

SB 2224

THE STATE SENATE
Monday, February 22, 2010

Senate Bill No. 2224
As Amended

SENATE BILL NO. 2224 - By: Myers of the Senate and Terrill and Hickman of the House.

[prisons and reformatories - Private Prison Certificate of Need Act - stating purpose - defining terms - stating power and duties - codification - effective date]

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 561.7 of Title 57, unless there is created a duplication in numbering, reads as follows:

This act shall be known and cited as the "Private Prison Certificate of Need Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 561.8 of Title 57, unless there is created a duplication in numbering, reads as follows:

The Legislature hereby declares that it is the public policy of the State of Oklahoma that the offering and development of private prison services should be made in a planned, orderly and economical manner that it is essential to the realization of this public policy. That the offering and development of private prison services in the state be made in accordance with the needs for such services. It is the purpose of the Legislature in enacting this act

1 to further this public policy by providing for the submittal of
2 plans and applications, and by prohibiting the offering, development
3 or change of existing services prior to the issuance of a
4 certificate of need by the Department of Corrections.

5 SECTION 3. NEW LAW A new section of law to be codified
6 in the Oklahoma Statutes as Section 561.9 of Title 57, unless there
7 is created a duplication in numbering, reads as follows:

8 As used in the Private Prison Certificate of Need Act:

- 9 1. "Board" means the Board of Corrections;
- 10 2. "Director" means the Director of the Department of
11 Corrections;
- 12 3. "Department" means the Department of Corrections;
- 13 4. "Private prison" means any correctional facility within this
14 state which houses minimum, medium or maximum security inmates and
15 which is not owned or operated by the State of Oklahoma or the
16 Department of Corrections, whether such facility is operated for
17 profit or not for profit;
- 18 5. "Disclosure statement" means a written statement by the
19 applicant which contains:
 - 20 a. the full name, business address, and social security
21 number of the applicant, and all persons with
22 controlling interest as defined by the Private Prison
23 Certificate of Need Act,

- 1 b. the full name and address of any legal entity in which
2 the applicant holds a debt or equity interest of at
3 least five percent (5%), or which is a parent company
4 or subsidiary of the applicant,
- 5 c. a description of the experience and credentials of the
6 applicant, including any past or present permits,
7 licenses, certifications, or operational
8 authorizations relating to private prison regulation,
- 9 d. a listing and explanation of any administrative,
10 civil, or criminal legal actions against the applicant
11 or any person with a controlling interest which
12 resulted in a final agency order or final judgment by
13 a court of record including, but not limited to, final
14 orders or judgments on appeal related to private
15 prison operations in the five (5) years immediately
16 preceding the filing of the application. Such actions
17 shall include, without limitation, any permit denial
18 or any sanction imposed by a state or federal
19 regulatory authority, and
- 20 e. a listing of any state, federal, or local government
21 agency outside this state that has or has had
22 regulatory responsibility over the applicant;

1 6. "History of noncompliance" means a detailed listing of fines
2 or other penalties levied against the applicant by state, federal,
3 or local government regulatory agencies in the past three (3) years;

4 7. "Person" means any individual, corporation, industry, firm,
5 partnership, association, venture, trust, institution, federal,
6 state or local governmental instrumentality, agency or body or any
7 other legal entity however organized; and

8 8. "Person with a controlling interest" means a person who
9 meets any one or more of the following requirements:

10 a. controls fifty percent (50%) or more of the common
11 stock of the corporate entity involved or controls
12 fifty percent (50%) or more of the interest in the
13 partnership involved,

14 b. controls a percentage of stock greater than any other
15 stockholder or equal to the other single largest
16 stockholder or controls a percentage of partnership
17 interest greater than any other partner or equal to
18 the other single largest partnership interest, or

19 c. a managing member of a Limited Liability Company
20 (LLC).

