§ 2802. Approval of construction. The construction of a hospital, whether public or private, incorporated or not incorporated, shall require the prior approval of the commissioner.

1. An application for such construction shall be filed with the department, together with such other forms and information as shall be prescribed by, or acceptable to, the department. Thereafter the department shall forward a copy of the application and accompanying documents to the public health and health planning council and the health systems agency, if any, having geographical jurisdiction of the area where the hospital is located.

1-a. The following types of construction projects by a hospital possessing a valid operating certificate shall not require prior approval pursuant to this section, provided that a written notice has been submitted to the department together with, where appropriate, a written architect and/or engineering certification that the project meets the applicable statutes, codes and regulations specified in the certification statement and, where required by the department, the hospital shall implement a plan to protect patient safety during construction:

(a) correction of cited deficiencies, provided that the construction is limited to the correction of the deficiencies and is authorized by a plan of correction approved by the department;

(b) repair or maintenance, regardless of cost, including routine purchases and the acquisition of minor equipment undertaken in the course of a hospital's inventory control functions; provided that for projects under this paragraph with a total cost of up to six million dollars, no written notice shall be required;

(c) non-clinical infrastructure projects regardless of cost including, but not limited to, replacement of heating, ventilating and air conditioning systems, roofs, fire alarm and call bell systems, parking lots and elevators;

(d) one for one equipment replacements regardless of cost, including replacement of equipment with another piece of equipment used for similar purposes but employing current technology; and

(e) other projects as specified in regulations adopted by the council

and approved by the commissioner.

1-b. The commissioner is authorized to waive any requirement for pre-opening certifications and/or surveys for construction projects approved in accordance with this section.

2. The commissioner shall not act upon an application for construction of a hospital until the public health and health planning council and the health systems agency have had a reasonable time to submit their recommendations, and unless (a) the applicant has obtained all approvals and consents required by law for its incorporation or establishment (including the approval of the public health and health planning council pursuant to the provisions of this article) provided, however, that the commissioner may act upon an application for construction by an applicant possessing a valid operating certificate when the application qualifies for review without the recommendation of the council pursuant to regulations adopted by the council and approved by the commissioner, or as otherwise authorized by this section; and (b) the commissioner is satisfied as to the public need for the construction, at the time and place and under the circumstances proposed, provided however that, in the case of an application by a hospital established or operated by an organization defined in subdivision one of section four hundred eighty-two-b of the social services law, the needs of the members of the religious denomination concerned, for care or treatment in accordance with their religious or ethical convictions, shall be deemed to be public need.

2-a. The council shall afford the applicant an opportunity to present information in person concerning an application to a committee designated by the council.

2-b. Beginning on January first, nineteen hundred ninety-four, and each year thereafter, a complete application received between January first and June thirtieth of each year shall be reviewed by the appropriate health systems agency and the department and presented to the public health and health planning council for its consideration prior to June thirtieth of the following year and a complete application

received between July first and December thirty-first of each year shall be reviewed by the appropriate health systems agency and the department and presented to the public health and health planning council for consideration prior to December thirty-first of the following year.

2-c. An application for the relocation of long-term ventilator beds from one residential health care facility to another residential health care facility with common ownership shall be subject, as determined by the commissioner, to either an administrative or limited review by the department. Common ownership shall be found when the ownership or controlling interest in the operator of each residential health care facility is the same, provided the percentage of ownership interest of each owner may vary between the two facilities but must meet the whole in common ownership. For purposes of this subdivision, the commissioner, when making a determination of public need, may consider access to long-term ventilator beds in the affected portions of the health systems region, and the quality of care provided at the facilities with common ownership. At no time shall an application submitted pursuant to this subdivision result in a change in the total combined number of long-term ventilator and residential health care facility beds, including residential health care facility beds converted from transferred long-term ventilator beds, operated by the two facilities with common ownership.

