

SENATE PUBLIC HEALTH, WELFARE & SAFETY

EXHIBIT NO. 7

DATE: 1-28-05

BILL NO. SB 257

April 22, 2003

Roy Kemp, Chief, Licensure Bureau
Pam Sourbeer, Administrative Officer, CON
Quality Assurance Division

Re: Applicability of CON to transfer of beds from long-term care facility to conjoined and co-owned critical access hospital as swing beds

Dear Roy and Pam:

You have asked whether an entity that operates both a critical access hospital (CAH) and an attached skilled nursing facility can designate some of its beds in the skilled nursing facility as swing beds in the CAH without undergoing review for and receiving a certificate of need to do so. The answer is yes.

The CON statutes, in 50-5-301(2)(a), have a very limited definition of "health care facility," i.e., "a nonfederal home health agency, a long-term care facility, or an inpatient chemical dependency facility." Neither hospitals nor CAH's are included in that definition, so the provisions of the CON statutes relating to "health care facilities" generally do not apply to either of them.

There is another provision in the CON statutes, however, that, at first glance, might seem to apply. Sec. 50-5-301(1)(g), MCA, although it does not use the term "swing beds," subjects to CON review "the use of hospital beds in excess of five to provide services to patients or residents needing only skilled nursing care, intermediate nursing care, or intermediate developmental disability care, as those levels of care are defined in 50-5-101." However, 50-5-301(1)(g) subjects to CON review the addition to a hospital of swing beds in excess of five. Critical access hospitals are not covered by that provision, since the pertinent definition in state law of "hospital," set out in 50-5-101(24), MCA, specifically states that the "term....does not include critical access hospitals." A provision separate from CON review--Sec. 50-5-233, MCA-- does allow a CAH to have swing beds, defined in 50-5-101 as being used to provide either "acute care or extended skilled nursing care."

Neither is the "removal" of beds from the nursing facility subject to CON review. Sec. 50-5-301(1)(b) subjects to CON review only a "change in the bed capacity of a health care facility [which would include a long-term care facility] through an increase in the number of beds or a relocation of beds from one health care facility or site to another..." [emphasis added] In this case, the number of beds in the nursing home is being decreased, not increased, the beds are not being relocated to another health care facility because a CAH is not a "health care facility" for CON purposes, and the beds apparently are not even being moved to another site. Therefore, 50-5-301(1)(b) does not apply

to this scenario.

In sum, under the scenario that you have presented, the entity that operates both the CAH and the conjoined nursing home in this case does not have to undergo CON review to begin utilizing some of the nursing home beds as swing beds in the CAH. Please let me know if you have any further questions.

Sincerely,

Eleanor A. Parker
Counsel