



INSTITUTE FOR JUSTICE

May 1, 2020

VIA EMAIL AND UPS

The Honorable Muriel Bowser
Mayor of the District of Columbia
1350 Pennsylvania Avenue, NW; Suite 406
Washington, DC 20004-3003
eom@dc.gov

Re: Certificate-of-Need waivers during COVID-19 pandemic.

Dear Mayor Bowser:

We are writing on behalf of the Institute for Justice (IJ)—a national public-interest, civil liberties law firm—to respectfully request that **you suspend the District’s certificate-of-need requirements for healthcare facility beds, diagnostic and therapeutic equipment, and new health services.**¹

In Mayor’s Orders 2020-45 and 2020-46, you rightly found “[t]he spread of COVID-19 is an imminent threat to the health, safety, and welfare of District residents that requires emergency protective actions be undertaken by the District Government.” As the COVID-19 pandemic has shown, District residents need access to more healthcare, not less. Waiving CON requirements is not only commonsense and compassionate, but also demonstrates bold leadership that District residents admire and deserve during this unprecedented emergency.

For nearly 30 years, IJ has worked to remove burdensome, unnecessary, and in this case, dangerous, licensing requirements, including in the healthcare field.² IJ also drafts legislation and advises city councils and legislatures throughout the country on other regulatory matters. IJ’s mission is to support Americans’ ability to provide for themselves and care for their health free from unreasonable interference.

IJ has a particular commitment to removing barriers to opportunities in the District. Our office is headquartered in the DMV. Over the past several years, IJ has worked with small-business owners, District agencies, and the DC Council to create jobs by drafting DC’s food truck law and the new cottage food law. IJ is also working with DCRA Director Ernest Chapprah and his team to simplify the Basic Business License process.

In recent years, IJ has become particularly concerned about the burdens that CON laws impose on access to healthcare. Not only do these laws fail to protect public health and safety,³ 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 purpose.⁵ Instead, they serve as barriers to entry.⁶ The problems with CON laws amount to more than bad policy. Courts have condemned this kind of economic protectionism.⁷

During this crisis, you have shown your office is uniquely positioned to address today's concerns. You already took quick and decisive action to declare the pandemic a public health emergency⁸ and mandated certain protocols at specified healthcare facilities.⁹ These measures are extremely welcome and demonstrate the District's ability to act quickly.

But there is more to do. As you noted in your April 27th Coronavirus Situational Update, patients desperately need access to hospital beds.¹⁰ And the plan announced yesterday to build new healthcare facilities over the next five years does not address the immediate need, which is hampered by CON requirements.¹¹ Under current law, healthcare facilities that want to relocate beds to another facility or even redistribute beds within a facility are required to go through the months-long CON process before they can act. The same is true for other critical services like diagnostic and therapeutic equipment. And as you lift stay-at-home restrictions, there will be high demand for new health services that may not have been offered by an existing facility. Worse, the CON-process is at a standstill as the required public hearings have been cancelled indefinitely due to the COVID-19 crisis.

Healthcare facilities and providers 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 practical solution. Many states, including Virginia, New Jersey, and Oklahoma, have waived CON requirements for beds. Connecticut, Georgia, South Carolina have gone further and 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.¹²

Similar, quick action could save many lives. **We thus respectfully urge you to suspend the District's CON requirements for healthcare facility beds, diagnostic and therapeutic equipment, and new health services.** Doing so will give healthcare providers the flexibility needed to best serve their patients. We also hope that you will choose to make these changes permanent.

IJ stands ready to assist you in crafting a tailored solution that will serve the residents of the District. We have a highly experienced team that would be honored to help your office implement this change. We look forward to working with you further on this issue and can be reached at (703) 682-9320 or at the email addresses below.

Respectfully,



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¹ See D.C. Code Ann. §§ 44-401 *et seq.*

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 *N'Da v. Hybl*, No. CI-20-1227 (Dist. Ct. Lancaster Cty., 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., Fed. Trade Comm'n & Dep't of Justice, *Improving Health Care: A Dose of Competition* (July 2004), <https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf>; 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* (Dec. 2018), <https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.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 certificate-of-need laws).

⁶ See *Yakima Valley Mem. Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 929 (9th Cir. 2011) (recognizing that certificates of need are a "barrier to market entry"); see also *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); see, also *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

⁷ See, e.g., *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Merryfield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014) (holding a certificate-of-need law unconstitutional).

⁸ Mayor's Order 2020-046 (March 11, 2020).

⁹ Mayor's Order 2020-063 (April 15, 2020).

¹⁰ Mayor Bowser Presentation on Coronavirus Situational Update, April 27, 2020, https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/COVID19-Situational-Update-Presentation_0412720.pdf.

¹¹ Mayor Bowser Presentation on New Hospitals, Health Equity Initiatives, April 30, 2020, https://coronavirus.dc.gov/sites/default/files/dc/sites/coronavirus/page_content/attachments/MMB-Hospital-Announcement-Presentation_04302020.pdf.

¹² 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>.