



PERMISSION TO CARE:

HOW VIRGINIA'S CERTIFICATE OF NEED LAW
HARMS PATIENTS AND STIFLES HEALTH CARE
INNOVATION

ABOUT AMERICANS FOR PROSPERITY FOUNDATION

Americans for Prosperity Foundation is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society.

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VIRGINIA

In Virginia, health care providers who wish to offer new services or expand their existing operations must apply for Certificate of Public Need (“COPN”). The regional health planning agency (“RHPA”) for the applicant’s region and the Department of COPN (“DCOPN”) review the application and make a recommendation to approve or deny to the State Health Commissioner. Ultimately, the Commissioner makes the decision to approve, or not, for all COPN applications. A single unelected bureaucrat, appointed by the governor, decides for all of Virginia what health care facilities and services they can have.

Virginia claims its COPN program “seeks to contain health care costs while ensuring financial viability and access to health care for all Virginia at a reasonable cost.”¹

But the true *cost* of Virginia’s COPN program is that Virginians have access to fewer health care facilities and services, receive diminished quality of care, and pay more for care than patients in states without CON laws.

A recent [study](#) conducted by the Mercatus Center found that without the COPN program, Virginians would spend less annually on health care services per capita.² The study also estimated that Virginians would have access to as many as 49 additional hospitals as well as more facilities offering medical imaging services, even in rural areas. Virginians would also enjoy higher quality of care and experience better patient outcomes.

AFPF’s analysis of COPN applications from January 2018 to March 2021 finds the State Health Commissioner denied applications for projects with an estimated total value of \$74 million. But the true value of health care services that would be provided if not for the COPN program is much higher, as providers are unlikely to submit a COPN application they expect will be denied.

For example, Dr. Mark Baumel’s COPN application to offer “virtual colonoscopy” was denied despite the innovative service not being offered anywhere in the state. In an [interview](#) he states that other providers told him,

*“Don’t even bother with Virginia. Don’t even try.”*³

The sentiment is revealing: Virginia’s COPN program turns away health care providers and innovative treatments beyond the COPN applications denied.

Much like other states with CON programs, Virginia’s COPN program turns the process of opening a facility or expanding operations from a business activity into a political campaign—a process that can last “six to seven months to complete.”⁴ Providers launch full scale advocacy campaigns to support their applications, asking community members and health care professionals to [write letters](#) of support and sign online petitions.⁵ Currently, fights centered on the COPN program have led two competing health systems in the state into an ongoing all-out war, [including litigation](#) and an

1. *Certificate of Public Need Program*, VIRGINIA DEPARTMENT OF HEALTH, <https://www.vdh.virginia.gov/licensure-and-certification/the-certificate-of-public-need-program/> (last visited Aug. 4, 2021).

2. Matthew D. Mitchell *et al.*, *Certificate-of-Need Laws: Virginia State Profile*, MERCATUS CENTER AT GEORGE MASON UNIVERSITY, November 11, 2020, <https://www.mercatus.org/publications/certificate-need-laws-virginia-0>.

3. Kate Masters, *Inside (another) failed attempt to reform health care facility approvals in Virginia*, Virginia Mercury, March 10, 2020, <https://www.virginiamercury.com/2020/03/10/behind-the-failed-efforts-to-make-2020-the-year-of-copn-reform-in-virginia/>.

4. *Supra* note 1.

5. Jason Marks, *With more beds clearly needed, hospital expansion coming to Suffolk’s Harbour View*, WAVY.COM, July 9, 2020, <https://www.wavy.com/news/local-news/suffolk/with-more-beds-clearly-needed-hospital-expansion-coming-to-suffolks-harbour-view/>.

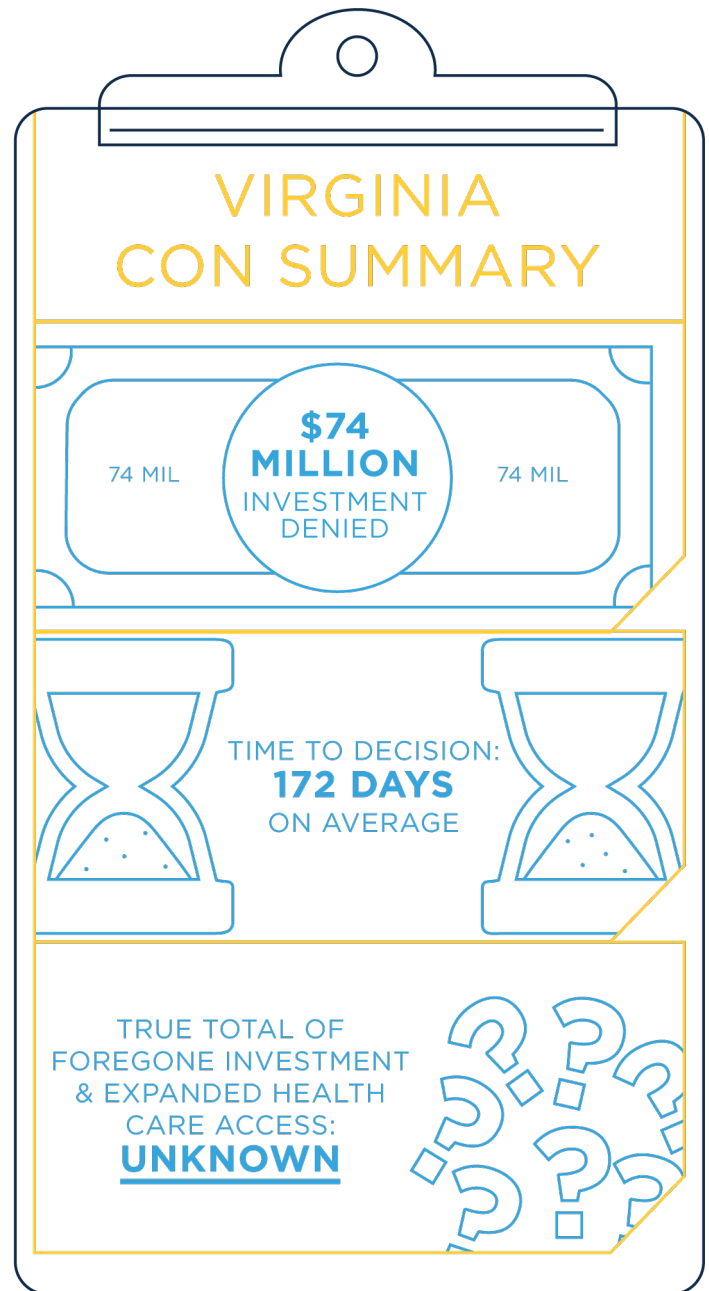
extensive melee in the press.⁶ Whenever providers have to fight for government favoritism to be able to provide services to patients, patients often miss out on those critical services.

