

MAINE STATE LEGISLATURE

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ONE HUNDRED AND EIGHTH LEGISLATURE

Legislative Document

No. 1358

S. P. 384

In Senate, March 31, 1977

Referred to the Committee on Health and Institutional Services. Sent down for concurrence and 2,000 ordered printed.

MAY M. ROSS, Secretary

Presented by Senator Snowe of Androscoggin.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED
SEVENTY-SEVEN

AN ACT Relating to Certificate of Need.

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 shall be known and may be cited as the "Maine Certificate of Need Act."

§ 302. Declaration of purpose

The Legislature finds that unnecessary construction or modification of health care facilities and duplication of services are substantial factors in the cost of health care and the ability of the public to obtain necessary medical services. The purposes of this Act are to promote effective and meaningful health planning; to assist in providing quality health care at the lowest possible cost; to avoid unnecessary duplication in the construction or modification of health care facilities by insuring that only those facilities that are needed will be built or modified; to assure that state funds are not used to support unnecessary capital expenditures made by or on behalf of health care facilities; to reduce or eliminate existing duplication and shortages of health care facilities, health care personnel and health services wherever possible; and to provide an orderly method of resolving questions concerning the necessity for construction or modification of health care facilities.

§ 303. Definitions

As used in this Act, unless the context otherwise indicates, the following words and terms shall have the following meanings.

1. **Ambulatory surgical facility.** "Ambulatory surgical facility" means a facility, not a part of a hospital, which provides surgical treatment to patients not requiring hospitalization. Such term does not include the offices of private physicians or dentists, whether in individual or group practice.

2. **Capital expenditure.** "Capital expenditure" means an expenditure which, under generally accepted accounting principles is not properly chargeable as an expense of operation and maintenance, and, for the purposes of this Act, shall include without limitation thereto interest on borrowed funds and the purchase value of any property or equipment which is leased or acquired by deferred payment plan.

3. **Construction.** "Construction" means the establishment, erection, building, purchase or acquisition by lease, deferred payment plan or other means of a health care facility.

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

5. **Health care facility.** "Health care facility" means any of the following facilities, whether public or private, proprietary or not for profit: General, psychiatric, specialty or tuberculosis hospitals; health maintenance organizations; skilled nursing facilities; kidney disease treatment centers, including free-standing hemodialysis units; intermediate care facilities; ambulatory surgical facilities, but does not include Christian Science sanatoriums operated or listed and certified by the First Church of Christ, Scientist, Boston, Massachusetts.

6. **Health service.** "Health service" means a clinically related, i.e. diagnostic, treatment or rehabilitative, service and includes alcohol, drug abuse and mental health services.

7. **Health systems agency.** "Health systems agency" means the health systems agency established in this State in accordance with the National Health Planning and Resources Development Act of 1974 or its successor.

8. **Institutional health care facility.** "Institutional health care facility" means any health care facility where any client or clients are or are expected to be in residence for more than 6 hours a visit.

9. **Modification.** "Modification" means the alteration, improvement, expansion, extension, renovation or replacement of a health care facility or portion thereof.

§ 304. Certificate of need required

A certificate of need from the Department of Human Services shall be required for:

1. **New health care facility.** The construction or establishment of any new health care facility;

2. Existing health care facility. The construction or modification of any health care facility or portion thereof which involves a capital expenditure of \$150,000 or more, with the exception of the leasing or subleasing of space in any facility or portion thereof for which a certificate of need has already been issued, or, with respect to any institutional health care facility, will result in any change in service or bed capacity as specified in subsections 4 or 5;

3. Certain equipment. The purchase, lease or acquisition of equipment, including the replacement of existing equipment, for diagnostic, therapeutic, administrative or operational purposes which will result in any change in service or bed capacity as specified in subsections 4 or 5, or which involves a capital expenditure of \$150,000 or more by or on behalf of a health care facility or, with the exception of dentists, by or on behalf of any other provider of medical or other health services, excluding the purchase, lease or acquisition of equipment commonly associated with the establishment of a new practice;

4. Bed capacity. A change in the existing bed capacity of any institutional health care facility where the change is 10% of the facility's licensed bed capacity or 5 beds, whichever is less, in any 12-month period;

5. Delivery of new health services. The delivery of new health services which are to be offered in or through an institutional health care facility, which were not offered on a regular basis in or through such facility within the 12-month period prior to the time that such services are to be offered;

6. Planning and development activities. Planning and development activities by or on behalf of a health care facility in preparation for a project involving any construction, modification or other change for which a certificate of need is required under this Act and which involve a total cost of \$150,000 or more. Such activities shall include studies, surveys, designs, plans, working drawings, specifications, the engaging of architectural, professional consultation or fund raising services and other activities essential to the acquisition, replacement, construction or modification of a facility or equipment; and

7. Commitment made by or on behalf of health care facility. Any arrangement or commitment made by or on behalf of a health care facility for financing any construction, modification or other change for which a certificate of need is required under this chapter.

