negatives, was denied at its first appearance in April 1998, denied again in August 1998, and approved in July 1999. Project A, also with 12 Agency Report negatives, was approved at its first appearance in April 1998. After examining the State Agency Reports and meeting transcripts, it was unclear why the Board initially approved Project A over the other projects.

HFPB Response: The report points out that there appear to have been occasions where applications proposing similar services may have had different outcomes. The State Board notes that, while some applications are similar, none are identical. Each case is reviewed on its own merits, within its own unique context, with consistent attention to equitable administration of the Board's authority. Even the most similar of cases may exhibit different applicant responses to the same review criteria and may have had different degrees of support from the community through the public comment and hearing process. The State Board agrees that applicants should be treated consistently, and appreciates the Report's suggestion that a comparative review process be initiated in order to choose the best application to meet community needs. The State Board will initiate a

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review of its procedures to consider whether a comparative review process should be initiated in Illinois to assure overall consistency in application reviews.

- 7. The Board should consider issuing a statement of findings for why a project is approved or denied. This should be done for all projects approved as well as projects receiving an intent-to-deny, an initial denial, and a final denial. For denials, this statement should not just reiterate the criteria not met in the State Agency Report since most projects are approved without meeting all criteria.**

Findings: The Board does not issue a statement of finding that documents why they approve or deny a project. It is therefore sometimes difficult to understand the reasons for the decision. The auditors identified instances of unclear Board actions.

In June 1998, an existing hospital proposed to replace its existing hospital information system because it was outdated and was not Y2K compliant. The Board issued an intent-to-deny. Subsequently the applicant addressed variances that cleared two of the three negatives, but did not alter the project. The project was then approved in August 1998 when the applicant stated that if the project did not get put in place, the accounting and clinical systems of the organization would become inoperative.

An applicant proposed to construct a health and fitness center adjacent to the facility's primary care center. The Agency Report gave the application positive findings for all applicable criteria. At the August 1998 meeting, the Board expressed concern for a not-for-profit hospital competing against for-profit fitness centers. The applicant was twice denied and the project went to administrative hearing and was still in that process in May 2001.

An applicant proposed to construct a long-term care facility with 112 beds in McLean County. The bed inventory in March 1999 showed a need for 161 beds in the planning area. The State Agency report stated that nine of 13 existing long-term providers were below the 90% target occupancy. The applicant contested the occupancy figures and showed in three separate surveys that the average occupancy rates were exactly 90%. The Board denied the project.

HFPB Response: The State Board has considered the issue of written findings in the past and will consider this matter again by the end of the year. The State Board concurs that applicants are entitled to know the basis of approval or disapproval. To assist applicants and interested parties, the State Board has utilized a court reporter to transcribe the entire proceedings of State Board meetings. Nonetheless, many applicants may desire comments or specific citations from Board members with respect to what criteria are adequately met or not met. The State Board will explore various options with respect addressing this recommendation.