

1 HB174  
2 147908-3  
3 By Representatives McClendon and Davis  
4 RFD: Health  
5 First Read: 06-FEB-13

2  
3  
4  
5  
6  
7  
8 SYNOPSIS: Under existing law, the Court of Civil  
9 Appeals has ruled that a certificate of need (CON)  
10 issued to a business entity not specified in the  
11 law for a health care facility or health  
12 maintenance organization, or issued for an  
13 institutional health service, is generally not  
14 transferable by sale, lease, or other transaction.

15 This bill would specify that the transfer of  
16 a certificate of need by lease issued to a limited  
17 liability company or other legal entity by lease,  
18 sale, or other transaction involving an existing  
19 health care facility, health maintenance  
20 organization, or institutional health service does  
21 not require a new or additional CON.

22 The bill would apply retroactively when an  
23 amendment to the CON law was enacted which had  
24 previously been interpreted as authorizing the  
25 transfers without a new CON.

26  
27 A BILL

1 TO BE ENTITLED

2 AN ACT

3  
4 To amend Sections 22-21-260, 22-21-263, and  
5 22-21-270, Code of Alabama 1975, relating to the issuance of a  
6 certificates of need for health care facilities, health  
7 maintenance organizations, and the institutional health  
8 services; to specify that health care facilities and health  
9 maintenance organizations may be organized in limited  
10 liability companies and other legal entities; and to provide  
11 that this act would be retroactive to July 30, 1979.

12 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

13 Section 1. Sections 22-21-260, 22-21-263, and  
14 22-21-270, Code of Alabama 1975, are amended to read as  
15 follows:

16 "§22-21-260.

17 "As used in this article, the following words and  
18 terms, and the plurals thereof, shall have the meanings  
19 ascribed to them in this section, unless otherwise required by  
20 their respective context:

21 "(1) ACQUISITION. Obtaining the legal equitable  
22 title to a freehold or leasehold estate or otherwise obtaining  
23 the substantial benefit of such titles or estates, whether by  
24 purchase, lease, loan or suffrage, gift, devise, legacy,  
25 settlement of a trust or means whatever, and shall include any  
26 act of acquisition. The term "acquisition" shall not mean or  
27 include any conveyance, or creation of any lien or security

1 interest by mortgage, deed of trust, security agreement, or  
2 similar financing instrument, nor shall it mean or include any  
3 transfer of title or rights as a result of the foreclosure, or  
4 conveyance or transfer in lieu of the foreclosure, of any such  
5 mortgage, deed of trust, security agreement, or similar  
6 financing instrument, nor shall it mean or include any gift,  
7 devise, legacy, settlement of trust, or other transfer of the  
8 legal or equitable title of an interest specified hereinabove  
9 by a natural person to any member of such person's immediate  
10 family. For the purposes of this section "immediate family"  
11 shall mean the spouse of the grantor or transferor and any  
12 other person related to the grantor or transferor to the  
13 fourth degree of kindred as such degrees are computed  
14 according to law.

15 "(2) APPLICANT. Any person, as defined in this  
16 section, who files an application for a certificate of need.

17 "(2.1) CAMPUS. The contiguous real property,  
18 contained within a single county, which is owned or leased by  
19 a health care facility and upon which is located the buildings  
20 and any other real property used by the health care facility  
21 to provide existing institutional health services which are  
22 subject to review.

23 "(3) CAPITAL EXPENDITURE. An expenditure, including  
24 a force account expenditure (i.e., an expenditure for a  
25 construction project undertaken by the health care facility as  
26 its own contractor), which, under generally accepted  
27 accounting principles, is not properly chargeable as an

1 expense of operation and maintenance and which satisfies any  
2 of the following:

3 "a. Exceeds two million dollars (\$2,000,000) indexed  
4 annually for inflation for major medical equipment; eight  
5 hundred thousand dollars (\$800,000) for new annual operating  
6 costs indexed annually for inflation; four million dollars  
7 (\$4,000,000) indexed annually for inflation for any other  
8 capital expenditure. The index referenced in this paragraph  
9 shall be the Consumer Price Index Market Basket Professional  
10 Medical Services index as published by the U.S. Department of  
11 Labor, Bureau of Labor Statistics. The SHPDA shall publish  
12 this index information to the general public.

13 "b. Changes the bed capacity of the facility with  
14 respect to which such expenditure is made.

15 "c. Substantially changes the health services of the  
16 facility with respect to which such expenditure is made.

