

MAINE STATE LEGISLATURE

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ONE HUNDRED AND EIGHTH LEGISLATURE

Legislative Document

No. 1202

H. P. 724

House of Representatives, March 23, 1977

On motion of Mr. Goodwin of South Berwick, referred to Committee on Health and Institutional Services. Sent up for concurrence and 2,500 ordered printed.

EDWIN H. PERT, Clerk

Presented by Mrs. Najarian of Portland.

Cosponsors: Messrs. Kerry of Old Orchard Beach, Palmer of Nobleboro.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED
SEVENTY-SEVEN

AN ACT Establishing a Maine Certificate of Need Program.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. 22 MRSA c. 103 is enacted to read:

CHAPTER 103

CERTIFICATE OF NEED

§ 301. Short title

This chapter may be cited as the "Maine Certificate of Need Act of 1977."

§ 302. Declaration of findings and purposes

The achievement of equal access to quality health care at a reasonable cost has been and continues to be a priority objective of State Government. The unchecked development of unnecessary or inappropriate health care facilities and services will threaten the achievement of that objective. The purposes of this chapter are to:

1. Promote health planning. Promote effective health planning;
2. Restrain increase in cost of health care. Restrain increases in the cost of health care by assuring that only those health care facilities and services which have been determined to be needed are developed;
3. Determine need for health care facilities. Establish an orderly meth-

od for determining the need for health care facilities and services which are proposed to be developed; and

4. Permit consumer participation. Permit consumers of health care services to participate in the process of determining the distribution, quantity, quality and cost of such services.

§ 303. Definitions

As used in this chapter, the following words and terms shall have the following meanings.

1. Annual implementation plan. "Annual implementation plan" means the Health Systems Agency's annual statement describing the objective which will achieve the goals identified in its health systems plan and prioritizing such objectives.

2. Capital expenditure. "Capital expenditure" means an expenditure including a force account expenditure, which under generally accepted accounting principles is not properly chargeable as an expense of operation and maintenance and, for the purposes of this chapter, shall include capitalized interest on borrowed funds and the fair market value of any property or equipment which is acquired under lease or comparable arrangement or through donation.

3. Construction. "Construction," when used in connection with "health care facility," means the establishment, erection, building, purchase or other acquisition of a health care facility.

4. Department. "Department" means the Department of Human Services.

5. Development. "Development," when used in connection with "health care service," means the undertaking of those activities which on their completion will result in the offering of a new health care service to the public.

6. Health care facility. "Health care facility" means any of the following facilities whether public or private, proprietary or not-for-profit general, specialty and psychiatric hospitals, skilled nursing facilities, intermediate care facilities, drug or alcohol treatment facilities, boarding homes, mental health centers, kidney disease treatment centers, including freestanding hemodialysis units, home health agencies, ambulance services, clinical laboratories and organized ambulatory care facilities.

7. Health care service. "Health care service" means clinically related, that is, diagnostic, treatment or rehabilitative services, and includes alcohol, drug abuse and mental health services.

8. Health maintenance organization. "Health maintenance organization" means an entity which:

A. Provides or otherwise makes available to enrolled participants health care services, including at least the following basic health care services, usual physician services, hospitalization, laboratory, x-ray, emergency and preventive health services and out-of-area coverage;

B. Is compensated, except for copayments, for the provision of such basic health care services to enrolled participants on a predetermined periodic rate basis; and

C. Provides physicians' services primarily through physicians who are either employees or partners of such organization or through arrangements with individual physicians or one or more groups of physicians.

9. Health Systems Agency. "Health Systems Agency" means the not-for-profit corporation established in this State in accordance with the provisions of the National Health Planning and Resources Development Act of 1974 or its successor.

10. Health systems plan. "Health systems plan" means the Health Systems Agency's annual statement of the goals for the health care system of the State and the strategies for achieving such goals.

11. Modernization. "Modernization" means the alteration, repair, remodeling, replacement and renovation of existing buildings, including initial equipment thereof and the replacement of equipment of existing buildings.

12. Offer. "Offer," when used in connection with "health care service," means to represent oneself to be capable of providing or having the means to provide a health care service.

13. Organized ambulatory care center. "Organized ambulatory care center" means a facility which provides health care services to patients not requiring inpatient care and includes health centers, outpatient clinics, family planning clinics, facilities providing diagnostic and therapeutic radiology services and ambulatory surgical facilities, but does not include the offices of physicians, dentists and other health professionals, whether in individual or group practice.

