

1 HB294
2 127673-1
3 By Representative McClurkin
4 RFD: Health
5 First Read: 22-MAR-11

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8 SYNOPSIS: Under existing law, any party to a contested
9 case involving a Certificate of Need (CON)
10 application is required to appeal an adverse
11 decision by the CON Review Board first to the
12 Circuit Court of either Montgomery County or the
13 county wherein the applicant is situated or where
14 the new institutional health service is to be
15 located before the decision can be appealed to the
16 Alabama Court of Civil Appeals.

17 This bill would provide for a direct appeal
18 to the Alabama Court of Civil Appeals, thereby
19 bypassing the initial review by the circuit court.
20 This bill would apply to CON applications appeals
21 pending on the effective date of this bill.
22 Further, this bill would place monetary limits on
23 the costs imposed by parties in a contested CON
24 application and streamline the processing of such
25 cases.

26 This bill would provide for approved fee
27 rates for administrative judges in contested cases

1 with fees shared by the parties to the contested
2 case.

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4 A BILL
5 TO BE ENTITLED
6 AN ACT

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8 Relating to the State Health Plan and the issuance
9 of a Certificate of Need (CON); to amend Section 22-21-275,
10 Code of Alabama 1975, to amend the procedure for the granting
11 or denial of an application for a Certificate of Need (CON) by
12 providing for a direct appeal of the decisions of the CON
13 Board to the Alabama Court of Civil Appeals; to place monetary
14 limits on the administrative law judge fees and costs imposed
15 by parties in a contested CON application; and to streamline
16 the processing of contested cases.

17 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

18 Section 1. Section 22-21-275, Code of Alabama 1975,
19 is amended to read as follows:

20 "§22-21-275.

21 "The SHPDA, pursuant to the provisions of Section
22 22-21-274, shall prescribe by rules and regulations the
23 procedures for review of applications for certificates of need
24 and for issuance of certificates of need. Rules and
25 regulations governing review procedures shall include, but not
26 necessarily be limited to, the following:

1 "(1) Agreement with other review agencies for review
2 procedures consistent with this article and federal
3 regulations.

4 "(2) Application procedures and forms of the
5 application necessary to elicit and provide all necessary
6 information as required by the review criteria.

7 "(3) Establishment of a project review period of 90
8 days from the date the state agency determines that the
9 application is complete and notification thereof is made to
10 the applicant. The rules and regulations may provide for a
11 period of not more than 15 days for determination of the
12 completeness of the application, notification of the beginning
13 and termination dates of the project review period and
14 criteria for determining by the state agency of an extension
15 of the project review period not to exceed 30 days with or
16 without the consent of the applicant. An extension of the
17 review period without limitation may be made with the written
18 consent of the applicant and shall occur automatically without
19 the consent of the applicant for the time period necessary to
20 accommodate referral to an administrative law judge under this
21 chapter and the issuance of a recommended order. All reviews
22 must be completed prior to the termination of the review
23 period. If the state agency does not make a decision within
24 the period of time specified for state agency review, the
25 proposal shall be deemed to have been found not to be needed.

1 "(4) Provision for a "nonsubstantive" review which
2 shall be a modified review applicable to proposals for capital
3 expenditures up to \$500,000.00 and which:

4 "a. Do not result in a substantial change in a
5 service; or

6 "b. Propose equipment to upgrade or expand an
7 existing service; or

8 "c. Increase the bed capacity by not more than 10
9 percent of the existing bed capacity; provided, that such
10 increase in bed capacity is consistent with the State Health
11 Plan.

12 "(5) Public notification of receipt of application,
13 review periods, public hearings, decisions of the state
14 agency, fair hearings if requested and final decisions
15 regarding a certificate of need.

