

# Certificate of Need (CON) Decision-Making Recommendations and Survey Results

## Summary of Recommendations

### **A. Organization – who reviews applications and renders decisions**

**Recommendation:** Maintain the organizational structure of the CON process as it currently exists with OHCA staff responsible for reviewing health care facility CON applications and DSS staff responsible for reviewing long-term care facility applications. Final decisions on CON applications should continue to be rendered by the Deputy Commissioner of the Department of Public Health (DPH) and the Commissioner of the Department of Social Services (DSS) respectively. The Attorney General's Office should continue its limited role in the CON process consisting of the review of charitable assets in hospital conversion applications and providing legal guidance to OHCA as needed.

### **B. Public Input – opportunities for consumers to participate in the CON process**

**Recommendation:** Maintain current methods of soliciting and accepting public input on pending CON applications. Require that transfers of ownership of health care facilities other than hospitals (freestanding emergency departments, outpatient surgical facilities, mental health facilities, and substance abuse treatment facilities) to hospitals or hospital systems also receive mandatory public hearings.

### **C. Transparency – methods of informing the public about pending applications and consumer access to information**

**Recommendation:** Maintain current methods of informing the public about the status of CON applications, public hearings, and decisions.

### **D. Appeals Process – mechanism through which the public can appeal a CON decision**

**Recommendation:** Maintain the current appeals process for CON decisions.

## Certificate of Need (CON) Decision-Making Recommendations and Survey Results

### Introduction

Nationally, the Certificate of Need (CON) decision-making authority and process varies among the states currently operating CON programs. The majority of data for this document comes from the 2016 Merger Watch Report, *When Hospitals Merge*, which focuses on the 32 states and the District of Columbia that utilize the CON process to regulate hospital care<sup>1</sup>.

This guide focuses on four major areas of CON decision-making:

- Organization – who reviews applications and renders decisions
- Public Input – opportunities for consumer participation in the CON process
- Transparency – methods of informing the public about pending applications and consumer access to information
- Appeals Process – mechanism through which the public can appeal a CON decision

### SUMMARY OF INFORMATION:

CON Review Structure		Consumer Representation on Appointed Board	
<i>Joint Review by Administrative Staff and Appointed Board</i>	<i>No Review by Appointed Board</i>	Yes	No
18 states	15 states*	9 states	9 states*

Allow public to participate in review process through:	Number of States	
	Yes	No
Conducting regularly scheduled review meetings (“batched” applications)	7	26*
Allowing written comments	20*	13
Conducting mandatory public hearings	5	28*
Conducting public hearings upon request	22*	11

Public communication includes:	Number of States	
	Yes	No
Details about CON process, regulations and statutes on a website	32*	1
Details about each CON application with public hearing dates and comment submission on a website	24*	9
“Easy to find” information on the website for the consumer	23*	10
Notifications about CON applications via newspaper or other platform	18*	15

State post-approval process includes:	Number of States	
	Yes	No
Ability for public to contest a CON decision	19	14*

\* Connecticut is represented in this category

<sup>1</sup> Three states (Arkansas, Ohio, and Oklahoma) do not review hospitals as part of their CON process. Therefore the questions posed by the Merger Watch study were not applicable to those states and they are not included in the data tables.

## Certificate of Need (CON) Decision-Making Recommendations and Survey Results

### CON Decision-Making: ORGANIZATION

CON application review and decision making authority rests in three main categories<sup>2</sup>:

1. State health departments;
2. Joint administrative teams and appointed boards; and
3. Attorney General’s Office.<sup>3</sup>

States utilize different mechanisms to review CON applications with 18 states conducting a joint administrative staff and appointed board review. Of the 18 states that utilize this joint approach, 9 require consumer representation on the appointed board.

**Table 1: CON Review Structure and Consumer Representation**

CON Review Structure		Consumer Representation on Appointed Board	
<i>Joint Review by Administrative Staff and Appointed Board</i>	<i>No Review by Appointed Board</i>	<i>Yes</i>	<i>No</i>
18 states	15 states*	9 states	9 states*

\*Connecticut is represented in this category

See [Appendix A](#) for an overview of the CON Process

See [Appendix C](#) for a detailed list of CON review structures by state.

States utilizing appointed boards are likely to have required board composition specified in state statute and are comprised of various combinations of the following members:<sup>4</sup>

- Consumers;
- Physicians;
- Non-physician health care practitioners;
- State staff;
- Nursing home administrators;
- Representation from each state county;
- A combination of members of that equalize political weight;
- Majority composition with no ties to management or of providers or payers.