17 "(4) CONSTRUCTION. Actual commencement, with bona  
18 fide intention of completing the construction, or completion  
19 of the construction, erection, remodeling, relocation,  
20 excavation, or fabrication of any real property constituting a  
21 facility under this article, and the term construct shall mean  
22 and include any act of construction. "Ground breaking  
23 ceremony," "receipt of bids," "receipt of quotation," or  
24 similar action that will permit unilateral termination without  
25 penalty shall not be considered construction.

26 "(5) FIRM COMMITMENT or OBLIGATION. Any of the  
27 following:

1            "a. Any executed, enforceable, unconditional written  
2 agreement or contract not subject to unilateral cancellation  
3 for the acquisition or construction of a health care facility  
4 or purchase of equipment therefor.

5            "b. Actual construction of facilities peculiarly  
6 adapted to the furnishing of one or more particular services  
7 and with the bona fide intention of furnishing such service or  
8 services.

9            "c. Any executed, unconditional written agreement  
10 not subject to unilateral cancellation for the bona fide  
11 purpose of furnishing one or more services.

12            "(6) HEALTH CARE FACILITY. General and specialized  
13 hospitals, including tuberculosis, psychiatric, long-term  
14 care, and other types of hospitals, and related facilities  
15 such as, laboratories, out-patient clinics, and central  
16 service facilities operated in connection with hospitals;  
17 skilled nursing facilities; intermediate care facilities;  
18 skilled or intermediate care units operated in veterans'  
19 nursing homes and veterans' homes, owned or operated by the  
20 State Department of Veterans' Affairs, as these terms are  
21 described in Chapter 5A (commencing with Section 31-5A-1) of  
22 Title 31, rehabilitation centers; public health centers;  
23 facilities for surgical treatment of patients not requiring  
24 hospitalization; kidney disease treatment centers, including  
25 free-standing hemodialysis units; community mental health  
26 centers and related facilities; alcohol and drug abuse  
27 facilities; facilities for the developmentally disabled;

1 hospice service providers; and home health agencies and health  
2 maintenance organizations. The term health care facility shall  
3 not include the offices of private physicians or dentists,  
4 whether for individual or group practices and regardless of  
5 ownership, or Christian Science sanatoriums operated or listed  
6 and certified by the First Church of Christ, Scientist,  
7 Boston, Massachusetts, or a veterans' nursing home or  
8 veterans' home owned or operated by the State Department of  
9 Veterans' Affairs, not to exceed 150 beds to be built in Bay  
10 Minette, Alabama, and a veterans' nursing home or veterans'  
11 home owned or operated by the State Department of Veterans'  
12 Affairs not to exceed 150 beds to be built in Huntsville,  
13 Alabama, for which applications for federal funds under  
14 federal law are being considered by the U.S. Department of  
15 Veterans' Affairs prior to March 18, 1993.

16 "(7) HEALTH SERVICE AREA. A geographical area  
17 designated by the Governor, as being appropriate for effective  
18 planning and development of health services.

19 "(8) HEALTH SERVICES. Clinically related (i.e.,  
20 diagnostic, curative, or rehabilitative) services, including  
21 alcohol, drug abuse, and mental health services customarily  
22 furnished on either an in-patient or out-patient basis by  
23 health care facilities, but not including the lawful practice  
24 of any profession or vocation conducted independently of a  
25 health care facility and in accordance with applicable  
26 licensing laws of this state.

1           "(9) INSTITUTIONAL HEALTH SERVICES. Health services  
2 provided in or through health care facilities or health  
3 maintenance organizations, including the entities in or  
4 through which such services are provided.

5           "(9.1) MAJOR MEDICAL EQUIPMENT. Medical clinical  
6 equipment intended for use in the diagnosis or treatment of  
7 medical conditions, which is used to provide institutional  
8 health services of a health care facility which are subject to  
9 review, and which expenditure exceeds the thresholds  
10 referenced in this section and in Section 22-21-263.

11           "(10) MODERNIZATION. The alteration, repair,  
12 remodeling, and renovation of existing buildings, including  
13 equipment within the existing buildings. Modernization does  
14 not include the replacement of existing buildings which are  
15 used by a health care facility to provide institutional health  
16 services which are subject to review and does not include the  
17 replacement of major medical equipment.

18           "(11) PERSON. Any person, firm, partnership,  
19 association, joint venture, ~~or~~ corporation, limited liability  
20 company, or other legal entity, the State of Alabama and its  
21 political subdivisions or parts thereof, and any agencies or  
22 instrumentalities and any combination of persons herein  
23 specified, but person shall not include the United States or  
24 any agency or instrumentality thereof, except in the case of  
25 voluntary submission to the regulations established by this  
26 article.