§ 305. Periodic reports

The department shall require institutional health facilities subject to the requirements of this Act to maintain current health services and capital requirements' plans on file with the department. The department, in its rules and regulations, shall prescribe the form and contents of the health services and capital requirements' plans and shall require annual or other periodic reports updating such plans to be filed with the department. No application for a certificate of need made pursuant to this Act shall be accepted from any institutional health care facility for which such current health services and capital requirements' plans are not on file.

§ 306. Application

Applications, together with an additional number of copies as the department may require, shall be sent simultaneously to the health systems agency and the department. The department shall promulgate, with the advice of the health systems agency, rules and regulations governing the contents of applications. Such rules and regulations may take into account regional differences that exist within the State, differences in the size, classification and type of facility submitting an application, the nature of the proposed project and the relationship of the proposal to applicable state health plans. Information submitted in any application shall be supported by available, relevant, specific, empirical data and statistics.

§ 307. Incomplete applications

Upon receipt of an application for a certificate of need, the department shall examine the application to determine whether a certificate of need is required for the proposed project and whether the application is complete and in conformity with the regulations and requirements of the department. If an application is deemed to be complete by the department, after consultation with the health systems agency, the department shall so notify the applicant. If an application is deemed not to contain adequate and complete information by the department, after consultation with the health systems agency, the department shall request additional information to be submitted by the applicant. Such request shall be made within at least 15 working days after the timely receipt of an application. The health systems agency shall have 10 working days in which to request that the department require additional information to be submitted. When additional information is provided by the applicant, the department must notify the applicant within 15 working days that such information is either acceptable or unacceptable. Neither the department nor the health systems agency shall be required to consider or review any application which does not conform to the regulations of the department. The time requirements for review of applications shall not begin to run until all requested information has been submitted.

§ 308. Review cycles

The department may establish review cycles for the review of applications. There shall be at least 6 review cycles scheduled for each calendar year. As soon as is practicable, the dates of review cycles and deadlines for submission of applications shall be scheduled and published one year in advance. Applications shall be submitted at least 15 working days prior to the beginning of any scheduled review cycle.

§ 309. Notice and public hearing

The department, in its rules and regulations, shall provide for notice of any pending review of an application to be given at the beginning of such review to the public. A public hearing shall be held during the course of a review if requested, in accordance with the department's regulations, by the applicant or any person directly affected by a review, or at the direction of the department or the health systems agency. Persons directly affected

by a review shall be defined by the department in its rules and regulations and shall at least include: The applicant for a certificate of need; any health care facility located in the health service area in which the service is proposed to be offered or developed which provides services similar to the proposed services under review or which has indicated an intent to provide or develop such services prior to receipt by the department of the application being reviewed either through the filing of a letter of intent or by including such services in its plans or reports filed with the department pursuant to section 305; any private 3rd party payor that contributes 10% or more of the applicant's gross revenues; and a minimum of any 10 residents making a reasonable request for a public hearing. Notice of a public hearing shall be given by publication in a newspaper of general circulation in the area or community, at least 10 days before the date of such hearing. All persons attending shall be given reasonable opportunity to present their views or arguments in writing or orally. A transcript of the hearing, if requested in writing at least 3 days prior to the hearing, shall be provided at the expense of any individual requesting it. If no public hearing is required, any person may submit a written statement or other materials and evidence to be considered during the review process.

§ 310. Review by health systems agency

The health systems agency shall be entitled to review all applications for a certificate of need. Such review shall be conducted and the health systems agency shall submit its recommendations to the department within at least $\frac{2}{3}$ of the time allotted for review. The health systems agency shall either recommend that the department issue a certificate of need or recommend that the department deny the application for a certificate of need. The reasons for the recommendation shall be set forth in detail. The health systems agency shall notify the applicant and the department in writing of its recommendation. Failure of the health systems agency to complete its review and submit its recommendations within the required time shall be deemed a recommendation to issue a certificate of need.