21 SECTION 4. NEW LAW A new section of law to be codified
22 in the Oklahoma Statutes as Section 561.10 of Title 57, unless there
23 is created a duplication in numbering, reads as follows:

1 No private prison facility shall be developed, acquired or
2 offered unless a certificate of need therefor has been issued as
3 provided in the Private Prison Certificate of Need Act. No
4 governmental entity shall approve any grant of funds, issue any
5 debentures or issue or renew any license for the operation of a
6 private prison facility, nor shall any third-party purchasers,
7 licensed or operated by this state, issue reimbursement for services
8 provided to its insurers or clients, unless the certificate of need
9 as provided in the Private Prison Certificate of Need Act has been
10 obtained.

11 SECTION 5. NEW LAW A new section of law to be codified
12 in the Oklahoma Statutes as Section 561.11 of Title 57, unless there
13 is created a duplication in numbering, reads as follows:

14 A. Every entity desiring to establish a new private prison, to
15 expand an existing facility whether through construction or
16 conversion of facilities, or to acquire an existing prison shall
17 make application to the State Department of Corrections for a
18 certificate of need. The application for a certificate of need
19 shall be in such form as the Director of the State Department of
20 Corrections shall prescribe.

21 B. A certificate of need shall be required for:

22 1. Any capital investment or lease of One Million Dollars
23 (\$1,000,000,000) or more, including predevelopment activities such

1 as arrangements and commitments for financing, architectural
2 designs, plans, working drawings specifications, and site
3 acquisition;

4 2. Acquisition of the ownership or operation of a facility
5 whether by purchase, lease, donation, transfer of stock or interest,
6 management contract, corporate merger, assignment, or through
7 foreclosure; and

8 3. An increase in authorized beds, whether through
9 establishment of a new facility or expansion of an existing
10 facility.

11 SECTION 6. NEW LAW A new section of law to be codified
12 in the Oklahoma Statutes as Section 561.12 of Title 57, unless there
13 is created a duplication in numbering, reads as follows:

14 The Director of the Department of Corrections shall have the
15 power and duty to:

16 1. Issue, renew, deny, modify, suspend and revoke certificates
17 of need;

18 2. Establish and enforce standards and requirements for
19 certificates of need;

20 3. Require the submission of and to review reports from any
21 person requesting or obtaining a certificate of need;

22 4. Employ or designate personnel necessary to implement the
23 provisions of the Private Prison Certificate of Need Act;

1 5. Report to the district attorney having jurisdiction or the
2 Attorney General, any act committed by any person which may
3 constitute a violation pursuant to the provisions of the Private
4 Prison Certificate of Need Act;

5 6. Advise, consult and cooperate with other agencies of this
6 state, the federal government, other states and interstate agencies,
7 and with affected groups and political subdivisions to further the
8 purposes of the provisions of the Private Prison Certificate of Need
9 Act;

10 7. Promulgate and enforce rules subject to the approval of the
11 Board of Corrections to implement the provisions of the Private
12 Prison Certificate of Need Act;

13 8. Investigate, request or otherwise obtain the information
14 necessary to determine the qualifications and background of an
15 applicant for a certificate of need and to determine whether a
16 violation of the Private Prison Certificate of Need Act might have
17 occurred;

18 9. Establish administrative penalties for violations of the
19 provisions of the Private Prison Certificate of Need Act as
20 authorized by the Board;

21 10. Institute and maintain or intervene in any action or
22 proceeding where deemed necessary by the Department pursuant to the
23 Private Prison Certificate of Need Act; and

1 11. Exercise all incidental powers as necessary and proper for
2 the administration of the Private Prison Certificate of Need Act.

3 Facility occupancy data used in the review of certificate of
4 need applications shall be based upon reports to the Department of
5 Corrections which are submitted by agency facilities and currently
6 operating private prison facilities and which are available to the
7 public upon request.