1           "(12) RURAL HEALTH CARE PROVIDER/APPLICANT/HOSPITAL.  
2           A provider or applicant or hospital which is designated by the  
3           United States government Health Care Financing Administration  
4           as rural.

5           "(13) STATE HEALTH PLAN. A comprehensive plan which  
6           is prepared triennially and reviewed at least annually and  
7           revised as necessary by the Statewide Health Coordinating  
8           Council, with the assistance of the State Health Planning and  
9           Development Agency, and approved by the Governor.

10           "The Statewide Health Coordinating Council shall  
11           meet at least annually to determine whether revisions for the  
12           State Health Plan are necessary. If the Statewide Health  
13           Coordinating Council fails to meet and to review or revise the  
14           State Health Plan on an annual basis, there shall be no fees  
15           required on all certificate of need applications filed with  
16           the Certificate of Need Review Board until the Statewide  
17           Health Coordinating Council meets and reviews or revises the  
18           State Health Plan. For purposes of this paragraph, the annual  
19           meeting of the Statewide Health Coordinating Council shall  
20           occur on or before August 1 of each calendar year.

21           "The State Health Plan shall provide for the  
22           development of health programs and resources to assure that  
23           quality health services will be available and accessible in a  
24           manner which assures continuity of care, at reasonable costs,  
25           for all residents of the state. Nothing in this section should  
26           be construed as permitting expenditures for facilities,

1 services, or equipment which are inconsistent with the State  
2 Health Plan.

3 "(14) STATE HEALTH PLANNING AND DEVELOPMENT AGENCY  
4 (SHPDA). An agency of the State of Alabama which is designated  
5 by the Governor as the sole State Health Planning and  
6 Development Agency, which shall consist of three consumers,  
7 three providers, and three representatives of the Governor who  
8 all shall serve staggered terms and all be appointed by the  
9 Governor. Where used in this article, the terms, "state  
10 agency," and the "SHPDA," shall be synonymous and may be used  
11 interchangeably.

12 "(15) STATEWIDE HEALTH COORDINATING COUNCIL. A  
13 council, appointed by the Governor, established pursuant to  
14 Sections 22-4-7 and 22-4-8 to advise the State Health Planning  
15 and Development Agency on matters relating to health planning  
16 and resource development and to perform other functions as may  
17 be delegated to it, to include an annual review of the State  
18 Health Plan.

19 "(16) TO OFFER. When used in connection with health  
20 services, a health care facility or health maintenance  
21 organization that holds itself out as capable of providing, or  
22 as having the means for the provision of, specified health  
23 services.

24 "§22-21-263.

25 "(a) All new institutional health services which are  
26 subject to this article and which are proposed to be offered  
27 or developed within the state shall be subject to review under

1 this article. No institutional health services which are  
2 subject to this article shall be permitted which are  
3 inconsistent with the State Health Plan. For the purposes of  
4 this article, new institutional health services shall include  
5 any of the following:

6 "(1) The construction, development, acquisition  
7 through lease or purchase, or other establishment of a new  
8 health care facility or health maintenance organization. A  
9 transaction involving the sale, lease, or other transfer or  
10 change of control of an existing health care facility,  
11 existing health maintenance organization, or existing  
12 institutional health service is not subject to certificate of  
13 need review or approval under this article unless the  
14 transaction also involves implementing one or more of the new  
15 institutional health services described in subdivision (2),  
16 (3), or (4). The two immediately preceding sentences are  
17 applicable to all transactions occurring on or after July 30,  
18 1979. Notwithstanding anything to the contrary in this  
19 article, expenditures incurred in the sale, lease, or other  
20 transfer of an existing health care facility or existing  
21 health maintenance organization or existing institutional  
22 health service shall not be subject to subdivision (2).

23 "(2) Any expenditure by or on behalf of a health  
24 care facility or health maintenance organization which, under  
25 generally accepted accounting principles consistently applied,  
26 is a capital expenditure in excess of two million dollars  
27 (\$2,000,000) indexed annually for inflation for major medical

1 equipment; in excess of eight hundred thousand dollars  
2 (\$800,000) for new annual operating costs indexed annually for  
3 inflation; in excess of four million dollars (\$4,000,000)  
4 indexed annually for inflation for any other capital  
5 expenditure by or on behalf of a health care facility or a  
6 health maintenance organization. The index referenced in this  
7 subdivision shall be the Consumer Price Index Market Basket  
8 Professional Medical Services index as published by the U.S.  
9 Department of Labor, Bureau of Labor Statistics. The SHPDA  
10 shall publish this index information to the general public.