<sup>2</sup> Khaikin, Christine; Uttley, Lois; & Winkler, Aubree; *When Hospitals Merge: Updating State Oversight to Protect Access to Care*; Merger Watch; March 2016.

<sup>3</sup> Only the state of California has CON application review and decision making authority solely administered by the Attorney General’s Office. It should be noted that California does not operate a traditional CON program but has a regulatory oversight structure similar enough to CON that most CON studies include CON in their research findings.

<sup>4</sup> Khaikin, Christine et al.; *When Hospitals Merge: Updating State Oversight to Protect Access to Care*; Merger Watch; March 2016.

## Certificate of Need (CON) Decision-Making Recommendations and Survey Results

**Task Force Recommendation:** Maintain the organizational structure of the CON process as it currently exists with OHCA staff responsible for reviewing health care facility CON applications and DSS staff responsible for reviewing long-term care facility applications. Final decisions on CON applications should continue to be rendered by the Deputy Commissioner of the Department of Public Health (DPH) and the Commissioner of the Department of Social Services (DSS) respectively. The Attorney Generals’ Office should continue its limited role in the CON process consisting of the review of charitable assets in hospital conversion applications and providing legal guidance to OHCA as needed.

**Survey Results:**

**For CON applications submitted under the purview of OHCA, staff review the CON application and the final approval decision is made by the DPH Deputy Commissioner. Should Connecticut consider changing the decision making structure for CON applications to a joint review process involving both administrative staff and an appointed board?**

Joint review?	Appointed Board Composition						
	Consumers	Health Care Practitioners	State agencies	Insurance providers	Hospitals	Health Care Economists	Health Care Labor
NO			X				
NO	X	X				X	
YES	X		X			X	X
NO	X	X	X	X	X	X	
NO							
NO	X	X	X	X	X		
NO							
YES			X				
NO	X	X	X	X	X	X	X
<b>YES: 2</b>	5	4	6	3	3	4	2
<b>NO: 7</b>							

Comments:

*“Do not think [an appointed board] is necessary if the decision making process is objective and based on data and an approved state plan.”*

*“Not in favor of a Board. Having a Board will complicate the process and not necessarily add value.”*

*“We currently have input from all above mentioned”*

*“If the approval process is based on objective data and an approved statewide plan, then the makeup of the decision making body is less relevant.”*

*“I would limit the board to the Commissioners of DPH, DOI, and OPM, and the AG”*

*“My initial response is no, but depends on who appoints if we were to consider a board. This needs to be an independent process. What would make sense is a panel of subject matter experts that could make recommendations.”*

## Certificate of Need (CON) Decision-Making Recommendations and Survey Results

### CON Decision-Making: PUBLIC INPUT

Opportunities for public involvement in the Certificate of Need (CON) process beyond participation on boards or councils vary among the 33 CON states.

**Table 2: Opportunity for Public Input in the CON Process**

Allow public to participate in review process through:	Number of States	
	Yes	No
Conducting regularly scheduled review meetings (“batched” applications)	7	26*
Allowing written comments	20*	13
Conducting mandatory public hearings	5	28*
Conducting public hearings upon request	22*	11

\* Connecticut is represented in this category

See [Appendix B](#) for an overview of the CON public hearing process.

*Public Hearings.* For applications submitted to OHCA, a public hearing is held when:

- OHCA independently elects to hold a hearing;
- 3 or more individuals request a hearing in writing;
- An individual representing a group of 5 or more people requests a hearing in writing;
- For the transfer of a large group practice, 25 people (or an individual representing a group of 25 or more people) request a hearing in writing
- The application involves a hospital transfer of ownership

A request for a hearing must be made not later than 30 days after the office determines the application is complete. Once OHCA has determined a public hearing will be held, it will notify the applicant at least two weeks in advance and will place an advertisement in a newspaper in the area of the proposed project announcing the time, place, and topic of the hearing.

Public hearings are open to all members of the public. Individuals who wish to comment may do so in person at the hearing or in writing prior to the official closing of the record.

