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Proposed Regulation Agency Background Document

Agency name	Virginia Department of Health
Virginia Administrative Code (VAC) citation(s)	12VAC5-371
Regulation title(s)	Regulations for the Licensure of Nursing Facilities
Action title	Amend regulations to revise construction standards for nursing facilities
Date this document prepared	August 26, 2015

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

This regulatory action is in response to a Petition for Rulemaking. This action will bring the Regulations for the Licensure of Nursing Facilities (the Regulations), 12VAC5-371 *et. seq.*, into conformance with the provisions of §32.1-127.001 of the Code of Virginia (Code). Section 32.1-127.001 of the Code states that "Notwithstanding any law or regulation to the contrary," the Board of Health shall promulgate regulations for the licensure of hospitals and nursing homes that include minimum standards for design and construction that are consistent with the current edition of the Guidelines for Design and Construction of Hospital and Health Care Facilities issued by the American Institute of Architects Academy of Architecture for Health. The American Institute of Architects Academy of Architecture for Health has become the Facility Guidelines Institute (FGI). The latest edition of Guidelines published by the FGI is the 2014 edition of Guidelines for Residential Health Care, and Support Facilities (the Guidelines). However, the Regulations currently state that the Virginia Uniform Statewide Building Code takes precedence over the

Guidelines and the edition of the Guidelines listed within the Regulations is outdated. This regulatory provision is contrary to the requirements of §32.1-127.001.

The Virginia Department of Health (VDH) plans to amend regulatory section 410 and repeal section 420 of chapter 371 pertaining to building and construction codes for nursing facilities. The purpose of the amendment will be to specify that nursing facilities shall be designed and constructed consistent with Parts 1 and 2 and sections 3.1 and 3.2 of Part 3 of the 2014 Guidelines, and remove language which states the Virginia Uniform Statewide Building Code takes precedence over the Guidelines, thus bringing the Regulations into compliance with the Code. Further the action will repeal the unnecessary section 420.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the “Definition” section of the regulations.

FGI- Facility Guidelines Institute

VDH – means the Virginia Department of Health.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable; and 2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person’s overall regulatory authority.

The regulatory chapter 12VAC5-371 is promulgated under the authority of §§ 32.1-127 and 32.1-127.001 of the Code. Section 32.1-127 of the Code requires the Board to promulgate regulations including minimum standards for (i) the construction and maintenance of hospitals, nursing homes and certified nursing facilities to ensure the environmental protection and the life safety of its patients, employees and the public, (ii) the operation, staffing and equipping of hospitals, nursing homes and certified nursing facilities, (iii) qualifications and training of staff of hospitals, nursing homes and certified nursing facilities, except those professionals licensed or certified by the Department of Health Professions, (iv) conditions under which a hospital or nursing home may provide medical and nursing services to patients in their places of residence, and (v) policies related to infection prevention, disaster preparedness, and facility security of facilities. Section 32.1-127.001 states, “Notwithstanding any law or regulation to the contrary, the Board of Health shall promulgate regulations pursuant to § 32.1-127 for the licensure of hospitals and nursing homes that shall include minimum standards for the design and construction of hospitals, nursing homes, and certified nursing facilities consistent with the current edition of the Guidelines for Design and Construction of Hospital and Health Care Facilities issued by the American Institute of Architects Academy of Architecture for Health.” The American Institute of Architects Academy of Architecture for Health has become the FGI and the latest edition of Guidelines published by the FGI is the 2014 edition of Guidelines for Residential Health Care, and Support Facilities.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health,

safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

This regulatory action is in response to a Petition for Rulemaking. This action will bring the Regulations into conformance with the provisions of §32.1-127.001 of the Code. Section 32.1-127.001 of the Code states that “Notwithstanding any law or regulation to the contrary,” the Board of Health shall promulgate regulations for the licensure of hospitals and nursing homes that include minimum standards for design and construction that are consistent with the current edition of the Guidelines for Design and Construction of Hospital and Health Care Facilities issued by the American Institute of Architects Academy of Architecture for Health. The American Institute of Architects Academy of Architecture for Health has become the FGI and the latest edition of Guidelines published by the Facility Guidelines Institute is the 2014 edition of Guidelines for Residential Health Care, and Support Facilities. However, the regulations currently state that the Virginia Uniform Statewide Building Code takes precedence over the Guidelines and the edition of the Guidelines listed within the Regulations is outdated. This regulatory provision is contrary to the requirements of §32.1-127.001.