14. Person. "Person" means an individual, trust or estate, partnership, corporation, including associations, joint stock companies and insurance companies, the State or a political subdivision or instrumentality, including a municipal corporation of the State.

15. Predevelopment activities. "Predevelopment activities" means activities undertaken in preparation for the construction of a new health care facility, modernization of an existing health care facility, development of a new health care service or expansion of an existing health care service and includes the preparation of architectural designs, plans, working drawings and specifications as well as site acquisitions, preliminary plans, studies and surveys, and arrangements for financing.

16. Secretary. "Secretary" means the United States Secretary of Health, Education and Welfare and any other officer or employee of the United States Department of Health, Education and Welfare to whom the authority involved may be delegated.

17. State Health Coordinating Council. "State Health Coordinating Council" means the entity established by the Governor in accordance with the pro-

visions of section 1524 of the National Health Planning and Resources Development Act of 1974, Public Law 93-641.

18. State health plan. "State health plan" means the plan prepared annually by the State Health Coordinating Council after consideration of the health systems plan and the preliminary state health plan prepared by the Bureau of Health Planning and Development.

19. State medical facilities plan. "State medical facilities plan" means the annual statement of the number, types and distribution of medical facilities needed to provide adequate health care services to the people of the State prepared by the Bureau of Health Planning and Development and approved by the State Health Coordinating Council.

§ 304. Requirement for a certificate of need

Any person who offers or proposes to offer health care services to the public or who proposes to undertake a capital expenditure on behalf of a person who offers or proposes to offer health care services to the public shall be required to seek and receive a certificate of need from the department for:

1. Construction of facility. The construction of a health care facility or development of a health maintenance organization;

2. Certain capital expenditures on behalf of health care facility or organization. Any capital expenditure proposed to be undertaken by or on behalf of a health care facility or health maintenance organization which:

A. Would equal or exceed \$150,000; or

B. Would result in the development of a health care service not offered on a regular basis in or through such health care facility or health maintenance organization within the 12-month period immediately preceding the date on which the proposed service would be offered to the public;

3. Development of services. The development of a new health care service, except the establishment of a new practice or the expansion of an existing health care service which would involve a minimum of \$50,000 in annual operating expenses, depreciation and interests;

4. Change in existing bed complement. Any change in the existing bed complement of a health care facility or health maintenance organization which:

A. Increases or decreases the licensed bed capacity of such health care facility or health maintenance organization by more than 10% or 5 beds, whichever is less;

B. Redistributes such a number of beds among various categories or types of care; or

C. Relocates such a number of beds from one physical facility or site to another;

5. Certain capital expenditures on behalf of persons. Any capital expenditure proposed to be undertaken by or on behalf of any person who offers or

proposes to offer health care services to the public other than a health care facility or health maintenance organization which:

A. Exceeds \$150,000; or

B. Is undertaken for the purpose of acquiring equipment not commonly associated with the establishment of a new practice; and

6. Predevelopment activities. Any expenditure of \$150,000 or more for predevelopment activities proposed to be undertaken in preparation for any project which would itself require a certificate of need.

No person shall enter into any arrangement or commitment for financing a project which requires a certificate of need or incur an obligation for such a project without having sought and received a certificate of need.

§ 305. Review process

Persons who have reason to believe that a project which they propose to undertake or which is proposed to be undertaken on their behalf may require a certificate of need shall submit a letter of intent to the Department of Human Services and the Health Systems Agency. The information contained in the letter of intent shall form the basis for a determination by the department of the applicability of this chapter to the proposed project. In making such determinations the department shall consult with the Health Systems Agency.

Upon receipt of a determination by the department that a proposed project requires a certificate of need, the person who proposes to undertake the project or on whose behalf the project is proposed to be undertaken shall submit a formal application to the department and the Health Systems Agency. Each application shall be submitted in such a form and shall contain such information as the department and the Health Systems Agency may require to develop their respective findings. Neither the department nor the Health Systems Agency shall be required to consider any application which has not been submitted in such form and contain such information.

The department shall be responsible for determining whether a certificate of need shall or shall not be issued. Such determinations are to be made after consideration of the findings and recommendations of the Health Systems Agency which shall be afforded an opportunity to review each application.