11 "(3) A change in the existing bed capacity of a  
12 health care facility or health maintenance organization  
13 through the addition of new beds, the relocation of one or  
14 more beds from one physical facility to another, or  
15 reallocation among services of existing beds through the  
16 conversion of one or more beds from one category to another  
17 within the following bed categories: general medical surgical,  
18 inpatient psychiatric, inpatient/residential alcohol and drug  
19 abuse or inpatient rehabilitation beds, or long-term care beds  
20 including skilled nursing care, intermediate care,  
21 transitional care, and swing beds. Notwithstanding any  
22 provision of this subdivision to the contrary, any health care  
23 facility or health maintenance organization in which at least  
24 65 percent of the beds are dedicated or used exclusively for  
25 acute care services, general medical surgical, or  
26 nonspecialized services may reallocate existing beds within  
27 the following specialized bed categories: inpatient

1 psychiatric, inpatient/residential alcohol and drug  
2 rehabilitation beds, to acute care services, or general  
3 medical surgical beds without first obtaining a certificate of  
4 need from the SHPDA.

5 "(4) Health services proposed to be offered in or  
6 through a health care facility or health maintenance  
7 organization, and which were not offered on a regular basis in  
8 or through such health care facility or health maintenance  
9 organization within the 12 month period prior to the time such  
10 services would be offered. Health services, other than those  
11 health services involving long-term care services, including  
12 without limitation, skilled and intermediate nursing home  
13 care, swing beds services, or transitional care services,  
14 provided directly by acute care hospitals classified as rural  
15 by the U.S. Bureau of Census/Office of Management and Budget,  
16 United States government Health Care Financing Administration  
17 or acute care hospitals with less than 105 beds that are  
18 located over 20 miles from the nearest acute health care  
19 facility located within Alabama shall not be subject to this  
20 subdivision but shall be subject to the other subdivisions of  
21 this subsection. Provided, however, that the exemption from  
22 this subdivision herein established shall not apply to home  
23 health services provided outside of the county in which the  
24 hospital is located.

25 "(b) The four conditions of new institutional health  
26 services listed in this section shall be mutually exclusive.

1           "(c) Notwithstanding all other provisions of this  
2 article to the contrary, those facilities and distinct units  
3 operated by the Department of Mental Health and Mental  
4 Retardation and those facilities and distinct units operating  
5 under contract or subcontract with the Department of Mental  
6 Health and Mental Retardation where the contract constitutes  
7 the primary source of income to the facility shall not be  
8 subject to review under this article.

9           "(d) For the purposes of this article, and  
10 notwithstanding all other provisions of this article to the  
11 contrary and notwithstanding any and all provisions of the  
12 State Health Plan on September 1, 2003, relating to  
13 lithotripsy, magnetic resonance imaging, and positron emission  
14 tomography, new institutional health services, which are  
15 subject to this article, shall not include any health services  
16 provided by a mobile or fixed-based extracorporeal shock wave  
17 lithotripter, mobile or fixed-based magnetic resonance  
18 imaging, or positron emission tomography proposed to be  
19 offered in or through a health care facility or health  
20 maintenance organization. The SHPDA, after consultation with  
21 and the advice of the Statewide Health Coordinating Council,  
22 in accordance with the Alabama Administrative Procedure Act  
23 and within 60 days of September 1, 2003, shall cause the State  
24 Health Plan to be amended to repeal and delete all sections of  
25 the Alabama State Health Plan relating to mobile and  
26 fixed-based lithotripters, mobile and fixed-based magnetic  
27 resonance imaging, and positron emission tomography, and cause

1 the amendment and repeal of any other SHPDA rules and  
2 regulations inconsistent with this article.

3 "§22-21-270.

4 "(a) A certificate of need issued under subsection  
5 (a) of Section 22-21-265 and Section 22-21-268 shall be valid  
6 for a period not to exceed 12 months and may be subject to one  
7 extension not to exceed 12 months, provided the criteria for  
8 extension as set forth in the rules and regulations of the  
9 SHPDA are met. Applications for an extension filed under this  
10 section shall be accompanied by a filing fee to be established  
11 by rule, not to exceed 25 percent of the original CON  
12 application fee. If no obligation has occurred within such  
13 period, the certificate of need shall be considered terminated  
14 and shall be null and void. Should the obligation be incurred  
15 within such valid period, the certificate of need shall be  
16 continued in effect for a period not to exceed one year or the  
17 completion of the construction project, whichever shall be  
18 later, or the inauguration of the service or the actual  
19 purchase of equipment.