VDH plans to amend regulatory section 410 of chapter 371 pertaining to building and construction codes for nursing facilities. The purpose of the amendment will be to specify that nursing facilities shall be designed and constructed consistent with Parts 1 and 2 and sections 3.1 and 3.2 of Part 3 of the 2014 Guidelines, and remove language which states the Virginia Uniform Statewide Building Code takes precedence over the Guidelines, thus bringing the Regulations into compliance with the Code. Further the action will repeal the unnecessary section 420.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the “Detail of changes” section below.

VDH intends to amend section 410 of 12VAC5-371 to specify that nursing facilities shall be designed and constructed consistent with Parts 1 and 2 and sections 3.1 and 3.2 of Part 3 of the 2014 Guidelines, and remove language which states the Virginia Uniform Statewide Building Code takes precedence over the Guidelines, thus bringing the Regulations into compliance with the Code. Further the action will repeal the unnecessary section 420.

Issues

Please identify the issues associated with the proposed regulatory action, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.

The primary advantages of the proposed regulatory action to the public are increased facility and construction safety protections in new nursing facilities. The primary disadvantage to the public associated with the proposed action is the increased cost some facilities may incur to construct their facility in order to comply with the regulations. This increased cost may be passed on to the patient. VDH does not foresee any additional disadvantages to the public. The primary advantage to the agency and the Commonwealth is the promotion of public health and safety. There are no disadvantages associated with the proposed regulations in relation to the agency or the Commonwealth.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no applicable federal requirements associated with these regulations.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

No locality shall be particularly affected by the proposed regulation. No particular locality shall bear any identified disproportionate material impact which would not be experienced by other localities.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

In addition to any other comments, the agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so by mail, email or fax to Susan Puglisi, Policy Analyst, mail: 9960 Mayland Drive, Richmond, Virginia 23233, phone: 804-367-2157, fax: 804-527-4502 or email: susan.puglisi@vdh.virginia.gov. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: <http://www.townhall.virginia.gov>. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will not be held following the publication of this stage of this regulatory action.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

Projected cost to the state to implement and enforce the proposed regulation, including: a) fund source / fund detail; and b) a delineation of one-time versus on-going expenditures	None
Projected cost of the new regulations or changes to existing regulations on localities.	None
Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.	Licensed nursing facilities within the Commonwealth. Patients of such facilities.
Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	There are 266 licensed nursing facilities in operation in the Commonwealth. However, the proposed regulatory action will have no economic impact on existing facilities. All newly constructed facilities will have to comply with the updated Guidelines.
All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including: a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.	VDH has no data on what it will cost new nursing facilities to be compliant with the regulations. However, the proposed regulatory action will have no economic impact on existing facilities.
Beneficial impact the regulation is designed to produce.	This regulation is designed to promote and assure the health and safety of patients of nursing facilities

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

There are no viable alternatives to the proposal considered, as the amendments to the regulations are mandated by law. This action will bring the Regulations into conformance with the provisions of §32.1-127.001 of the Code, which states that “Notwithstanding any law or regulation to the contrary,” the Board of Health shall promulgate regulations for the licensure of hospitals and nursing homes that include minimum standards for design and construction that are consistent with the current edition of the Guidelines for Design and Construction of Hospital and Health Care Facilities issued by the American Institute of Architects Academy of Architecture for Health. However, the regulations currently state that the Virginia Uniform Statewide Building Code takes precedence over the Guidelines and the edition of the Guidelines listed within the Regulations is outdated. This regulatory provision is contrary to the requirements of §32.1-127.001. The regulatory action will bring the Regulations into compliance with the Code.

Regulatory flexibility analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

The amendments are clearly and directly mandated by law. The alternative regulatory methods are not permitted due to the statutory mandate.

Public comment

Please summarize all comments received during the public comment period following the publication of the NOIRA, and provide the agency response.