3. Subject to the provisions of paragraph (b) of subdivision two, the commissioner in approving the construction of a hospital shall take into consideration and be empowered to request information and advice as to (a) the availability of facilities or services such as preadmission, ambulatory or home care services which may serve as alternatives or substitutes for the whole or any part of the proposed hospital construction;

(b) the need for special equipment in view of existing utilization of comparable equipment at the time and place and under the circumstances proposed;

(c) the possible economies and improvements in service to be anticipated from the operation of joint central services including, but not limited to laboratory, research, radiology, pharmacy, laundry and

purchasing;

(d) the adequacy of financial resources and sources of future revenue; and

(e) whether the facility is currently in substantial compliance with all applicable codes, rules and regulations, provided, however, that the commissioner shall not disapprove an application solely on the basis that the facility is not currently in substantial compliance, if the application is specifically:

(i) to correct life safety code or patient care deficiencies;

(ii) to correct deficiencies which are necessary to protect the life, health, safety and welfare of facility patients, residents or staff;

(iii) for replacement of equipment that no longer meets the generally accepted operational standards existing for such equipment at the time it was acquired; and

(iv) for decertification of beds and services.

3-a. Review of applications from hospitals in epidemic areas and hospitals serving state correctional facilities to renovate or provide for capital improvement for the purpose of controlling the spread of tuberculosis infection may be approved by the commissioner, who to the extent practicable may, but shall not be required to, consider the recommendations of the health systems agency and the public health and health planning council for applications for which he grants approval. In such cases the commissioner shall take further measures necessary to expedite departmental reviews for such approval.

3-b. Review of applications from rural hospitals seeking approval in the swing bed program, authorized pursuant to section twenty-eight hundred three of this article, may be approved by the commissioner who, to the extent practicable, may consider the recommendations of the respective health systems agency. In such cases, the commissioner shall take further measures necessary to expedite departmental reviews for such approval.

3-c. An application shall state the proposed site or location of the proposed construction. Where the applicant changes the site or location after approval of the application, the commissioner may, subject to

regulations under this article, approve the change upon a finding that the change is in the best interest of the service area. In making such determination, the commissioner may seek a review of the proposed change by the public health and health planning council and the health systems agency having geographical jurisdiction.

4. No government agency shall construct any hospital without securing the written approval of the commissioner in accordance with the applicable requirements and procedures of the preceding subdivisions.

5. If the commissioner proposes to disapprove an application for construction of a hospital, he shall afford the applicant an opportunity to request a public hearing. The commissioner shall not take any action contrary to the advice of the health systems agency until he affords an opportunity to the agency to request a public hearing and, if so requested, a public hearing shall be held.

6. The commissioner, on his own motion, may hold a public hearing on an application for construction of a hospital.

7. (a) The commissioner shall charge to applicants for construction of hospitals the following fees and charges for administrative services so as to recover departmental costs in performing these functions. Each applicant for construction of a hospital shall pay to the department an application fee of two thousand dollars, provided, however, that diagnostic and treatment centers designated by the commissioner as safety net diagnostic and treatment centers, as defined in paragraph (c) of subdivision sixteen of section twenty-eight hundred one-a of this article, shall pay a fee of one thousand two hundred fifty dollars.

(b) At such time as the commissioner's written approval of the construction is granted, each applicant shall pay the following additional fee:

(i) for hospital, nursing home and diagnostic and treatment center applications that require approval by the council, the additional fee shall be fifty-five hundredths of one percent of the total capital value of the application, provided however that applications for construction of a safety net diagnostic and treatment center, as defined in paragraph

(c) of subdivision sixteen of section twenty-eight hundred one-a of this article, shall be subject to a fee of forty-five hundredths of one percent of the total capital value of the application; and

(ii) for hospital, nursing home and diagnostic and treatment center applications that do not require approval by the council, the additional fee shall be thirty hundredths of one percent of the total capital value of the application, provided however that safety net diagnostic and treatment center applications, as defined in paragraph (c) of subdivision sixteen of section twenty-eight hundred one-a of this article, shall be subject to a fee of twenty-five hundredths of one percent of the total capital value of the application.

(c) The commissioner is authorized to establish reduced fees for applications subject to limited review, as described in regulation, that do not require review by the council.

(d) The fees and charges paid by an applicant pursuant to this subdivision for any application for construction of a hospital approved in accordance with this section shall be deemed allowable capital costs in the determination of reimbursement rates established pursuant to this article. The cost of such fees and charges shall not be subject to reimbursement ceiling or other penalties used by the commissioner for the purpose of establishing reimbursement rates pursuant to this article. All fees pursuant to this section shall be payable to the department of health for deposit into the special revenue funds - other, miscellaneous special revenue fund - 339, certificate of need account.