8 SECTION 7. NEW LAW A new section of law to be codified
9 in the Oklahoma Statutes as Section 561.13 of Title 57, unless there
10 is created a duplication in numbering, reads as follows:

11 A. The Department of Corrections within fifteen (15) days after
12 receipt of an application, shall issue an exemption from certificate
13 of need requirements upon written request and demonstration that
14 applicable exemption criteria have been met, for any of the
15 following activities:

16 1. An increase of no more than ten beds or ten percent (10%) of
17 the facility's licensed beds, whichever is greater, per calendar
18 year if:

19 a. the total capital cost of the increase is less than
20 One Million Dollars (\$1,000,000.00), and

21 b. the facility's occupancy rate averaged ninety-three
22 percent (93%) or more during the twelve (12) months
23 preceding the filing of the exemption request;

1 2. Construction of a private prison facility to replace or
2 relocate all or part of the licensed bed capacity of an existing
3 facility if:

- 4 a. the project involves no increase in authorized beds,
- 5 b. the facility shall be constructed no farther than
6 three (3) miles for rural areas and seven and one-half
7 (7 1/2) miles for urban areas, as defined by the
8 Standard Metropolitan Statistical Area (SMSA), from
9 the facility it is replacing or relocating, and
- 10 c. a plan for the use of the facility to be replaced or
11 relocated is provided that ensures continuity of
12 services; and

13 3. A management agreement if:

- 14 a. the management entity discloses all persons with
15 controlling interest in the management entity and
16 discloses all experience in correctional facility
17 management or operation in any state during the
18 preceding thirty-six (36) months,
- 19 b. the management entity and any person with controlling
20 interest if the management entity has less than
21 thirty-six (36) months experience in management or
22 operation of correctional facilities, does not have a
23 history of noncompliance, and

1 SECTION 8. NEW LAW A new section of law to be codified
2 in the Oklahoma Statutes as Section 561.14 of Title 57, unless there
3 is created a duplication in numbering, reads as follows:

4 A. All applicants for the issuance of a certificate of need, at
5 such time and in such manner as required by the Department of
6 Corrections, shall file:

7 1. A disclosure statement with their applications unless the
8 applicant is a publicly held company required to file periodic
9 reports under the Securities and Exchange Act of 1934, or a wholly
10 owned subsidiary of a publicly held company. In such case, the
11 applicant shall not be required to submit a disclosure statement,
12 but shall submit the most recent annual and quarterly reports
13 required by the Securities and Exchange Commission, which provide
14 information regarding legal proceedings in which the applicant has
15 been involved; and

16 2. Such other relevant information required by the Department
17 pursuant to the Private Prison Certificate of Need Act that relates
18 to the competency, reliability, or responsibility of the applicant
19 and affiliated persons.

20 B. An application for a certificate of need shall be signed
21 under oath by the applicant.

22 C. Promptly upon receipt of any such application, the
23 Department shall examine and transmit the application to reviewing

1 bodies selected by the Department to assist the Department in
2 determining whether the application is complete. Once the
3 Department has determined that the application is complete, it shall
4 notify the affected parties and other reviewing bodies and cause a
5 thorough investigation to be made of the need for and
6 appropriateness of the new or any private prison service
7 acquisition, expansion, or establishment of a new facility.

8 D. Except as provided by Section 7 of this act, the
9 investigation made pursuant to an application for a certificate of
10 need shall include the following:

11 1. The availability of sufficient occupancy of the private
12 prison as determined by letters of intent from a state, federal or
13 local government jurisdiction;

14 2. The adequacy of financial resources for the acquisition,
15 expansion, or establishment of a new private prison facility and for
16 the continued operation thereof;

17 3. The availability of sufficient staff to properly operate the
18 proposed acquisition, expansion, or establishment of a new private
19 prison facility;

20 4. The record of the applicant's current and prior ownership,
21 operation and management of similar facilities in this state and in
22 any other state; and

23 5. Any other matter which the Department deems appropriate.

1 E. Before making a final determination on an acquisition
2 application, the Director of the Department of Corrections shall
3 cause paid public notices to be published in a newspaper of general
4 circulation near the facility and in a newspaper of general
5 circulation in the area where the application is available for
6 public inspection. The public notices shall offer participating
7 parties an opportunity to submit written comments.

8 F. The Director's decision to approve or deny the proposed
9 acquisition, expansion, or establishment of a new facility shall be
10 made within forty-five (45) days following the deadline for
11 submitting written comments, or the proposed acquisition or
12 establishment shall be automatically approved, unless otherwise
13 prohibited pursuant to the provisions of the Private Prison
14 Certificate of Need Act.