*Intervenors:* Individuals who have an interest in the matters at issue can petition the hearing officer to be designated an intervenor. The hearing officer may grant intervenor status if s/he finds that the individual has, at least 5 days prior to the hearing, sent a petition to the agency and all other parties that shows the individual’s legal rights, duties or privileges will be specifically affected by OHCA’s decision in the case. The hearing officer may also set the scope of an intervenor’s participation by limiting the ability to cross-examine witnesses, setting the issues for which an intervenor may contribute, and determining the intervenor’s ability to inspect and submit evidence.

Intervenors have the opportunity to speak at the public hearing and present witnesses, whose testimony is included in the public record on which OHCA bases its decision.

## Certificate of Need (CON) Decision-Making Recommendations and Survey Results

**Task Force Recommendation:** Maintain current methods of soliciting and accepting public input on pending CON applications. Require that transfers of ownership of health care facilities other than hospitals (freestanding emergency departments, outpatient surgical facilities, mental health facilities, and substance abuse treatment facilities) to hospitals or hospital systems also receive mandatory public hearings.

**Survey Results:**

**Currently, OHCA reviews CON applications as they are submitted. Should applications be "batched" and reviewed at regularly scheduled times throughout the year, with some exceptions?**

Batch Applications?	Exceptions	
	<i>Applications that include new services to designated "high-need" areas</i>	<i>Applications that include terminations of services due to insufficient patient volume or a certain threshold of financial loss</i>
NO		
NO		
YES	X	
NO		
YES	X	X
YES	X	X
NO		
NO		
NO		
<b>YES: 3</b>	3	2
<b>NO: 6</b>		

Comments:

For an exception – “new technology”

**Are there any other changes you would like to see to the current public hearing process, including the ability for public input and the timing of notifications?**

Comments:

*“I believe the current mechanism allows for public input”*

*“Public hearing should be mandatory; written public comment submission should be an option”*

*“No. Current process works well.”*

*“Schedule public hearings within 30 days of CON application deemed complete. Limit Intervener status to those cases where a significant financial impact can be demonstrated within the defined service area.”*

*“Public should be able submit written comments”*

## Certificate of Need (CON) Decision-Making Recommendations and Survey Results

### CON Decision-Making: TRANSPARENCY

In the Merger Watch study, transparency as it relates to the CON process is defined by how accessible information on the CON is to the general public. Although the study focused mainly on web site content and ease of use, other methods that could potentially be used to reach affected communities include social media, posting notice in municipal buildings, community centers, and libraries, and including information in sections of the newspaper that are more widely read than legal notices.

**Table 3: Communication with the Public Regarding CON Process**

Public communication includes:	Number of States	
	Yes	No
Details about CON process, regulations and statutes on a website	32*	1
Details about each CON application with public hearing dates and comment submission on a website	24*	9
“Easy to find” information on the website for the consumer	23*	10
Notifications about CON applications via newspaper or other platform	18*	15

\* Connecticut is represented in this category

#### Connecticut Transparency Efforts

The Office of Health Care Access maintains [CON informational web pages](#) as part of the Department of Public Health web site. The site contains the state’s CON statutes, regulations, information for applicants that includes CON process flow charts and timelines, a list of pending applications and accompanying materials, public hearing information, and final decisions. OHCA updates the online Status Report for pending CON applications on a weekly basis and usually posts materials related to applications with 24 hours of being received or issued by OHCA. OHCA also provides a [Frequently Asked Questions](#) page that includes information on how to obtain additional materials through the Freedom of Information Act process.

OHCA informs the public of upcoming public hearings through the following mechanisms: (1) publishes a legal notice informing the public in the major local newspaper where the proposal/project is to be located; (2) files its weekly calendar with the Secretary of State; (3) publishes information on the front webpage of OHCA’s website; and (4) posts notice of the public hearing on the Department of Public Health’s [online calendar](#).

**Task Force Recommendation:** Maintain current methods of informing the public about the status of CON applications, public hearings, and decisions.

**Certificate of Need (CON) Decision-Making  
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**Survey Results:**

**Are there any changes you would like to see in the way OHCA notifies the public about the CON process?**

Comments:

*"In the digital age within which we live, I am curious about the role social media could/can play in this. For now, I don't have any suggested changes."*

*"No. Current process works well."*

*"Is there any assessment of the effectiveness of the various modes of noticing the public?"*

*"Use of electronic postings exclusively."*

*"Press releases"*

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**Certificate of Need (CON) Decision-Making  
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**CON Decision-Making: APPEALS PROCESS**

Nationally, 19 of the 33 CON states allow public members to appeal CON decisions.

