



INSTITUTE FOR JUSTICE

April 29, 2020

VIA Email and UPS

Judith M. Persichilli
Commissioner, N.J. Department of Health
Post Office Box 360
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Re: Expanding Certificate-of-Need waivers during COVID-19 pandemic.

To Commissioner Persichilli:

I am writing on behalf of the Institute for Justice (IJ)—a national public-interest, civil liberties law firm—to respectfully request that your office expand the Temporary Operational Waivers. Specifically, please allow **facilities listed in N.J.A.C. § 8:33H1.1(c) to expand without a certificate of need (CON).**¹

My colleagues and I applaud you and Governor Murphy for waiving requirements allowing: (1) hospitals to add additional beds without first obtaining a CON and (2) home health agencies and hospice agencies to expand outside their existing service areas without a CON.

As the COVID-19 pandemic has shown, residents of the Garden State still need access to more care, not less, which is why we request that you further expand your CON waivers. Such action would be commonsense and compassionate and in line with the other swift actions the Department of Health has already taken in response to the pandemic.

For nearly three decades, IJ has worked to reduce and remove burdensome, unnecessary, and in this case, dangerous, licensing requirements, including in the healthcare field.² IJ also drafts model legislation and advises legislatures throughout the country on licensing and other regulatory matters. IJ's mission is to support and protect the right of all Americans to provide for themselves and care for their health free from unreasonable interference.

In recent years, IJ has become particularly concerned about the burdens that state CON laws impose on access to healthcare.³ Not only do these laws fail to protect public health and safety, they restrict the number of available healthcare providers, drive up consumer costs, and decrease quality of services.⁴ Indeed, the evidence is near universal that CON laws fail to further any legitimate government purpose.⁵ Instead, they serve as barriers to entry.⁶ The problems with CON laws amount to more than bad policy and courts from the Supreme Court down have condemned economic protectionism of this nature.⁷

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During this time of crisis, New Jersey has already demonstrated that it is uniquely positioned to address today's concerns. As already mentioned, you have taken several measures to increase access to healthcare, including reducing credentialing and licensure requirements for healthcare providers and increasing access to telehealth services. These actions have vastly expanded the number of providers and types of services available to patients throughout New Jersey.⁸ These measures are extremely welcome and demonstrate the Department's ability to tailor solutions to evolving challenges.

But there is more that can be done to serve patients and support healthcare workers. Patients now need access to continued care and under current state law, many facilities such as nursing homes, assisted living, and long-term care centers are required to go through the months-long CON process before they can respond to patients' needs.⁹ The providers need more flexibility to provide safe, quality services to patients.

These entities are simply unable to meet these regulatory burdens right now, nor should they be forced to divert their limited resources away from patient care. During a pandemic, these irrational and significant administrative burdens cross the line from counterproductive red tape to potentially deadly barriers to necessary care.

Thankfully, this problem has a simple solution. In fact, states like Connecticut, Georgia, and South Carolina have eliminated *all* CON laws for projects necessary to respond to the pandemic. And at least a dozen states fully repealed their CON laws even before the pandemic began.¹⁰

Similar quick action now could save lives in the long run. **IJ thus respectfully recommends that the Department issue a waiver allowing the facilities listed in N.J.A.C. 8:33H-1.1(c) to expand without a CON.** Doing so will give healthcare providers the flexibility needed to best serve their patients during this time of uncertainty. We also hope that you will choose to make this change and many others you have recently implemented permanent.

IJ stands ready to assist you in crafting a tailored solution that will serve the citizens of this great state. We have a highly experienced team that would be honored to help your office implement this change. If we can be of assistance, we can be reached at 248-895-1555.

Respectfully,



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¹ These facilities are: nursing homes; comprehensive personal care homes; pediatric long-term care; specialized long-term care; assisted living residences; assisted living programs; and statewide restricted admissions facilities.

² See, e.g., *Garrett v. Tex. State Bd. of Pharmacy*, Cause No. D-1-GN-19-003686 (Travis Cty., 98th Jud. Dist., filed June 27, 2019); *Opternative, Inc. v. S.C. Bd. of Med. Exam'rs*, Civ. Action No. 2016-CP-40-06276 (Richland Cty., 5th Jud. Cir., filed Oct. 20, 2016).

³ See, e.g., *N'Da v. Hybl*, No. CI-20-1227 (Dist. Ct. Lancaster Cty. Neb., filed Apr. 23, 2020); *Singleton v. N.C. Dep't of Health & Human Servs.*, No. 20 CVS 5150 (Cty. of Wake, Sup. Ct. filed Apr. 23, 2020); *Am. Compl. Tiwari v. Friedlander*, No. 3:19-cv-00884-JRA (W.D. Ky, filed Dec. 2, 2019); *Birchansky v. Clabaugh*, No. 18-3403, 2020 WL 1861975 (8th Cir. Apr. 14, 2020); *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145 (4th Cir. 2016).

⁴ See, e.g., U.S. Dep't of Health and Human Servs., U.S. Dep't of the Treasury, & U.S. Dep't of Labor, *Reforming America's Healthcare System Through Choice and Competition*, 50–59 (Dec. 2018), <https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf> (recommending repeal or significant reduction of CON laws); Fed. Trade Comm'n & Dep't of Justice, *Improving Health Care: A Dose of Competition*, ch. 8 at 1–6 (July 2004), <https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723/healthcarerpt.pdf>.

⁵ E.g., Mercatus Ctr., *Healthcare Favoritism*, <https://www.mercatus.org/tags/healthcare-favoritism> (collecting research, articles, policy papers, and more about the problems with CON laws).

⁶ See *Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 929 (9th Cir. 2011) (recognizing that CONs are a “barrier to market entry”).

⁷ See, e.g., *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882–83 (1985); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 227–28 (5th Cir. 2013); *Craigmiles v. Giles*, 312 F.3d 220, 228–29 (6th Cir. 2002); *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 700–01 (E.D. Ky. 2014) (holding a CON law unconstitutional).

⁸ See generally Dep't of Health, *COVID-19 Temporary Operational Waivers and Guidelines*, <https://www.state.nj.us/health/legal/covid19/>.

⁹ See generally N.J.A.C. §§ 8:33H-1.1 to -1.20; N.J. Dep't of Health, *Certificate of Need Facility Licensing*, <https://www.nj.gov/health/healthfacilities/certificate-need/>.

¹⁰ See Nat'l Conference of State Legislatures, *CON – Certificate of Need State Laws* (Dec. 1, 2019), <https://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx>.