15 G. If the Director finds that a proposed acquisition,
16 expansion, or establishment of a new facility is consistent with the
17 criteria and standards for review of such projects, and is otherwise
18 in compliance with the provision of the Private Prison Certificate
19 of Need Act, then the Director shall issue a certificate of need.
20 If the Director finds that the proposed acquisition, expansion, or
21 establishment of a new facility is not consistent with the criteria
22 and standards, or is otherwise not in compliance with the provisions

1 of the Private Prison Certificate of Need Act, the Director shall
2 deny the certificate of need.

3 SECTION 9. NEW LAW A new section of law to be codified
4 in the Oklahoma Statutes as Section 561.15 of Title 57, unless there
5 is created a duplication in numbering, reads as follows:

6 A. Each application for a new certificate of need applied for
7 pursuant to the provisions of Section 5 of this act, except for
8 those applications filed by state agencies, shall be accompanied by
9 an application fee of Three Thousand Dollars (\$3,000.00).

10 B. The maximum filing fee on an application for replacement of
11 an existing facility shall be One Thousand Dollars (\$1,000.00).

12 C. 1. The maximum filing fee on an application for an
13 acquisition shall be Five Thousand Dollars (\$5,000.00).

14 2. The capital cost for acquisition shall be the current book
15 value of the facility as shown by a recognized method or basis of
16 accounting as attested by a Certified Public Accountant.

17 D. If an application for a certificate of need is not approved,
18 the Department of Corrections shall refund the application fee in
19 full.

20 E. Each request for exemption from certificate of need
21 requirements submitted under Section 7 of this act, except for a
22 request filed by a state agency, shall be accompanied by a fee of
23 One Hundred Dollars (\$100.00).

1 SECTION 10. NEW LAW A new section of law to be codified
2 in the Oklahoma Statutes as Section 561.16 of Title 57, unless there
3 is created a duplication in numbering, reads as follows:

4 Except as provided in subsection D of Section 7 of this act, no
5 certificate of need shall be issued by the Department of Corrections
6 unless, after investigation, the Director of the Department of
7 Corrections makes the following findings:

8 1. The proposed action can be economically accomplished and
9 maintained;

10 2. The proposed action will contribute to the orderly
11 development of corrections services in the state;

12 3. The applicant employs or has the resources to adequately
13 staff the facility with trained employees; and

14 4. The applicant is found to be in compliance with the
15 provisions of Section 12 of this act.

16 5. The applicant provides proof of the availability of
17 sufficient occupancy of the private prison as determined by letters
18 of intent from a state, federal or local government jurisdiction.

19 SECTION 11. NEW LAW A new section of law to be codified
20 in the Oklahoma Statutes as Section 561.17 of Title 57, unless there
21 is created a duplication in numbering, reads as follows:

22 An application for a certificate of need for a capital
23 expenditure to eliminate or prevent imminent safety hazards as

1 defined by federal, state or local fire, building or life safety
2 codes or regulations, or to comply with state licensure standards,
3 or to comply with accreditation standards, shall be approved unless
4 the Department of Corrections finds:

- 5 1. That the facility or service is not needed; or
- 6 2. That the applicant is found to be out of compliance with the
7 provisions of Section 12 of this act.

8 Approval under this section shall cover only the capital
9 expenditure to eliminate or prevent the hazards or to comply with
10 standards described herein.

11 SECTION 12. NEW LAW A new section of law to be codified
12 in the Oklahoma Statutes as Section 561.18 of Title 57, unless there
13 is created a duplication in numbering, reads as follows:

14 A. No certificate of need shall be issued for the acquisition
15 of an existing facility unless after investigation the Director of
16 the Department of Corrections finds that the applicant:

- 17 1. Has financial resources necessary to complete the
18 transaction and to maintain services and staffing; and
- 19 2. Is found to be in compliance with the provisions of Section
20 10 of this act.