**Table 4: Post-Approval Review and Enforcement**

State post-approval process includes:	Number of States	
	Yes	No
Ability for public to contest a CON decision	19	14*

\* Connecticut is represented in this category

Connecticut’s CON Appeals Process

Connecticut’s CON appeals process can occur through three paths: (1) upon release of proposed final decision the applicant can request a an oral argument with the Deputy Commissioner of DPH to change the decision before a final decision is issued; (2) upon formal denial the applicant can file a petition for a reconsideration; and/or (3) if the reconsideration is denied, or the terms to file a reconsideration are not met, the applicant may file an appeal with the state Superior Court.

1. Oral Argument

Prior to a final decision including a denial of a CON application, OHCA releases a proposed final decision. An oral argument is a formal dialogue between the Deputy Commissioner of DPH and the applicant where the applicant can make a case for why the application should not be denied such as highlighting an error in facts used to support the decision. New information may not be presented during an oral argument. Oral arguments are open to the public but only the applicant and Deputy Commissioner may speak. There is no opportunity for public comment.

2. Application Reconsideration:

Once an application final decision is rendered, applicants may request a reconsideration. To request a reconsideration, applicants must file a petition within 15 days of OHCA’s mailing the decision. The petition must be based on one of the following: an error of law or fact; newly discovered relevant evidence that was not, for good reason, presented previously; or other good cause.<sup>5</sup>

If, after 25 days of receiving the petition, OHCA determines the denial does not warrant additional review, the petition for reconsideration is considered rejected. If OHCA does decide to reconsider the application, it has 90 days after receipt of the petition to issue a new decision affirming, modifying or reversing the denial. OHCA may request additional information. If it does not issue a decision within those 90 days, the original denial will remain the final decision.<sup>6</sup> Only applicants or parties as designated by OHCA can request a reconsideration. Intervenors and the general public cannot request a reconsideration<sup>7</sup>.

<sup>5</sup> Contested cases. CONN. GEN. STAT §4-181a (2015).

<sup>6</sup> Contested cases. CONN. GEN. STAT §4-181a (2015).

<sup>7</sup> Department of Public Health, Office of Health Care Access; *Certificate of Need Application Guide*; January 13, 2016.

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### 3. Appeals to the State Superior Court:

Applicants may, after a final decision has been rendered, appeal to Superior Court. Applicants must file an appeal within 45 days of either the mailed final decision or the rejection of a petition for reconsideration. Only applicants or parties as designated by OHCA can file an appeal. The general public and intervenors cannot appeal a final decision.

**Task Force Recommendation:** Maintain the current appeals process for CON decisions.

#### **Survey Results:**

**Should there be a mechanism in which members of the public can have an opportunity to challenge or request the reexamination of a CON decision?**

