

MAINE STATE LEGISLATURE

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FIRST REGULAR SESSION

ONE HUNDRED AND TENTH LEGISLATURE

Legislative Document

No. 718

S. P. 248

In Senate, February 9, 1981

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

MAY M. ROSS, Secretary of the Senate

Presented by Senator Gill of Cumberland.

Cosponsors: Senator C. Sewall of Lincoln, Representative Kelleher of Bangor and Representative MacBride of Presque Isle.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED AND EIGHTY-ONE

AN ACT to Amend the Maine Certificate of Need Act of 1978.

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

Sec. 1. 22 MRSA § 302, sub-§ 3 is enacted to read:

3. Further findings. The Legislature further finds that this chapter and the National Health Planning and Resources Development Act of 1974, Public Law 93-641, as amended by Public Law 96-79, are bases for promoting effective health planning in fulfillment of the other purposes of this section and such federal Act. Any inconsistent provisions governing review and approval of health care expenditures contained in the United States Social Security Act, Section 1122, are superseded by the National Health Planning and Resources Development Act, as implemented in this chapter for purposes of health planning by application. The Commissioner of Human Services shall not renew the existing "1122 Agreement" currently existing between the department and the United States Department of Health and Human Services, but may enter into a modified agreement solely with respect to capital expenditures incurred prior to March 30, 1978.

Sec. 2. 22 MRSA § 303, sub-§§ 6-A, 6-B, 6-C and 12-A are enacted to read:

6-A. Expenditure minimum for annual operating costs. "Expenditure minimum for annual operating costs" means, as determined according to

generally accepted accounting principles, \$75,000 for the 12-month period beginning October 1, 1979 and for each 12-month period thereafter, the figure in effect for the preceding 12-month period, adjusted to reflect the change in the United States Department of Commerce Composite Construction Cost Index.

6-B. Expenditure minimum for capital expenditures. "Expenditure minimum for capital expenditures" means, as determined according to generally accepted accounting principles, \$150,000 for the 12-month period beginning October 1, 1979 and for each 12-month period thereafter, the figure in effect for the preceding 12-month period, adjusted to reflect the change in the preceding 12-month period in the United States Department of Commerce Composite Construction Cost Index.

6-C. Generally accepted accounting principles. "Generally accepted accounting principles" means accounting principles approved by the American Institute of Certified Public Accountants.

12-A. Major medical equipment. "Major medical equipment" means a single unit of medical equipment or a single system of components with related functions which is used to provide medical and other health services and which costs more than \$150,000 as determined according to generally accepted accounting principles. In determining whether medical equipment costs more than \$150,000, the cost of studies, surveys, designs, plans, working drawings, specifications and other activities essential to acquiring the equipment shall be included. If the equipment is acquired for less than fair market value, the term "cost" includes the fair market value.

Sec. 3. 22 MRSA § 304, as amended by PL 1979, c. 375, is repealed.

Sec. 4. 22 MRSA § 304-A is enacted to read:

§ 304-A. Certificate of need program

1. Administration. The department shall administer within the State a certificate of need program meeting the requirements of this Act and the National Health Planning and Resources Development Act of 1974, as amended, and its accompanying regulations.

2. Issuance, denial or withdrawal of certificates. Only the department, or the appropriate administrative or judicial review body, may issue, deny or withdraw certificates of need, grant exemptions from certificate of need reviews or determine that certificate of need reviews are not required.

3. Recommendation of Health Systems Agency. In issuing or denying certificates of need or in withdrawing certificates of need, the state agency shall take into account recommendations made by Health Systems Agency.

4. Decisions not to be inconsistent with state health plan. Each decision of the department, or the appropriate administrative or judicial review body, to issue a certificate of need shall not be inconsistent with the state health plan, except in emergency circumstances that pose an imminent threat to public health.

5. Basis for decision. Each decision of the department to issue, deny or withdraw a certificate of need shall be based:

A. On the review by the department conducted in accordance with procedures and criteria it has adopted pursuant to sections 309 and 312; and

B. On the record of the administrative proceedings held on the application for the certificate or the department's proposal to withdraw the certificate. Each decision of a state agency to grant or deny an exemption to a health maintenance organization shall be made in accordance with the department's procedures for reviewing applications for exemptions and shall be based solely on the record of the administrative proceedings held on the application.

6. Scope of coverage. The state certificate of need program applies to the obligation of capital expenditures, the offering of new institutional health services and the acquisition of major medical equipment. Persons may only obligate capital expenditures, offer institutional health services or acquire major medical equipment after a certificate of need is obtained, or with respect to a health maintenance organization, an exemption is granted. For purposes of this chapter, "the obligation of capital expenditures, offering of new institutional health services and acquisition of major medical equipment," subject to review, means the following:

A. The obligation by or on behalf of a health care facility of any capital expenditure, other than to acquire an existing health care facility, that exceeds the expenditure minimum for capital expenditures. The cost of any studies, surveys, designs, plans, working drawings, specifications and other activities, including staff effort and consulting and other services, essential to the acquisition, improvement, expansion or replacement of any plant or equipment with respect to which an expenditure is made shall be included in determining if the expenditure exceeds the expenditure minimum. As to the obligation of a capital expenditure to acquire an existing health care facility, see paragraph E;