21 B. 1. The Director shall refuse to issue a certificate of need
22 to any applicant who has had, in ten percent (10%) or more of the
23 applicant's private prison facility holdings in the preceding sixty

1 (60) months, fines for inadequate staff or training, escapes,
2 excessive assaults, or other fines or other penalties relating to
3 the operation or security of a facility; license or certification
4 revoked, rescinded, canceled, terminated, involuntarily suspended,
5 or refused renewal; or if the license or certification was
6 relinquished voluntarily in lieu of penalty.

7 2. The Director shall refuse to issue a certificate of need to
8 any applicant except where the applicant overcomes a presumption
9 against approval with clear and convincing evidence that one of the
10 following circumstances was not due to the action or inaction of the
11 applicant or any person with a controlling interest:

12 a. the applicant has had, in any of the applicant's
13 private prison holdings in the preceding sixty (60)
14 months, a facility's license or certificate revoked,
15 rescinded, canceled, terminated, involuntarily
16 suspended or refused renewal,

17 b. the applicant has a history of noncompliance, as
18 defined by statute, with the standards for licensure
19 of private prison facilities of any state in which the
20 applicant has or has had private prison facilities, or
21 with federal standards for certification of private
22 prison facilities,

- 1 c. the applicant, in all current and prior ownership,
2 operation and management of private prison facilities,
3 has not complied with all lawful orders of suspension,
4 receivership, temporary management, or administrative
5 penalty issued by the Department or by other
6 authorities with similar responsibilities in other
7 states or by the federal government, or
8 d. the applicant has been convicted of a felony criminal
9 offense related to the operation or management of a
10 private prison facility.

11 3. Other than any of those reasons listed in paragraph 1 or 2
12 of this subsection, the Director may refuse to issue a certificate
13 of need to any applicant who has had, in the preceding thirty-six
14 (36) months, one or more of the following:

- 15 a. a temporary manager, monitor, or receiver appointed,
16 or
17 b. had a civil money penalty imposed of Thirty-five
18 Thousand Dollars (\$35,000.00) or more.

19 C. Noncompliance with a final agency order or final order or
20 judgment of a court of record which has been set aside by a court on
21 appeal of such final order or judgment shall not be considered a
22 final order or judgment for the purposes of this section.

1 SECTION 13. NEW LAW A new section of law to be codified
2 in the Oklahoma Statutes as Section 561.19 of Title 57, unless there
3 is created a duplication in numbering, reads as follows:

4 A. When the Director of the Department of Corrections makes a
5 determination to issue or deny a certificate of need, the Director
6 shall provide written findings to the applicant, other reviewers and
7 to other persons upon their request. The certificate of need shall
8 establish the maximum capital expenditure for the project. The
9 Board of Corrections shall adopt rules concerning the time in which
10 a decision must be made on an application.

11 B. Any person may request a reconsideration of the Director's
12 determination for good cause shown, the grounds for which shall be
13 established by the Board by rule. A request for reconsideration
14 shall be filed within ten (10) days of the Department's
15 determination. The hearing thereupon shall be conducted within
16 thirty (30) days following the receipt of request. Written findings
17 shall be issued within forty-five (45) days of such hearing.

18 C. Any final determination by the Department pursuant to the
19 Private Prison Certificate of Need Act may be appealed by the
20 applicant, or any other aggrieved party under the provisions of
21 Sections 317 and 318 of Article II of the Administrative Procedures
22 Act; provided, that the venue for such appeal shall be in Oklahoma

1 County or in the county in which the facility at issue in the
2 application is located.

3 SECTION 14. NEW LAW A new section of law to be codified
4 in the Oklahoma Statutes as Section 561.20 of Title 57, unless there
5 is created a duplication in numbering, reads as follows:

6 A. 1. A certificate of need issued pursuant to the provisions
7 of the Private Prison Certificate of Need Act for the construction
8 or establishment of a new private prison facility or the expansion
9 of an existing facility shall be valid for a period of six (6)
10 months during which time the applicant shall submit to the
11 Department of Corrections the plans and specifications for the
12 facility to be constructed; however, the Department may extend such
13 time by a period not to exceed twelve (12) months for extraordinary
14 circumstances beyond the control of the applicant.

15 2. If no such plans and specifications are submitted within the
16 time required by this section, then such certificate shall be null
17 and void.

