Certificate of Need Act Effective
22 MRSA c. 103
22 MRSA §1122

JOSEPH E. BRENNAN
ATTORNEY GENERAL

RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE

DEPARTMENT OF THE ATTORNEY GENERAL

AUGUSTA, MAINE 04333

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TO: Carl V. O'Donnell, Director, Bureau of Health Planning & Devel.

FROM: David A. Williams, Assistant Attorney General

SUBJECT: Implementation of the Maine Certificate of Need Act of 1978

The Director of the Division of Health Planning and Development has requested an opinion with regard to the implementation of the Maine Certificate of Need Act of 1978, 22 M.R.S.A. c. 103, c. 687 of P.L. of 1978.

The Certificate of Need Act of 1978, hereafter the "Act", was designed to meet the requirements of certain amendments to Title XV of the Public Health Service Act enacted by Pub. L. 93-641, and the regulations pursuant thereto which amended parts 122, 123 and 100 of 42 CFR as published in 42 FR 4002. The concept was to control the costs of medical and nursing home care by supplementing the existing planning process created by section 1122 of the Social Security Act. Each state was to enact legislation based on the Certificate of Need concept with penalties that went beyond the mere withholding of Federal Financial Participation from facilities found not to be in compliance with §1122 requirements.

The Maine Act was enacted as emergency legislation, thereby becoming law on March 30, 1978, the date it was signed by the Governor. Yet the staff of the Bureau of Health Planning required a considerable period of time in which to write and hold a public hearing on the regulations required to implement the Act. In fact the regulations are not to become effective until September 1, 1978, some six months after the date which the Act became law.

During this six month period from March 30, 1978 to September 1, 1978, applications and letters of intent for new projects have been received by the Division for review under the §1122 review process, and approvals for projects reviewed pursuant to §1122 have been issued both by the Division and by the Secretary of Health, Education and Welfare. In view of this continual flow of new and completed reviews during this six month period when the Act was in effect but without regulations, the question arises as to what compliance, if any, with the provisions of the Act was required prior to September 1, 1978.

One class of application is exempt from the Act by the specific language of the Act itself. Section 316 of the Act provides that application is not required for any health service or predevelopment activity otherwise subject to review if prior to March 30, 1978 said health service or predevelopment activity "has received approval pursuant to section 1122." "Approval" within the terms of the Social Security Act is defined as approval by the Secretary of HEW after consideration of the recommendation of the Maine Commissioner of Human Services. (See §1122(d)(1) of the Social Security Act.)

Having said that we are brought then to a consideration of the major issue of what effect is to be given to this Act prior to the effective date of valid regulations promulgated pursuant thereto. It would appear that absent valid regulations as they pertain to the application process, all applications received prior to September 1, 1978 for §1122 approval or reconsideration need not also be required to apply under the Act, and any other health service or predevelopment activity offered or developed within the State prior to September 1, 1978 also need not comply with the Act.[1] Letters of intent received by the Division prior to September 1, 1978 should receive a response from the Division which informs the applicant that the Act does not apply to that health service or predevelopment activity.

Since July 1, 1978[2], the promulgation of regulations by the Division has been governed by the Administrative Procedure Act, 4 M.R.S.A. §8001 et seq. In addition §312 of the Act itself required that the procedures established by the APA for promulgating regulations be followed. Since the Division will not have complied with the requirements of §312 or the APA until September 1, 1978, it is clear that no judicially enforceable regulation exists under the Act. (See 4 M.R.S.A. §8057(1).) Therefore the Department should not require compliance with the application process unless or until the regulations which govern it are themselves judicially enforceable.

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1. It has been argued that the Act should nevertheless apply to those applicants who have filed a letter of intent within a period of sixty days prior to the effective date of the regulations, September 1, 1978 since pursuant to section 306 of the Act the actual application would be received after September 1, 1978 when the Act is enforceable. However, this argument overlooks the fact that the requirement of the letter of intent is itself created by sections of the Act which are unenforceable until September 1, 1978. Thus letters of intent have no more validity then do actual applications to fix the enforceable date of the Act.

2. Prior to July 1, 1978, the procedures for promulgating regulations by the Department of Human Services were governed solely by a Departmental regulation dated November, 1975. (The former Administrative Procedure Act did not apply to the Department of Human Services except for its licensing functions. (See former 5 M.R.S.A. §2301) In any event, the Division did not attempt to comply with the requirements of the Departmental regulations prior to July 1, 1978.

That the law requires valid procedural regulations to be promulgated if an administrative agency is to operate constitutionally is clear.

> Proper administrative procedure requires that [a licensee's] rights and agency procedure generally should be the subject of agency regulations so that a licensee may know of his rights. Mazza v. Caricchia, 15 NJ 498, 105 A2d 545. See also Winter v. Barrett, 352 Ill. 441, 186 NE 113.

Although the Act itself contains much of the procedural detail and review criteria to be followed by the division, the regulations nevertheless supply essential details for the application and review process. For example, the regulations set forth the application format, the specific timetables for interagency comment, and the criteria for extended or simplified review. Each of these items are prerequisites for the application of the Act to a specific set of facts in a manner that is constitutionally acceptable. For while not every factor to be taken into account in the decision making process in the area of health planning must be contained in a valid rule or regulation (See Merry Heart Nursing and Convalescent Home v. Dougherty, 131 N.J. Sup. 412, 418.), due process requires that the major features of the application and review process be promulgated according to State law, which in this case is the Maine Administrative Procedure Act. Failure to do so leaves the Act vulnerable to a due process challenge which could render it unenforceable.

In conclusion the Department shall begin enforcement of the Certificate of Need Act of 1978 beginning with letters of intent received on or after September 1, 1978.

David A. Williams
Assistant Attorney General