



The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
Determination of Need Program
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Memorandum

To: Interested Parties
From: Joan Gorga, Director, Determination of Need Program
Date: August 15, 2011
Subject: Disaggregation and Substantial Capital Expenditure Prior to a DoN

1. Disaggregation

The Department has reviewed its policy regarding “disaggregation,” which is the concept that construction and/or renovation projects could be divided up into smaller components that fell below the current substantial capital expenditure minimum so as to avoid DoN review and approval. Effective immediately, the Department will no longer entertain arguments that a renovation or construction project can avoid DoN review based on the disaggregation of component parts. Facilities should be prepared to submit an application whenever estimates for a planned construction or renovation project will exceed the current expenditure minimum. Additionally, facilities should consult with the Department if a planned construction or renovation is below the expenditure minimum but could reasonably exceed that minimum.

2. Substantial Capital Expenditure Prior to a DoN

Facilities are reminded that the statute authorizing the Determination of Need Program (M.G.L. c.111, §25C) and the regulations adopted thereunder do not permit a substantial capital expenditure for construction involving a health care facility to be undertaken prior to the Department of Public Health’s determination of need for such capital expenditure. Substantial capital expenditure is defined in the DoN regulation (105 CMR 100.020) as “a capital expenditure which exceeds *or may reasonably be regarded as likely to exceed* the expenditure minimum.”

There are several exceptions to this requirement. The DoN Program Director is authorized to permit a health care provider, in extraordinary circumstances and upon written request, to begin early construction activities (e.g., site preparation, asbestos removal) prior to DoN approval. Additionally, expenses related solely to project planning and incurred prior to filing a DoN application are permitted.

Thus, the scope of a DoN project may not include construction already undertaken or equipment previously purchased without the express written permission of the DoN Program Director. Inasmuch as a project is required to demonstrate a sound health planning process, such permission will be granted only in highly unusual circumstances.

An expenditure incurred for capital improvements or equipment subject to DoN approval and commenced prior to such approval may be subject to substantial penalties, including fines. Providers are strongly advised to work closely with this office whenever contemplating a capital expenditure for construction or equipment of significant magnitude. A health care provider is fully at risk for fines or other penalties based on noncompliance if factors such as reasonably foreseeable scope changes or cost overruns result in a project exceeding the expenditure minimum for filing an application for DoN.