<u>YES</u>	<u>NO</u>
2	7

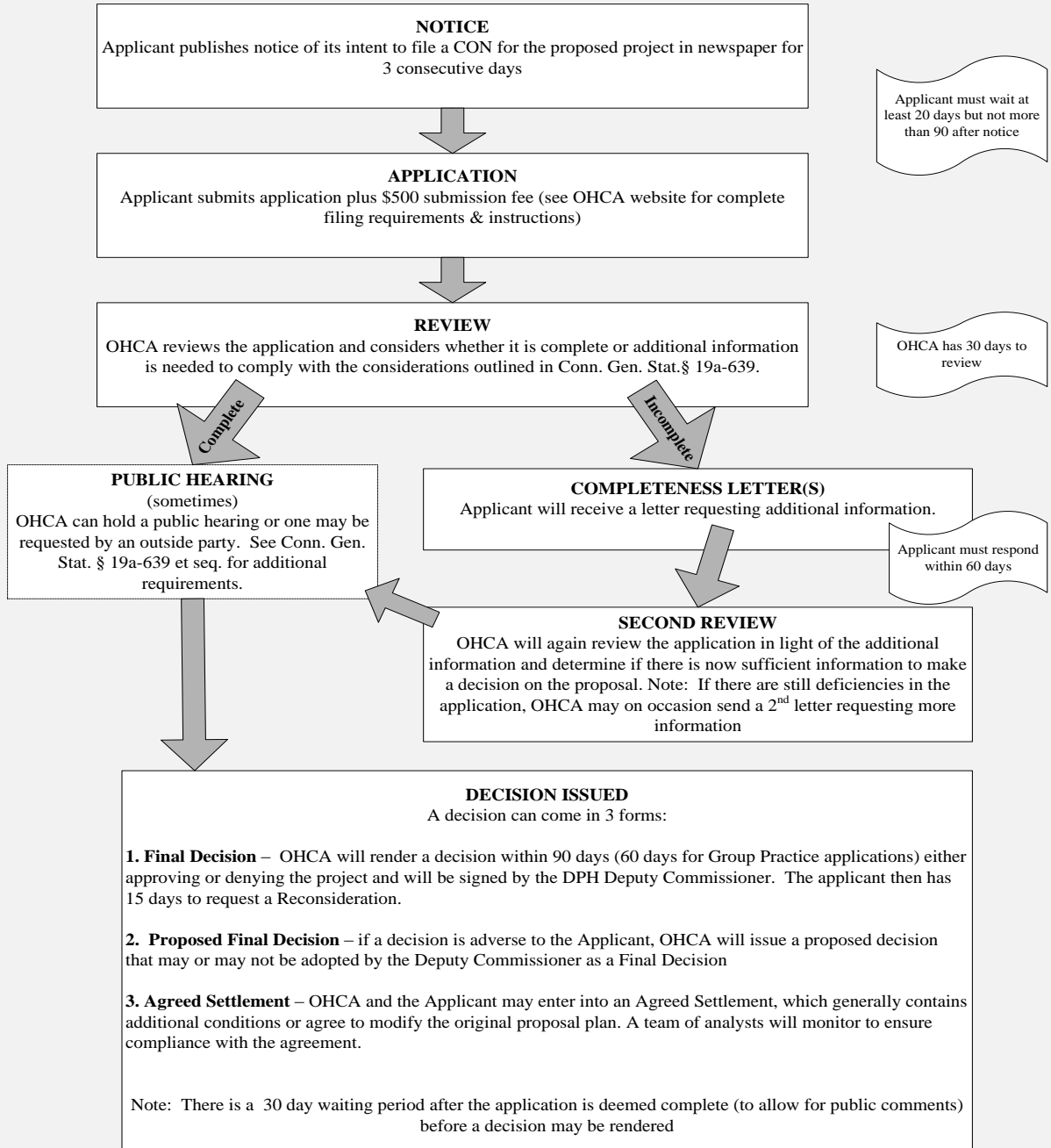
**Do you have any additional suggestions on how to improve the CON decision-making process regarding the organizational structure of the decision-making authority, availability for public input, increased transparency, or modifying the appeals process?**