18 3. If plans and specifications are submitted, the Department
19 shall approve or disapprove such plans and specifications within
20 thirty (30) days of the filing of such plans and specifications
21 shall be presumed to be approved.

1 4. If the Department disapproves the plans and specifications,
2 such disapproval shall include a detailed statement of the
3 corrections needed.

4 5. The Board of Corrections shall provide by rule the review
5 process and time deadlines not exceeding twelve (12) months for
6 approval or disapproval and resubmittal of initial, final and
7 corrected plans and specifications. The applicant's failure to meet
8 the review process deadlines promulgated by the Board shall render
9 the certificate of need void.

10 6. The applicant must begin construction of the structure
11 within twelve (12) months following the approval of the final plans
12 and specifications and must proceed to complete the structure within
13 eighteen (18) months of the approval from the beginning of
14 construction or the certificate will be canceled.

15 However, the Department may extend such completion day by a
16 period not to exceed twenty-four (24) months for good cause upon the
17 applicant's demonstration that the applicant has made a good faith
18 effort to complete the structure or modifications and that the delay
19 is unlikely to result in harm to the population to be served by the
20 applicant.

21 B. A certificate of need issued pursuant to the provisions of
22 this act for the acquisition of a private prison facility shall be
23 valid for a period of six (6) months by which time the acquisition

1 must be finalized, provided that the Department may extend such
2 final date by a period not to exceed twelve (12) months for good
3 cause.

4 C. Pending the appeal of an order granting a certificate of
5 need in the district or Supreme Court, the effective dates of
6 deadlines for submitting plans, filing reports, completion of the
7 project and other requirements related to such project shall
8 commence on the date of a final judicial determination of any such
9 appeal, and any certificate of need which has been approved by the
10 Department shall remain in effect pending such appeal. The
11 effective date of the issuance of a certificate of need shall be the
12 date of a final judicial determination of any such appeal. The
13 provisions of this subsection shall have prospective and
14 retrospective application.

15 SECTION 15. NEW LAW A new section of law to be codified
16 in the Oklahoma Statutes as Section 561.21 of Title 57, unless there
17 is created a duplication in numbering, reads as follows:

18 A. The Board of Corrections shall promulgate such rules as are
19 necessary to implement the provisions of the Private Prison
20 Certificate of Need Act and meet the requirements of federal
21 regulations. The Department of Corrections may administer oaths at
22 any hearing or investigation conducted pursuant to the Private

1 Prison Certificate of Need Act, and receive federal grant or
2 contract funds by complying with the requirements therefor.

3 B. The Department shall post on the Department's Internet site
4 a monthly report which shall include the status of each review
5 currently being conducted, the reviews completed since the last
6 report issued, and a general statement of the findings and decisions
7 made in the course of these reviews.

8 SECTION 16. NEW LAW A new section of law to be codified
9 in the Oklahoma Statutes as Section 561.22 of Title 57, unless there
10 is created a duplication in numbering, reads as follows:

11 A. Any person who offers or develops or begins to offer or
12 develop a private prison facility without having first obtained a
13 certificate of need, as provided by the Private Prison Certificate
14 of Need Act, shall be deemed guilty of a misdemeanor, and upon
15 conviction shall be punishable by payment of a fine of not less than
16 One Thousand Dollars (\$1,000.00) and not more than Five Thousand
17 Dollars (\$5,000.00).

18 B. If the Department of Corrections, through one of its agents
19 or representatives, notifies in writing, through certified mail,
20 return receipt requested, the person who has unlawfully commenced
21 the offering or development of a private prison facility to cease
22 and desist, then each day that such person continues such offering
23 or development shall be a separate offense. If any person continues

1 to offer or develop a private prison service after the issuance of a
2 cease and desist order, the Department shall seek an injunction to
3 prohibit the continued offering or development.

4 SECTION 17. This act shall become effective November 1, 2010.

5 COMMITTEE REPORT BY: COMMITTEE ON APPROPRIATIONS, dated 2-17-10 - DO
6 PASS, As Amended and Coauthored.