§ 311. Review by department

The department shall conduct a review of each application and make its decision either to issue a certificate of need or to deny the application for a certificate of need. In reaching its decision, the department shall consider the recommendations of the health systems agency. The department shall have up to 90 days from the date the notice is sent to an applicant that an application is complete in which to make its decision, unless such period is changed in accordance with the following provisions. The department shall, in its rules and regulations, establish criteria for determining when it is not practicable to complete a review within 90 days. Whenever it is not practicable to complete a review within 90 days, the department, after consultation with the health systems agency, may extend the review period to 150 days. The department, after consultation with the health systems agency, may extend the review period for any application for an additional 60 days with the written consent of the applicant. The department shall notify the applicant and the health systems agency in writing of its decision

to issue or deny a certificate of need. The department shall set forth the reasons for its decision in writing.

§ 312. Waiver of requirements; emergency certificate of need

1. Waiver of full review. The department may waive otherwise applicable requirements and establish a simplified review process for projects which do not warrant a full review. Procedures for conducting such reviews shall be established by the department in its rules and regulations. Such procedures shall provide for a shortened review by the health systems agency and for a public hearing to be held during the course of a review, if requested by any person directly affected by the review. In order to waive requirements for a full review, the department, after consulting with the health systems agency, must find that the proposed project:

- A. Meets an already demonstrated need, as established by applicable state health plans or by the rules and regulations of the department;
- B. Is a part of a minor modernization or replacement program which is an integral part of an institutional health care facility's health services or capital expenditures' plans required by section 305; or
- C. Is required to meet federal, state or local life safety codes or other applicable requirements.

2. Waiver of other requirements. The department, after consultation with the health systems agency, may waive otherwise applicable provisions of this chapter and procedural requirements and criteria for review and issue an emergency certificate of need, subject to such limitations and restrictions in regard to duration, right of extension or renewal, subsequent review and other factors as may be imposed by the department. A review of any emergency certificate of need must begin within at least 90 days after its issuance. In order to issue an emergency certificate of need, the department must find that an emergency situation exists and that the applicant has affirmatively demonstrated:

- A. The necessity for immediate or temporary relief due to natural disaster, fire, unforeseen safety consideration or other circumstances;
- B. The serious adverse effect of delay on the applicant and the community that would be occasioned by compliance with the regular requirements of this chapter and the rules and regulations promulgated pursuant to this chapter; or
- C. The lack of substantial change in the facility or services which existed before the emergency situation.

§ 313. Principles governing review of applications

1. Requirement for issue of certificate of need. A certificate of need shall be issued with respect to any application if the department finds:

- A. That the applicant is fit, willing and able to provide the proposed services at the proper standard of care;

B. The economic feasibility of the proposed project is demonstrated in terms of: Effect on the existing and projected operating budget of the applicant; the applicant's ability to establish and operate such facility or services in accordance with licensure regulations promulgated under pertinent state laws; and the projected impact on the facility's costs and rates and the total health care expenditures in the community and the State;

C. That there is a public need for the proposed construction, modification or change; and

D. That the proposed construction, modification or change is consistent with the orderly and economic development of health facilities and health resources for the State and is in accordance with standards, criteria or plans adopted and approved pursuant to relevant state health plans developed by the health systems agency and the department.

2. Criteria for certificate of need. The department, after consulting with the health systems agency, shall establish rules and regulations consistent with subsection 1, setting forth criteria to be used in determining whether to issue a certificate of need or to deny an application for a certificate of need. Such criteria may vary according to regional differences that exist within the State and differences in the size, classification and type of facility submitting an application, the nature of the proposed project and the relationship of the proposal to applicable state health plans. The department's regulations shall provide for consideration, where applicable, of at least the following:

A. The relationship of the health services being reviewed to the applicable state health plans;

B. The relationship of the health services being reviewed to the health services and capital requirements' plans, if any, of the applicant;

C. The current and projected needs that the population served or to be served has for the proposed services;

D. The availability of less costly alternatives or more effective methods of providing the proposed services;

E. The relationship of the proposed services to the existing health care systems;

F. The availability of resources, including health personnel, management personnel and funds for capital and operating needs, for the provision of the proposed services and the availability of alternative uses of such resources for the provision of other health services;

G. The relationship, including the organizational relationship, of the proposed services to ancillary or support services;

H. The special needs and circumstances of health maintenance organizations;

I. The importance of recognizing the public's choice of allopathic or osteopathic health services by considering the unique needs and circumstances of providers of allopathic and osteopathic health care;

J. The costs and methods of any proposed construction or modification of a facility;

K. The probable impact of the proposal being reviewed on the costs of providing health services;

L. The need for utilizing new technological developments on a limited experimental basis in the absence of sufficient data to establish the need for such services;

M. The gains that may be anticipated from innovative measures in the organization, financing and delivery of health care and the development of comprehensive services for the community to be served; and

N. 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.

§ 314. Special procedures

The department shall not issue a certificate of need with respect to any application or portion thereof which involves new technological developments or innovative methods for the organization, financing or delivery of health services for which there is not sufficient data to determine adequately the need for such developments or methods until it has given notice and opportunity to other qualified health care facilities to submit similar proposals. All such applications or portions thereof shall be reviewed in accordance with this section, notwithstanding any other provisions of this Act to the contrary.