#### Comments:

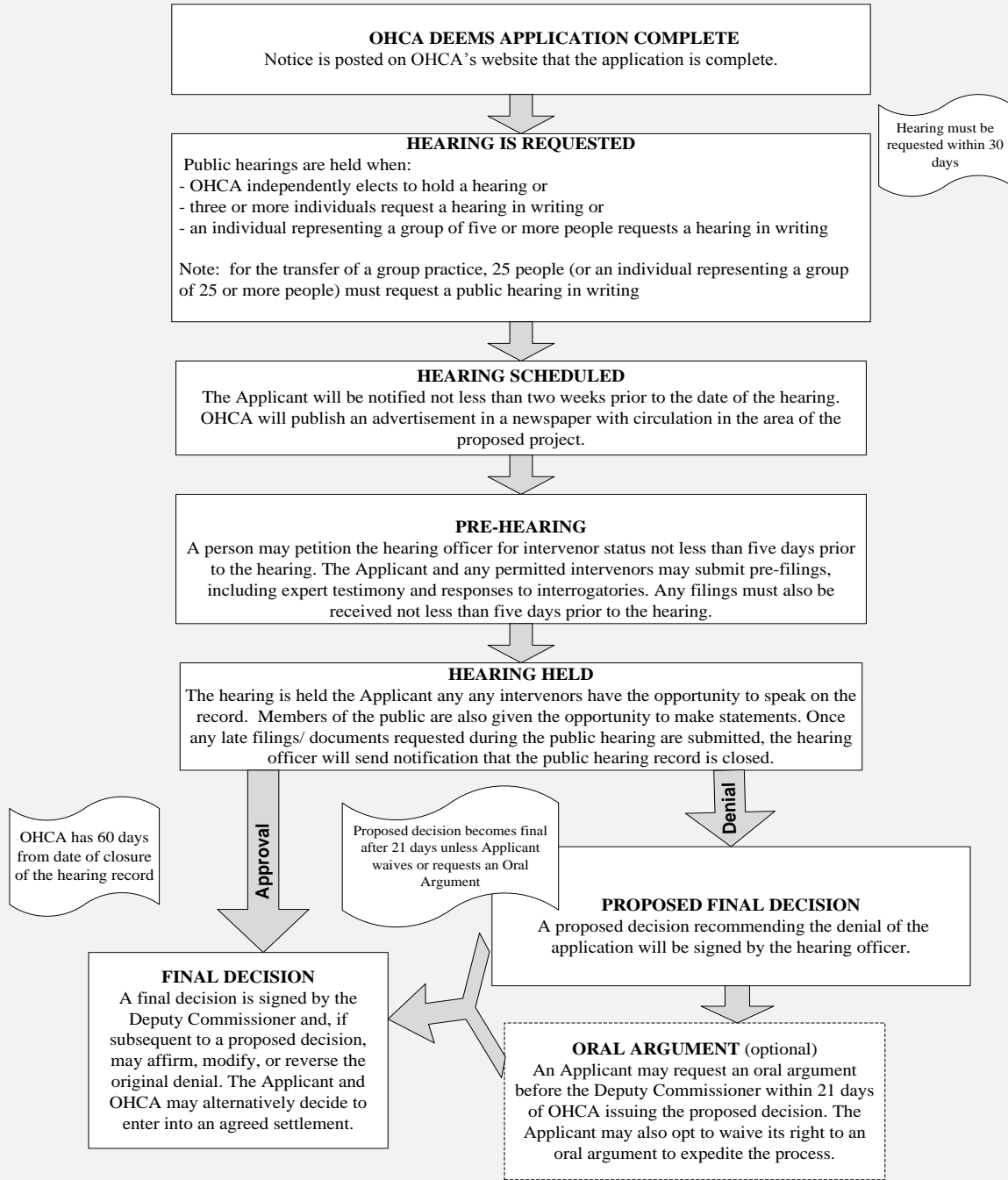
*"I would suggest streamlining the functions and having all CON applications reviewed in place. This is probably evident from my vote to have a joint commission but I want to be explicit and say it does not make sense to have two offices with duplicating functions."*

*"Limit the CON approval process to 90-120 days, and there should be an expedited review process, i.e. within 30 days for service relocations, change in ownership, service additions and terminations, outpatient operating room capacity. Distinguishing between substantive and non-substantive review, defined."*

## Certificate of Need Process Overview



# Public Hearing Process



## Appendix C

	CON Review Structure		Consumer Representation on Appointed Board	
	Joint Review by Administrative Staff and Appointed Board	No Review by Appointed Board	Yes	No
	18 States	15 States*	9 States	9 States*
<b>Alabama</b>	<b>Joint Review</b> - sixteen-member Statewide Health Coordinating Council (SHCC) appointed by the Governor to advise the appointed board on health planning and resource development		<b>Yes</b> the reviewing body is required to have at least eight consumer representatives	
<b>Alaska</b>	<b>No Review by Appointed Board</b> -health department staff review, commissioner makes final decision		<b>No</b>	
<b>California</b>	<b>No Review by Appointed Board</b> -conducted by the Attorney general's office only		<b>No</b>	
<b>Connecticut</b>	<b>No Review by Appointed Board</b> -staff of the Office of Health Care Access (OHCA) review, appointed Commissioner of OHCA makes final decisions		<b>No</b>	
<b>DC</b>	<b>Joint Review</b> - specific criteria for appointing board members in order to encourage political pluralism and/or protect the review board from excess political and business pressure		<b>Yes</b> - project review committee is composed of health care consumers and providers who are appointed by the mayor with the consent of the D.C. city council	
<b>Delaware</b>	<b>Joint Review</b> - specific criteria for appointing board members		<b>Yes</b> - The reviewing body is required to have at least four consumer representatives	
<b>Florida</b>	<b>No Review by Appointed Board</b> -staff of the Florida Agency for Health Care		<b>No</b>	
<b>Georgia</b>	<b>No Review by Appointed Board</b> -Georgia Department of Community Health (DCH) Health Care Facility Regulation Division (HFR) administers the CON program		<b>No</b>	
<b>Hawaii</b>	<b>Joint Review</b> - specific criteria for appointing board members		<b>Yes</b> -members of the panels should include representatives from each county and the majority of the members should be consumers	