20 "(b) Failure to commence the construction project  
21 within the time period stated in the construction contract or  
22 to complete the construction project within the time period  
23 specified in the construction contract, which may be extended  
24 by mutual agreement of the parties to the contract, shall  
25 render the certificate of need null and void, unless tolled or  
26 extended pursuant to statute or SHPDA rule or regulation.  
27 Provided, the SHPDA, or an administrative law judge appointed

1 by the Governor on appeal for a fair hearing, may for causes  
2 beyond the control of the applicant, continue the certificate  
3 of need in force if commencement of the construction project  
4 is delayed for a period not to exceed 60 days or if during the  
5 specified construction period the construction work should  
6 cease for not more than six months, or in the event of default  
7 in the construction contract by the contractor, or if, for any  
8 cause, the construction work has not ceased or otherwise been  
9 stopped for a period exceeding 60 consecutive days.

10 "(c) Applicants who held valid certificates of need  
11 which were terminated under this section may file a new  
12 application for a certificate pursuant to and subject to the  
13 provisions of this article.

14 "(d) Upon completion of the construction and  
15 issuance of a certificate of completion or the receipt of  
16 proof of purchase of equipment or inauguration of a new health  
17 service, the certificate of need shall be vested in and  
18 continued in force and effect as a part of the health care  
19 facility and shall survive changes of control and changes of  
20 ownership of the health care facility without further  
21 certificate of need approval by this agency.

22 "(e) ~~A~~ Prior to becoming vested under subsection  
23 (d), a certificate of need shall not be transferable,  
24 assignable, or convertible other than ~~between members of a~~  
25 ~~parent-subsidiary controlled corporate group as defined in~~  
26 ~~Internal Revenue Code, 26 U.S.C. §1563 (a) (1), and shall be~~  
27 ~~valid solely to the person and purpose named thereon, except~~

1 ~~to such other member of the controlled group, or by change of~~  
2 ~~name or merger with another corporation~~ to an entity under  
3 common ownership and control. As used in this subsection only,  
4 "ownership and control" means ownership, directly or through  
5 one or more affiliates, of 50 percent or more of the shares of  
6 stock entitled to vote for the election of directors, in the  
7 case of a corporation, or 50 percent or more of the voting  
8 equity interests in the case of any other type of legal  
9 entity, or status as a general partner in any partnership, or  
10 any other arrangement whereby an entity including, without  
11 limitation, any governmental entity, controls has the right to  
12 control the selection of 50 percent or more of the board of  
13 directors, managing members, or equivalent governing body of a  
14 legal entity. An "affiliate" under the preceding sentence  
15 means any corporation, limited liability company, partnership,  
16 or other legal entity that directly or indirectly controls or  
17 is controlled by or is under common control with such entity.  
18 Any agreement entered into by an applicant, prior to the  
19 issuance of a certificate of need, to transfer ownership or  
20 control of such health care facility to another person after  
21 the certificate becomes vested shall be disclosed to SHPDA  
22 prior to a decision by the Certificate of Need Review Board to  
23 grant or deny such certificate.

24           "(f) ~~The~~ Notwithstanding any other provisions of  
25 this article, the transfer of ~~stock~~ equity interests in, or  
26 change of name or merger of, ~~a corporation~~ any legal entity  
27 which holds a certificate of need shall not constitute a

1 transfer, assignment, or conversion of the certificate of  
2 need. The transaction is not subject to certificate of need  
3 approval under this article unless the transaction also  
4 involves implementing one or more of the new institutional  
5 health services or a new health care facility or health  
6 maintenance organization described in subdivisions (2), (3),  
7 or (4) of Section 22-21-263(a). The preceding sentence is  
8 applicable to all transactions occurring on or after July 30,  
9 1979.

10 "(g) SHPDA may adopt rules requiring the submission  
11 of informational filings relating to a transfer of control or  
12 ownership interests under subsections (d), (e), and (f).

13 "(h) The provisions of this section are applicable  
14 to all transactions occurring on or after July 30, 1979.

15 Section 2. This act shall become effective  
16 immediately following its passage and approval by the  
17 Governor, or its otherwise becoming law.