16 "(6) Provisions and procedures for public hearings
17 in the course of agency review on any application for the
18 certificate of need for new institutional health service which
19 requires substantive review. The SHPDA shall make provisions
20 for a public hearing of any contested case before an
21 administrative law judge designated by the Governor, which
22 shall be conducted as a contested hearing pursuant to the
23 requirements of the Alabama Administrative Procedure Act,
24 Chapter 22 of Title 41, as modified by this article and
25 regulations consistent therewith adopted under this article.
26 The fee for the administrative law judge shall be based on a
27 standard hourly rate approved by the Executive Director of

1 SHPDA on an annual basis and shall be apportioned, on a pro
2 rata basis, between all parties to the contested case hearing,
3 with each party paying its pro rata amount within 30 days of
4 receipt of an itemized invoice from the administrative law
5 judge. Unless extended by agreement of all parties: (i) any
6 public hearing before an administrative law judge pursuant to
7 this article shall begin within 45 days of assignment to the
8 administrative law judge and completed within 90 days; and
9 (ii) the administrative law judge shall issue a recommended
10 order within 45 days of completion of the transcript. SHPDA
11 shall make provisions that if neither the applicant nor
12 aggrieved party shall have requested the application be heard
13 before an administrative law judge, the application shall be
14 heard before SHPDA at a public hearing. Any aggrieved party to
15 a final decision of SHPDA may appeal the final decision of
16 SHPDA to the ~~circuit court in the county in which the~~
17 ~~applicant resides or of the county in which the applicant is~~
18 ~~situated or in which the new institutional health service~~
19 ~~being applied for is located~~ Alabama Court of Civil of
20 Appeals. An appeal shall be perfected by filing a written
21 notice of appeal with the clerk of the Court of Civil Appeals
22 within 21 days after the decision of the agency becomes final.
23 The notice of appeal shall be on a form prescribed by the
24 Alabama Rules of Appellate Procedure. The Court of Civil
25 Appeals shall have no discretion to refuse to hear appeals of
26 the final decisions of SHPDA under this article. Within 30
27 days after a notice of appeal is filed, SHPDA shall transmit

1 the administrative record to the clerk, with the appealing
2 party bearing the costs associated with the preparation and
3 transmission of the record and transcript of the hearing and
4 give notice to the parties of the transmittal. Upon the
5 transmittal of the administrative record to the Court of Civil
6 Appeals, the appeal shall proceed in accordance with the
7 Alabama Rules of Appellate Procedure.

8 "(7) Schedule for reviews to include hearings before
9 the state agency, beginning and ending of review periods and
10 time of the review period as provided in this section.

11 "(8) Provision of the applicant to submit such
12 information that he may deem advisable in justification of the
13 application over and above the minimum information required by
14 this article and the regulations adopted hereunder.

15 "(9) Provisions for periodic reports by the health
16 provider or applicant respecting the development of the
17 proposal subject to review and for which a certificate of need
18 is issued.

19 "(10) Provisions for written findings, as
20 appropriate, which the state used as the basis for its
21 decision or any recommendation of the state agency. Such
22 findings and recommendations shall be provided to the
23 applicant and available to other interested persons upon
24 request and upon payment of a reasonable fee to cover actual
25 costs of reproduction and handling.

26 "(11) Notification upon request of providers of
27 health services and other persons subject to review of

1 findings, recommendations and decisions made under this
2 article.

3 "(12) Provision for a public hearing upon written
4 request for the reconsideration of a decision by the SHPDA and
5 for good cause by any aggrieved party, including any competing
6 applicant, or any aggrieved person who has intervened pursuant
7 to Section 41-22-14. Request for reconsideration shall be made
8 in writing not more than 15 days subsequent to the date the
9 agency (SHPDA) decision is deemed final and shall have the
10 effect of holding in abeyance the final decision and
11 suspending any certificate of need issued pursuant thereto,
12 subject to the outcome of the public hearing. The provision
13 shall state that there can be no reconsideration by the SHPDA
14 of a decision on a prior request for reconsideration; that an
15 aggrieved party shall not be required to request
16 reconsideration prior to or as a condition to requesting a
17 fair hearing; and that an aggrieved party shall not be
18 required to request reconsideration or a fair hearing prior to
19 or as a condition to seeking judicial review pursuant to
20 Section 41-22-20.