Virginia's COPN restrictions can be tragic. In 2010, LewisGale Medical Center in Salem applied for a COPN to construct a neonatal intensive care unit ("NICU") at the facility to treat mothers and infants requiring special life-saving care. Per the DCOPN's recommendation, the State Health Commissioner denied the application. The state subsequently denied a second application for a NICU unit at LewisGale, stating both times that NICU services at LewisGale were unnecessary as they are offered at nearby Carilion Clinic in Roanoke.

Then, in 2012, [tragedy stuck](#).⁷ A pregnant mother and baby were admitted to LewisGale in urgent need of NICU care but specialized transport to the Carilion Clinic was unavailable. Despite doctors' best efforts, the baby was lost because they were denied the proper equipment to potentially save the child's life.

LewisGale has since established a Level II NICU unit at the medical center. AFPP's data on COPN applications includes two additional applications submitted by LewisGale to upgrade and expand NICU services. An application to "introduce neonatal special care services at the Specialty Level" submitted in July 2018 was denied in December 2019. LewisGale submitted another application in January 2021 to "introduce neonatal special care services at the Intermediate Level with 6 bassinets." The Commissioner has not yet rendered a decision, but the DCOPN has recommended the application be denied. It appears the Commonwealth has not learned its lesson and is once again setting up the people of Salem for disaster.

The true cost of Virginia's COPN program is more than Virginians should be forced to bear. Virginia's COPN laws make health care more expensive and limit access to care, which can be the difference between life and death.



6. Alia Paavola, *Sentara sued, accused of trying to wipe out Virginia hospital's cardiology business*, BECKER'S HOSPITAL REVIEW, May 18, 2021, <https://www.beckershospitalreview.com/legal-regulatory-issues/sentara-sued-accused-of-trying-to-wipe-out-virginia-hospital-s-cardiology-business.html>.

7. Eric Boehm, *How Virginia's Hospital Licensing Laws Led to an Infant's Death*, REASON, Jan. 25, 2017, <https://reason.com/2017/01/25/virginia-certificate-of-need-hospital/>.

THE COST OF GOING THROUGH THE COPN PROCESS

FEDERAL TRADE COMMISSION ON VA COPN LAW

“After fighting with the state for two years, Medarva Healthcare has received approval from the Virginia Department of Health to build its West Creek Surgery Center in Goochland County...According to a press release, Medarva spent more than 1,000 hours of staff time and in excess of \$300,000 in legal and other fees during the Certificate of Public Need—or COPN—process. It submitted its first application in January 2015.”

NOVEMBER 9, 2016:
RICHMOND TIMES-DISPATCH STORY ON THE COSTS OF
RECEIVING A COPN

“[CON laws] [c]reate or increase barriers to entry and expansion to the detriment of health care competition and consumers; Undercut consumer choice, stifle innovation, and weaken the market’s ability to contain health care costs; and appear to have generally failed in their intended purposes of controlling growing health care costs, increasing quality of health care, and ensuring access to care for uninsured and underinsured in urban and rural areas.”

DECEMBER 4, 2015:
FTC OFFICIAL TO VIRGINIA’S CERTIFICATE OF PUBLIC NEED
(COPN) WORKGROUP

“We believe that CON regulation is unlikely to benefit health care consumers in Virginia, and we support the complete elimination of CON regulation... Consequently, CON regulation is likely to harm consumers on balance by increasing the price, and decreasing the quality, of health services in Virginia. CON regulation only offers protection for those that do not effectively meet consumer demands (because of excessive prices or inferior quality, or because they are inefficient), by deterring or blocking entry by firms that could do better.”

AUGUST 6, 1997:
FEDERAL TRADE COMMISSION LETTER TO VIRGINIA
COMMISSION ON MEDICAL FACILITIES - CERTIFICATE OF
PUBLIC NEED