## Appendix C

	<b>CON Review Structure</b>	<b>Consumer Representation on Appointed Board</b>
<b>Illinois</b>	<b>Joint Review</b> -specific criteria for appointing board members	<b>Yes</b> -members include one representative of a non-profit health care consumer advocacy organization
<b>Iowa</b>	<b>Joint Review</b> - no specific criteria for appointing board members	<b>No</b>
<b>Kentucky</b>	<b>No Review by Appointed Board</b> -Kentucky Cabinet for Health and Family Services administers the CON program	<b>No</b>
<b>Louisiana</b>	<b>No Review by Appointed Board</b> -Department of Health and Hospitals performs the FNR review	<b>No</b>
<b>Maine</b>	<b>No Review by Appointed Board</b> -staff at the Department of Health and Human Services (DHHS) conducts the CON review	<b>No</b>
<b>Maryland</b>	<b>Joint Review</b> -specific criteria for appointing board members -members should include nine individuals who have no connection to management or policy of provider or payer, two physicians, two payers, one nursing home administrator, and one non-physician health care practitioner	<b>No</b>
<b>Massachusetts</b>	<b>Joint Review</b> -DON review is performed by the Public Health Council (PHC)	<b>Yes</b> -PHC includes 3 nominees submitted by Health Care For All, 3 nominees submitted by the MA Community Health Worker network among others. (Consumer representatives)
<b>Michigan</b>	<b>Joint Review</b> -specific criteria for appointing board members	<b>No</b>
<b>Mississippi</b>	<b>No Review by Appointed Board</b> -Mississippi Department of Health Staff reviews the CON applications	<b>No</b>
<b>Missouri</b>	<b>Joint Review</b> -specific criteria for appointing board members	<b>No</b>

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	<b>CON Review Structure</b>	<b>Consumer Representation on Appointed Board</b>
<b>Montana</b>	<p style="text-align: center;"><b>No Review by Appointed Board</b></p> <p>-Review is conducted by the Department of Public health and Human Services (DPHHS)</p>	<b>No</b>
<b>Nebraska</b>	<p style="text-align: center;"><b>No Review by Appointed Board</b></p> <p>-staff of the Department of health and Human Services conducts the CON review</p>	<b>No</b>
<b>New Hampshire</b>	<p style="text-align: center;"><b>Joint Review</b></p> <p>-specific criteria for appointing board members</p>	<b>No</b>
<b>New Jersey</b>	<p style="text-align: center;"><b>Joint Review</b></p> <p>-specific criteria for appointing board members - Commissioners of Health, Children and Families, and Human Services serve as non-voting, ex officio members</p>	<b>Yes</b> -require consumer representatives to sit on the review board
<b>New York</b>	<p style="text-align: center;"><b>Joint Review</b></p> <p>-specific criteria for appointing board members</p>	<b>Yes</b> -include a member of a health care consumer advocacy organization
<b>North Carolina</b>	<p style="text-align: center;"><b>Joint Review</b></p> <p>-The Department of health and Human Services(DHHS) performs the CON review -specific criteria for appointing board members</p>	<b>No</b>
<b>Oregon</b>	<p style="text-align: center;"><b>Joint Review</b></p> <p>-no specific criteria for appointing board members</p>	<b>No</b>
<b>Rhode Island</b>	<p style="text-align: center;"><b>Joint Review</b></p> <p>-no specific criteria for appointing board members -the review board is a statutory advisory council appointed by the Governor, Speaker of the House, and President of the Senate</p>	<b>No</b>
<b>South Carolina</b>	<p style="text-align: center;"><b>No Review by Appointed Board</b></p> <p>-Review is performed by the South Carolina Department for Health and Environmental Control</p>	<b>No</b>

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	<b>CON Review Structure</b>	<b>Consumer Representation on Appointed Board</b>
<b>Tennessee</b>	<b>Joint Review</b> -specific criteria for appointing board members	<b>Yes</b> - Consumer Representatives are required on the review board
<b>Vermont</b>	<b>Joint Review</b> - specific criteria for appointing board members	<b>No</b>
<b>Virginia</b>	<b>No Review by Appointed Board</b> -Review is conducted by the Virginia Department of Health	<b>No</b>
<b>Washington</b>	<b>No Review by Appointed Board</b> -State of Washington Department of Health conducts the CON review	<b>No</b>
<b>West Virginia</b>	<b>No Review by Appointed Board</b> -The West Virginia Health Care Authority conducts the CON review	<b>No</b>