21 "(13) Provision that no decision of the SHPDA under
22 this article shall be deemed final until 15 days following the
23 date of the decision.

24 "(14) Provisions that any adverse decision of the
25 agency (SHPDA) (other than a SHPDA decision after first being
26 heard as a contested case before an administrative law judge
27 pursuant to the requirements of the Alabama Administrative

1 Procedure Act) may be appealed to an administrative law judge
2 designated by the Governor for fair hearing which appeal shall
3 be heard de novo as a contested case in accordance with
4 Sections 41-22-12 and 41-22-13. The fair hearing appeal
5 proceedings shall be conducted pursuant to the requirements of
6 the Alabama Administrative Procedure Act, Chapter 22 of Title
7 41, as modified by this article and regulations consistent
8 therewith adopted under this article. The fee for the
9 administrative law judge shall be based on a standard hourly
10 rate approved by the Executive Director of SHPDA on an annual
11 basis and shall be apportioned, on a pro rata basis, between
12 all parties to the contested case hearing, with each party
13 paying its pro rata amount within 30 days of receipt of an
14 itemized invoice from the administrative law judge. Unless
15 extended by agreement of all parties: (i) any public hearing
16 before an administrative law judge pursuant to this article
17 shall begin within 45 days of assignment to the administrative
18 law judge and completed within 90 days; and (ii) the
19 administrative law judge shall issue a recommended order
20 within 45 days of completion of the transcript. The appeal
21 shall be commenced by a request for a fair hearing by the
22 applicant or any competing applicant, which request shall be
23 made within 15 days of the date that the decision by the state
24 agency became final, or in the event of a request for
25 reconsideration, within 15 days of the date that the decision
26 of the state agency on reconsideration became final and shall
27 have the effect of holding in abeyance the decision and

1 suspending any certificate of need issued pursuant thereto
2 subject to the outcome of the fair hearing. The decision of
3 the administrative law judge in the fair hearing proceedings
4 shall be considered the final decision of the state agency
5 (SHPDA); provided, that any aggrieved party may appeal the
6 decision to the ~~circuit court of the county in which the~~
7 ~~applicant resides or of the county in which the applicant is~~
8 ~~situated or in which the new institutional health service~~
9 ~~being applied for is located~~ Alabama Court of Civil Appeals in
10 accordance with the provisions of subsection (6) of this
11 section.

12 "(15) Preparation and publication, at least
13 annually, of reports by the state agency of the reviews being
14 conducted, decisions reached, certificates issued and status
15 of proposals.

16 "(16) Access by the general public to applications
17 reviewed by the SHPDA and to other written material pertinent
18 to the review.

19 "(17) Provisions for letters of intent in the case
20 of construction projects by persons proposing such projects.
21 Letters of intent shall be in such detail as the SHPDA may
22 direct by regulations. Letters of intent shall not substitute
23 for the formal application for a certificate of need as
24 provided in this article.

25 "(18) Provision that the review procedure may vary
26 according to the purpose for which a particular review is

1 being conducted and/or the nature and type of service or
2 expenditure proposed."

3 Section 2. This act shall apply to any application
4 pending before the Certificate of Need Board on the effective
5 date of this act and to any application filed after the
6 effective date of this act. This act shall also apply to any
7 appeal from a final determination by the Certificate of Need
8 Board pending on the effective date of this act. Any appeal
9 from a final determination by the Certificate of Need Board
10 pending in any circuit court of this state on the effective
11 date of this act will be deemed to have been filed in the
12 Alabama Court of Civil Appeals. The appeal shall proceed as if
13 originally filed in the Alabama Court of Civil Appeals. Any
14 appeal or petition for other relief pending in the Alabama
15 Court of Civil Appeals or in the Supreme Court of Alabama
16 shall proceed as if the final determination had been appealed
17 directly to the Alabama Court of Civil Appeals.

18 Section 3. This act shall become effective
19 immediately following its passage and approval by the
20 Governor, or its otherwise becoming law.