Commenter	Comment	Agency response
Leslie Rubio	<p>Amend regulations to revise construction standards for inpatient and outpatient hospitals</p> <p>If the BOH is going to amend regulations for inpatient and outpatient hospitals to grandfather existing facilities from the new construction guidelines, then it is only fair to do the same for Women's clinics in the State. Existing women's clinics that provide preventative reproductive health care and perform abortion procedures should also be grandfathered with these amended regulations. If the amended regulations intent is to allow existing facilities to continue to provide services then why are ONLY women's clinics (that also provide abortion) being singled out? How can the BOH treat one group of outpatient facilities differently than another?</p> <p>Women's clinics in the state of Virginia have been operating in accordance with the code</p>	<p>VDH believes that no response is necessary for this comment, as it does not speak to the regulations or the proposed regulatory action considered to amend 12VAC5-371 Regulations for the Licensure of Nursing Facilities</p>

	<p>established for them. Guidelines that were meant for new construction should never be applied to existing facilities. This realization becomes clear when amended regulations are being considered for existing inpatient and outpatient hospitals only.</p> <p>I urge you to include women's clinics in the state of Virginia as facilities that will also benefit from the amended regulations so that they can continue to operate by providing preventative reproductive health care to women.</p>	
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Family impact

Please assess the impact of this regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The proposed regulatory action will not have any impact on the institution of the family and family stability.

Detail of changes

Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please list separately: (1) all differences between the pre-emergency regulation and this proposed regulation; and 2) only changes made since the publication of the emergency regulation.

For changes to existing regulation(s), use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
410- Architectural drawings and specifications.		A. All construction of new buildings and additions, renovations or alterations of existing buildings for occupancy as a nursing	A. All construction of new buildings and additions, renovations, or alterations, or repairs of existing buildings for occupancy as a nursing facility shall conform to state and local

		<p>facility shall conform to state and local codes, zoning and building ordinances, and the Uniform Statewide Building Code.</p> <p>In addition, nursing facilities shall be designed and constructed according to Part 1 and sections 4.1-1 through 4.2-8 of Part 4 of the 2010 Guidelines for Design and Construction of Health Care Facilities of the Facilities Guidelines Institute (formerly of the American Institute of Architects). However, the requirements of the Uniform Statewide Building Code and local zoning and building ordinances shall take precedence.</p> <p>B. Architectural drawings and specifications for all new construction or for additions, alterations or renovations to any existing building, shall be dated, stamped with licensure seal and signed by the architect. The architect shall certify that the drawings and specifications were prepared to conform to building code requirements.</p> <p>C. Additional approval may include a Certificate of Public Need.</p> <p>D. Upon completion of the construction, the nursing facility shall maintain a complete set of legible "as built" drawings showing all construction, fixed equipment, and mechanical and electrical systems, as installed or built.</p>	<p>codes, zoning and building ordinances, and the <u>Virginia Uniform Statewide Building Code (13VAC5-63)</u>.</p> <p>In addition, nursing facilities shall be designed and constructed according to Part consistent with <u>Parts 1 and 2 and sections 4.1-1 through 4.2-8-3.1 and 3.2 of Part 43 of the 20102014 Guidelines for Design and Construction of Health Care Facilities Residential Health, Care, and Support Facilities of the Facilities Guidelines Institute (formerly of the American Institute of Architects)</u>. However, the requirements of the <u>Uniform Statewide Building Code and local zoning and building ordinances shall take precedence pursuant to § 32.1-127.001 of the Code of Virginia</u>.</p> <p>B. Architectural drawings and specifications for all new construction or for additions, alterations or renovations to any existing building, shall be dated, stamped with licensure <u>professional seal</u>, and signed by the architect. The architect shall certify that the drawings and specifications were prepared to conform to building code requirements. <u>the Virginia Uniform Statewide Building Code and be consistent with Parts 1 and 2 and sections 3.1 and 3.2 of Part 3 of the 2014 Guidelines for Design and Construction of Residential Health, Care, and Support Facilities of the Facilities Guidelines Institute. The certification shall be forwarded to the OLC.</u></p> <p>C. Additional approval may include a Certificate of Public Need.</p> <p>D. Upon completion of the construction, the nursing facility shall maintain a complete set of legible "as built" drawings showing all construction, fixed equipment, and mechanical and electrical systems, as installed or built.</p> <p>Intent: Update the regulations to be in compliance with the Code of Virginia. Likely impact: Greater clarity of the regulatory chapter.</p>
<p>420- Building inspection and classification.</p>		<p>All buildings shall be inspected and approved as required by the appropriate</p>	<p>All buildings shall be inspected and approved as required by the appropriate building regulatory entity. Approval shall</p>

		<p>building regulatory entity. Approval shall be a Certificate of Use and Occupancy indicating the building is classified for its proposed licensed purpose.</p>	<p>be a Certificate of Use and Occupancy indicating the building is classified for its proposed licensed purpose.</p> <p>Intent: Repeal the unnecessary section. Likely impact: Greater clarity of the regulatory chapter.</p>
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