Within 15 working days after receiving an application, the department, after consultation with the health systems agency, shall notify the applicant that review of the application is to be delayed for the purpose of allowing other health care facilities to submit similar proposals. The department, within 10 days of giving such notice, shall give public notice by publication in a newspaper of general circulation that it will accept for review similar proposals from other health care facilities or providers. All such proposals must be submitted within 30 days of the date of publication. A public hearing may be requested in accordance with section 309. The department, within 150 days after the deadline for submitting proposals, shall review, according to the procedures established by this Act, all applications and may issue a certificate of need to one or more facilities based upon the ability of a facility most efficiently and effectively to test and evaluate the technological development or innovative method for organization, financing or delivering of health services. The issuance of a certificate of need under this section may be grounds for denying further applications for a certificate of need of a similar nature for a period of time not to exceed 2 years, as established by the department, after which the department shall utilize available data derived from implementation of the proposal or proposals for which

a certificate was issued pursuant to this section in its review of such applications.

§ 315. Request for reconsideration

Any person directly affected by a review may, for good cause, 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. Information not previously considered. 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. Departmental failure to follow procedures. Demonstrates that the department has materially failed to follow its adopted procedures in reaching its decision; or

4. Other bases for a hearing. Provides such other bases for a hearing as the department determines constitutes good cause.

§ 316. Remedy

An applicant, the health systems agency, a private 3rd party payor that contributes 10% or more of a health care facility's gross revenues, if 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, in its rules and regulations, shall establish procedures for requesting a fair hearing. Fair hearings shall be arranged by the department through an annual written agreement, hereby authorized, with the State Planning Office. The State Planning Office shall designate one or more qualified persons or an independent arbitration association to act as fair hearing officers to hear any appeal. The decision of the fair hearing officer or officers shall be considered the final decision of the department; however, 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.

§ 317. Rules and regulations

The department, after consulting with the health systems agency, shall adopt such rules, regulations, standards, criteria or plans as may be necessary to carry out the provisions and purposes of this Act and shall adopt a schedule of fees authorized by section 328. The department shall provide for public notice and hearing on all proposed rules, regulations, standards, criteria, plans or schedules prior to their adoption. Such notice shall be given at least 60 days prior to the date of any scheduled hearing. The de-

partment is further authorized to accept any federal funds available under any federal law now in effect or hereafter enacted and to take such actions as necessary to comply with federal requirements for receiving such funds.

§ 318. Public information

The general public shall have reasonable access to all applications reviewed by the department and to all other written material pertinent to its review of such applications. The department shall prepare and publish at least annually a report on its activities conducted pursuant to this Act.

§ 319. Conflict of interest

Any member or employee of the Department of Human Services or health systems agency who has a substantial economic or fiduciary interest which would be affected by a recommendation or decision to issue or deny a certificate of need, or who has a close relative or economic associate whose interests would be so affected, or who has a personal interest shall be ineligible to participate in the review, recommendation or decision-making process with respect to any application for which such a conflict of interest exists.

§ 320. Division of project to evade cost limitation prohibited

No health care facility or other party required to obtain a certificate of need shall separate portions of a single project into components, including, but not limited to, site, facility and equipment, to evade the cost limitations or other requirements of section 304.

§ 321. Exemptions

Except as otherwise specifically provided, nothing in this Act 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 Act 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. Other approval. For which any construction, modification or other change subject to this Act has been reviewed and has received approval pursuant to section 1122 of the Federal Social Security Act from appropriate agencies prior to the effective date of this Act.

§ 322. Scope of certificate of need

A certificate of need shall be valid only for the defined scope, premises and facility or person named in the application and shall not be transferable or assignable. A certificate of need shall expire if the construction, modification or other change for which the certificate has been issued is not commenced within 12 months following the issuance of the certificate. The department may grant an extension of a certificate for an additional specified time not to exceed 12 months if good cause is shown why the construction, modification or change has not commenced. The department may require

evidence of the continuing feasibility and availability of financing for a project as a condition for extending the life of a certificate.