§ 306. Procedures

1. Procedures for carrying out department and Health Systems Agency responsibilities. In carrying out their respective responsibilities under section 305, the department and the Health Systems Agency shall follow procedures which they have developed in accordance with regulations prescribed by the secretary and which have been approved by the State Health Coordinating Council. Such procedures shall include at least the following:

A. Provision for the submission of letters of intent in such form and containing such information as may be necessary to inform the department and the Health Systems Agency of the nature and scope of a proposed project and permit the department to determine whether a certificate of need shall be required;

- B. Provision for the submission of applications in such form and containing such information as the department and Health Systems Agency may need to develop their respective findings;
 - C. Provision for written notification to affected persons of the beginning of a review;
 - D. Schedules for review which provide that no review shall, to the extent practicable, take longer than 90 days from the date the notification referred to in paragraph C is made;
 - E. Provision for the exclusion of members of the department's staff and members of the Health Systems Agency's board of trustees and staff from participation in the review of any proposed project with respect to which they have a conflict of interest, provided that such individuals may present testimony at public hearings held by either the department or the Health Systems Agency;
 - F. Provision for written findings which state the basis for any recommendation or decision made by the department or the Health Systems Agency;
 - G. Provision for public hearings in the course of each review if requested by persons directly affected by the outcome of such review;
 - H. Access by the general public to all applications reviewed by the department and the Health Systems Agency and to all other written materials pertinent to such reviews; and
 - I. Preparation and publication of regular reports by the department and Health Systems Agency of the reviews being conducted, including a statement concerning the status of each review, and of the reviews completed since the publication of the last report, including a general statement of the findings and decisions made at the conclusion of each review.
2. Procedures for submission to State Health Coordinating Council. In developing such procedures for submission to the State Health Coordinating Council, the department and the Health Systems Agency shall be guided by the following principles:
- A. The development of a single, well-coordinated review process which can best serve the people of the State;
 - B. The certificate of need program should be carried out in a manner which promotes the active involvement of the public in the course of each review; and
 - C. The certificate of need program should be carried out in a manner which is fair and equitable to those persons who are required to seek and receive a certificate of need.

The department and Health Systems Agency shall publish the procedures they proposed to follow at least 60 days prior to the date on which they plan to submit such procedures to the State Health Coordinating Council. Inter-

ested and affected persons shall be provided a period of not less than 45 days within which to submit any written comments they may wish to make regarding such proposed procedures to the department and the Health Systems Agency. The department and the Health Systems Agency shall hold at least one public hearing during that period for the purpose of soliciting such comments. The department and the Health Systems Agency shall forward a copy of all written comments received and the record of the public hearing or hearings to the State Health Coordinating Council at the same time they forward the procedures which they propose to follow. In determining whether the proposed procedures are to be approved or disapproved, the State Health Coordinating Council shall be guided by the same principals identified in subsection 2.

The procedures approved by the State Health Coordinating Council are to be reviewed annually. The department and the Health Systems Agency shall publish any changes they propose to make in such procedures at least 60 days prior to the date on which they plan to submit such procedures to the State Health Coordinating Council. Interested and affected persons shall be provided a period of not less than 45 days within which to submit any written comments they may wish to make regarding such proposed changes or other changes which they propose to the department and the Health Systems Agency. The department and the Health Systems Agency shall hold at least one public hearing during that period for the purpose of soliciting such comments. The department and the Health Systems Agency shall forward a copy of all written comments received and the record of the public hearing or hearings to the State Health Coordinating Council at the same time they forward the procedure which they propose to follow. Proposed changes shall not be implemented unless they are first approved by the State Health Coordinating Council.

§ 307. Principles governing the review of applications

1. Determinations for issue of certificate. A certificate of need shall be issued whenever the department, after considering the findings and recommendations of the Health Systems Agency, determines that:

A. The person who proposes to undertake the project or on whose behalf the project is proposed to be undertaken is fit, willing and able to offer the proposed health care services to the public at the proper standard of care; and

B. The proposed project is consistent with the orderly and economic development of the health care delivery system.

2. Review of applications. In the process of reviewing each application to determine whether the proposed project is consistent with the orderly and economic development of the health care delivery system, the department and the Health Systems Agency shall consider the relationship between the proposed project and the goals and objectives identified in the state health plan, state medical facilities plan, health systems plan and annual implementation plan and shall apply criteria which they have developed and which have been approved by the State Health Coordinating Council. These criteria shall include at least the following general considerations:

