Andy Beshear
GOVERNOR

CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF INSPECTOR GENERAL
275 East Main Street, 5E-A
Frankfort, Kentucky 40621
Phone: (502) 564-2888
Fax: (502) 564-6546

Eric Friedlander
SECRETARY

Adam Mather
INSPECTOR GENERAL

TO: Emergency Medical Services Task Force

FROM: Adam Mather, Inspector General

DATE: September 19, 2022

RE: CON Burden of Proof

At the last EMS Task Force meeting on August 16th, Co-Chair David Givens asked a follow-up question regarding the cabinet's *Certificate of Need (CON) Application Review Flowchart*. Specifically, Sen. Givens asked about the statement in the flowchart that pursuant to case law, a CON applicant bears the burden of showing that a proposal meets the CON review criteria. Set out below is an explanation of that statement.

Although it is not explicitly stated that an applicant bears the burden of proof in the CON statutes, it is a general rule of administrative law that any applicant to the government for relief, benefits, or privileges has the burden of proof in administrative hearings. The CON statutes in KRS Chapter 216B do not include any language that would shift the burden of proof and override this general rule for formal review CON cases.

KRS 216B.040 requires the cabinet to establish procedures to approve or deny certificates of need in accordance with state law. It also sets criteria that must be met and requires that public hearings be held as requested. These requirements are all consistent with the usual hearing process in administrative proceedings in which the applicant/plaintiff has the burden of proving it meets the criteria set by statute and regulation.

In a 1986 decision, the Kentucky Court of Appeals noted, "In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof. 73A C.J.S. *Public Administrative Law and Procedure* § 128. . . . The party having the burden of proof before an administrative agency must sustain that burden, and it is not necessary for an agency to show the negative of an issue when a

prima facie case as to the positive has not been established. 73A C.J.S., *supra,* § 128. Pers. Bd. v. Heck, 725 S.W.2d 13, 17 (Ky. Ct. App. 1986).

Kentucky administrative hearing officers and courts have interpreted the CON statutes to be consistent with that general rule. Administrative hearing officers routinely conduct formal review CON hearings in which the applicant bears the burden of proof, and upon judicial review, those decisions have not been overturned by the courts. In a 2013 CON case, the Kentucky Supreme Court noted, "The General Assembly has identified six statutory criteria that apply to the issuance and denial of CONs. KRS 216B.040(2)(a)2. Consistency with the State Health Plan ("SHP") is the first of the criteria, and ***an applicant must establish consistency with the SHP*** in order for a CON to be approved. KRS 216B.040(2)(a)2.a." (Emphasis added.) Comprehensive Home Health Servs., Inc. v. Pro. Home Health Care Agency, Inc., 434 S.W.3d 433, 434–35 (Ky. 2013).

Additionally, although CON hearings are not conducted pursuant to KRS Chapter 13B, KRS 13B.090(7) provides further evidence that Kentucky follows the general rules of administrative law. That statute establishes the burden of proof for all administrative hearings as follows:

> In all administrative hearings, unless otherwise provided by statute or federal law, the party proposing the agency take action or grant a benefit has the burden to show the propriety of the agency action or entitlement to the benefit sought. The agency has the burden to show the propriety of a penalty imposed or the removal of a benefit previously granted. The party asserting an affirmative defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of evidence in the record, except when a higher standard of proof is required by law.

Although the CON statutes in KRS Chapter 216B do not include any language that would shift the burden of proof and override this general rule for formal review cases, there is statutory language indicating that nonsubstantive review applications should be treated differently.

KRS 216B.095 distinguishes between formal and nonsubstantive review and requires an expedited process for nonsubstantive review applications. Subsection (4) makes clear that, "notwithstanding any other provision to the contrary . . . the cabinet may approve a certificate of need for a project . . . [subject to nonsubstantive review] . . . ***unless*** it finds the facility or service . . . is not required; or . . . is not consistent with the state health plan." (Emphasis added.)

This language allows a shifting of the burden of proof by allowing a presumption that nonsubstantive review applicants meet the CON criteria unless proven otherwise. Accordingly, the nonsubstantive review regulation, 900 KAR 6:075, shifts the burden to

the opposing party and states that there is a presumption of need unless rebutted by clear and convincing evidence by an affected party.

This statutory delineation between formal and nonsubstantive review processes is further evidence that the formal review process was intended to follow the general rules of administrative law placing the burden of proof on the applicant.