§ 323. Withholding of license

No new health care facility, as defined in section 303, shall be eligible to obtain a license under chapters 405 or 1663 or of Title 32, chapter 2-A, or their successors, if such facility has not obtained a certificate of need as required by this Act. The license of any facility licensed under chapters 405 or 1663 or of 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 Act 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.

§ 324. Withholding of funds

No health care facility or other provider shall be eligible to apply for or receive any reimbursement, payment or other financial assistance from any state agency, either directly or indirectly, for any capital expenditure or operating costs attributable to any construction, modification or other change for which a certificate of need as required by this Act 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.

§ 325. 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 Act has not been obtained, and to enjoin the operation of any portion of a facility or the delivery of any services for which a certificate of need as required by this Act has not been obtained, and take such other action as may be appropriate to enforce this Act.

§ 326. Penalty

Whoever violates any provision of this chapter or any rate, rule or regulation established hereunder shall be punished by a fine of not more than \$5,000.

§ 327. Partial invalidity

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

§ 328. Fees

1. Amount to be established by department. Each application shall be accompanied by a fee of an amount to be established by the department in its rules and regulations, but not to exceed \$250. The amount of such fee may vary according to the nature of the proposed application and the type of facility or provider submitting an application. Application fees required under this section may not be refunded.

2. Certification fee. A certificate of need shall be issued only upon payment of a certification fee. The amount of such fee shall be established by the department in its rules and regulations. In the case of a certificate of need which does not involve a capital expenditure of \$150,000 or more, the certification fee shall not exceed \$250 and may vary according to the nature of the proposal and type of facility involved. In the case of a certificate of need authorizing a capital expenditure of \$150,000 or more, the certification fee shall be based on a percentage of the proposed capital expenditure, not to exceed $\frac{3}{10}$ of 1%. If the actual capital expenditure is greater than the proposed capital by more than 10%, the department shall be entitled to collect any additional amount due resulting from such increased expenditure. Any application fee paid by an applicant shall be credited towards payment of the certification fee. Certification fees received by the department may not be refunded.

3. Certificate of Need Fund. There is created in the State Treasury a dedicated account to be designated the "Certificate of Need Fund," the funds of which are to be used by the department in carrying out the purposes of this Act. The Treasurer of State shall credit to the Certificate of Need Fund all fees charged and collected by the department pursuant to this section. The expenses of the department in carrying out this Act may be paid from such fund.

§ 329. Implementation reports

The holder of a certificate of need shall make a written report at the end of each 6-month period following its issuance regarding implementation activities, obligations incurred and expenditures made and such other matters as the department may require. A final report shall be made when the service or services for which the certificate of need was issued becomes operational. The department, in its rules and regulations, shall prescribe the form and contents of such reports. Any holder of a certificate of need which has been issued for the construction or modification of a facility or portion thereof shall file final plans and specifications therefor with the department within 6 months, or such other time as the department may allow, following the issuance of such certificate for review by the department to determine that such plans and specifications are in compliance with the certificate of need which has been issued therefor and are in compliance with applicable licensure, life safety code and accreditation standards. The department may revoke any certificate of need it has issued when the person to whom it has been issued fails to file reports or plans and specifications required by this section on a timely basis.

§ 330. Review by Superior Court

Any party aggrieved by a final decision of a fair hearing officer, made pursuant to section 316, may, within 30 days of receipt of notice of such decision, appeal therefrom to the Superior Court by filing a notice of appeal stating the points of appeal. Such appeal shall be heard by the court without a jury in the manner and with the rights provided by law in other civil actions. The proceedings shall not be de novo. The court shall receive into evidence true copies of the department's records on the matter, the exhibits thereto and the decision of the fair hearing officer. The court's review shall be limited to questions of law. The court may affirm, reverse or remand the fair hearing officer's decision. Appeals from all other orders or decisions of the department, unless otherwise specified by statute, shall be taken pursuant to the Maine Rules of Civil Procedure, Rule 80-B.

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

The Legislature finds that unnecessary construction or modification of health care facilities and duplication of services are substantial factors in the cost of health care and the ability of the public to obtain necessary medical services. This Act will require a prescreening of new or expanded health care services. The purposes of this Act are to promote effective and meaningful health planning; to assist in providing quality health care at the lowest possible cost; to avoid unnecessary duplication in the construction or modification of health care facilities by insuring that only those facilities that are needed will be built or modified; to assure that state funds are used to support unnecessary capital expenditures made by or on behalf of health care facilities; to reduce or eliminate existing duplication and shortages of health care facilities, health care personnel and health services wherever possible; and to provide an orderly method of resolving questions concerning the necessity for construction or modification of health care facilities.