- A. The needs of the population to be served;
- B. The availability of less costly or more effective methods of responding to such needs;
- C. The immediate and long-term financial feasibility of the proposed project as well as its probable impact on the costs of and charges for providing health services by the person proposing the project or on whose behalf the project is to be undertaken;
- D. The relationship of the proposed project to the existing health care system in the area in which the project is to be undertaken;
- E. The availability of resources, including health manpower, management personnel and funds for capital and operating needs for the provision of the services proposed and the availability of alternative uses of such resources for the provision of other health services;
- F. The relationship including the organizational relationship, of the proposed health services to ancillary or support services;
- G. The relationship of the proposed project to the long-range development plans of the person proposing the project or on whose behalf the project is proposed;
- H. The identified patient choices for allopathic or osteopathic facilities and services in the community;
- I. The special needs and circumstances of those entities which provide a substantial portion of their services or resources, or both, to individuals not residing in health service areas in which the entities are located or in adjacent health service areas;
- J. The special needs and circumstances of health maintenance organizations;
- K. The special needs and circumstances of biomedical and behavioral research projects which are designed to meet a national need and for which local conditions offer special advantages; and
- L. In the case of a construction project:
 - (1) The cost and methods of the proposed construction, including the costs and methods of energy provision; and
 - (2) The probable impact of the construction project on the costs of providing health services by the person proposing the project or on whose behalf the project is proposed.

The process by which the department and the Health Systems Agency shall develop additional criteria and submit them to the State Health Coordinating Council shall be identical to the process to be followed in the development and adoption of procedures identified in section 306.

§ 308. Reconsideration

Any person directly affected by a review may, for good cause shown, request in writing a hearing for the purpose of reconsideration of the decision of the department to issue or to deny an application for a certificate of need. The department, if it determines that good cause has been demonstrated, shall hold a hearing to reconsider its decision. For purposes of this section, a request for a hearing shall be deemed to have shown good cause if it;

1. **New information.** Presents significant, relevant information not previously considered by the department;
2. **Changes in circumstances.** Demonstrates that there have been significant changes in factors or circumstances relied upon by the department in reaching its decision;
3. **Failure to follow procedures.** Demonstrates that the department has materially failed to follow its adopted procedures in reaching its decision; or
4. **Other bases.** Provides such other basis for a hearing as the department determines constitutes good cause.

§ 309. Remedy

An applicant, the Health Systems Agency or any group of 10 taxpayers aggrieved by a decision of the department to issue or deny a certificate of need shall be entitled to request in writing and receive a fair hearing on procedural or substantive issues respecting such decision. The department shall establish the procedures by which such hearings may be conducted and is hereby authorized to arrange for the conduct of such hearings through an annual written agreement with the State Planning Office. The State Planning Office is hereby authorized to enter into a contract with the American Arbitration Association to develop and maintain a list of reputable persons willing and able to serve as Fair Hearing Officers, all of whom shall be acceptable to the Governor. The list of such persons as well as the method of their assignment and compensation shall be available for public inspection. The decision of the Fair Hearing Officer or Officers shall be considered the final decision of the department. The Fair Hearing Officer or Officers may remand the matter to the department for further action or consideration. The State Planning Office shall be reimbursed by the department for reasonable costs incurred and claimed in connection with and attendant to such fair hearings.

§ 310. Court decree; appeal

Any party in interest may present copies, certified by the Fair Hearing Officer or Officers, of any order or decision of the Fair Hearing Officer or Officers, together with all papers in connection therewith, to a clerk of courts for the County of Kennebec, whereupon any Justice of the Superior Court shall render a pro forma decree in accordance therewith and cause all interested parties to be notified. This decree shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though rendered in an action in which equitable relief is sought, duly heard and determined by the court.

Upon any appeal therefrom, the proceedings shall be the same as in appeals in actions in which equitable relief is sought and the law court may, after consideration reverse or modify any decree based upon an erroneous ruling or finding of law. There shall be no appeal from a decree based upon any order or decision of the Fair Hearing Officer or Officers unless the order or decision has been certified and presented to the court within 20 days after notice of filing thereof by the Fair Hearing Officer or Officers; and unless appeal has been taken from such pro forma decree within 10 days after such certified order or decision has been so presented to the court.

§ 311. Issuance of a certificate of need

A certificate of need shall be valid only for the scope, premises, facility or person specifically identified in the application and shall not be transferrable or assignable. A certificate of need shall be considered to have expired if an obligation for the project for which it was issued is not incurred within 12 months of the date it was issued. After consulting with the Health Systems Agency, the department may grant an extension of a certificate of need for a period not to exceed 12 months. In determining whether to grant such an extension, the department may require the person to whom the certificate of need was issued to submit additional information to document the continued need for a feasibility of the proposed project.

§ 312. Withholding of license

No new health care facility shall be eligible to obtain a license under chapters 405 or 1663, or Title 32, chapter 2-A, or their successors, if this facility has not obtained a certificate of need as required by this chapter. The license of any facility licensed under chapters 405 or 1663, or Title 32, chapter 2-A, shall not extend to, include or otherwise be deemed to allow the delivery of any services, the use of any equipment which has been acquired, the use of any portion of a facility which has been constructed or modified, or any other change for which a certificate of need as required by this chapter has not been obtained. Any such unauthorized delivery of services, use of equipment or portion of a facility, or other change shall be deemed to be in violation of the respective chapter under which such facility is licensed.

§ 313. Withholding of funds

No health care facility, health maintenance organization or other person shall be eligible to apply for or receive any reimbursement, payment or other financial assistance from any state agency, either directly or indirectly, for the capital or operating costs attributable to any project for which a certificate of need as required by this chapter has not been obtained. For the purposes of this section, the department shall determine the manner of computing the eligibility of a facility to receive public funds, using generally accepted accounting principles.

§ 314. Injunction

The Attorney General, upon the request of the department, shall seek to enjoin the construction or modification of, or other change in, a health care

facility for which a certificate of need as required by this chapter has not been obtained, and to enjoin the operation of any portion of a facility or the delivery of any new or expanded services or the undertaking of any capital expenditure for which a certificate of need as required by this chapter has not been obtained, and take such other action as may be appropriated to enforce the provisions of this chapter.

§ 315. Exemptions

Except as otherwise specifically provided, nothing in this chapter shall be construed to preempt, replace or otherwise negate the requirements of any other laws or regulations governing health care facilities. The requirements of this chapter shall not apply with respect to any health care facility:

1. Operated by religious groups. Operated by religious groups relying solely on spiritual means through prayer for healing; or

2. Change for which approved by department pursuant to federal laws. For which any construction, modification or other change subject to this chapter has been reviewed and approved by the department pursuant to its responsibilities as the designated planning agency under section 1122 of the Federal Social Security Act.

§ 316. Fees

Neither the department nor the Health Systems Agency shall require any person seeking a certificate of need to pay any fee for the processing of an application.

§ 317. Partial invalidity

If any provision of this chapter or the application thereof to any person or circumstances shall be held invalid, such invalidity shall not affect any provision or application of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.

Sec. 2. 22 MRSA § 2061, sub-§ 2, as last repealed and replaced by PL 1975, c. 264, is repealed and the following enacted in its place:

2. Review. Such project has been reviewed and approved by the appropriate regional and state health planning agencies as organized under section 253, or their successors, and has obtained a certificate of need as required by chapter 103.

STATEMENT OF FACT

Americans will spend approximately \$177 billion for health care services in fiscal year 1977, more than triple the amount they spent in 1965. During that period, health expenditures, as a percentage of the Gross National Product, rose from 5.9% to nearly 9%. Continued growth in health care spending is

expected. The U. S. Department of Health, Education and Welfare now estimates that if the current trend continues unabated, expenditures for health care service will rise to approximately \$250 billion and account for more than 10% of the Gross National Product by fiscal year 1981.

Although comprehensive data specific to this State has not yet been produced, the information that is available indicates that our experience is similar to that of the rest of the nation. Like most Americans, Maine residents now spend approximately 10% of their income for health services.

Many factors have contributed to this dramatic rise in the cost of health care services. Some of those factors, such as changes in the size and age of the population, are largely beyond the influence of either the providers of service or legislative action. No single legislative proposal can effectively address all those factors which can be influenced, and this proposal does not purport to do so. Rather, this proposal focuses on one factor that contributes to the rising cost of health care services, the investment in new and improved health care facilities and services.

Clearly, the public's demand for more effective health care services will require the maintenance and improvement of existing facilities and services as well as the development of new facilities and services. However, since all such actions will be supported by public funds or will have an impact on facilities and services which are supported with public funds, it seems prudent to establish a mechanism which permits a public determination of the need for such actions before they are undertaken. The purpose of this bill is to establish such a mechanism.