B. The obligation of any capital expenditure by or on behalf of a health care facility which:

(1) Increases or decreases the total number of beds by 10 beds or 10%, whichever is less, in any 2-year period;

(2) Redistributes beds among categories by 10 beds or 10%, whichever is less, in any 2-year period; or

(3) Relocates beds from one physical facility or site to another by 10 beds or 10%, whichever is less, in any 2-year period;

C. The addition of the following health services:

(1) The obligation of any capital expenditure by or on behalf of a health care facility which is associated with:

(a) The addition of a health service which was not offered by or on behalf of the facility within the previous 12 months; or

(b) The termination of a health service which was offered in or through the facility; or

(2) The addition of a health service which is offered by or on behalf of the health care facility which was not offered by or on behalf of the facility within the 12-month period before the month in which the service would be offered and which entails annual operating costs of at least the expenditure minimum for annual operating costs;

D. The acquisition of the following major medical equipment:

(1) The acquisition by any person of major medical equipment that will be owned by or located in a health care facility;

(2) The acquisition by any person of major medical equipment not owned by or located in a health care facility if:

(a) The notice of intent required by section 306 is not filed in accordance with that section; or

(b) The state agency finds, within 30 days after the date it receives a notice in accordance with section 306, that the equipment will be used to provide services for inpatients of a hospital; or

(3) An acquisition of major medical equipment need not be reviewed if it will be used to provide services to inpatients of a hospital only on a temporary basis in the case of:

(a) A natural disaster;

(b) A major accident; or

(c) Equipment failure; and

E. Except as provided with respect to health maintenance organizations, the obligation of a capital expenditure by any person to acquire an existing health care facility if:

(1) The notice of intent required by section 306 is not filed in accordance with that section; or

(2) The state agency finds, within 30 days after the date it receives a notice in accordance with section 306, that the services or bed capacity of the facility will be changed in being acquired, consistent with the requirements of paragraphs B and C.

7. Leases, donations and transfers. An acquisition by donation, lease, transfer or comparable arrangement shall be reviewed if the acquisition would be subject to review under subsection 6 if made by purchase. An acquisition for less than fair market value shall be reviewed if the acquisition at fair market value would be subject to review under subsection 6, paragraph A.

8. Incurring an obligation. No person may incur an obligation for a capital expenditure that is subject to review under subsection 6, paragraphs A or B, paragraph C, subparagraph (1) or paragraph E without obtaining a certificate of need for the capital expenditure. An obligation for a capital expenditure is considered to be incurred by or on behalf of a health care facility:

A. When a contract, enforceable under state law, is entered into by or on behalf of the health care facility for the construction, acquisition, lease or financing of a capital asset;

B. When the governing board of the health care facility takes formal action to commit its own funds for a construction project undertaken by the health care facility as its own contractor; or

C. In the case of donated property on the date on which the gift is completed under applicable state law.

9. Subsequent review. The following activities require subsequent review.

A. A proposed change in a project associated with a capital expenditure for which the department has previously issued a certificate of need will require review if the change is proposed within one year after the date the activity for which the expenditure was approved is undertaken. This paragraph applies to changes associated with capital expenditures that were subject to review under subsection 6, paragraphs A and B or paragraph C, subparagraph (1). A review is required under this paragraph whether or not a capital expenditure is associated with the proposed change. A "change in a project" includes any change in the bed capacity of a facility as described in subsection 6, paragraph B and the addition or termination of a health service.

B. If a person acquires major medical equipment not located in a health care facility without a certificate of need and proposes at any time to use that equipment to serve inpatients of a hospital the proposed new use shall be reviewed unless the use is one described in subsection 6, paragraph D, subparagraph (3).

C. If a person acquires an existing health care facility without a certificate of need and proposes to change within one year after the acquisition, or any longer period of time established under the state program, the services or bed capacity of the facility, the proposed change shall be reviewed if it would have required review under subsection 6 originally.

Sec. 5. 22 MRSA § 306, sub-§ 1, first sentence, as enacted by PL 1977, c. 687, § 1, is amended to read:

Prior to filing an application for a certificate of need, an applicant shall file a letter of intent with the department no less than ~~60~~ 30 days prior to the date on which the application is to be filed.

Sec. 5-A 22 MRSA § 306, sub-§ 2, as enacted by PL 1977, c. 687, section 1, is amended to read:

2. **Application filed.** Upon a determination by the department, after consultation with the Health Systems Agency, that a certificate of need is required for a proposed expenditure or action, an application for a certificate of need shall may be filed with the department.

Sec. 6. 22 MRSA § 306, sub-§ 3, as enacted by PL 1977, c. 687, § 1, is repealed and the following enacted in its place:

3. **Applications.** The review process shall begin upon receipt of an application. The department immediately shall transmit a copy of the application to the Health Systems Agency. The agency shall have 10 working days from the date the application is received by the department in which to present written request for additional information from the applicant.

Sec. 7. 22 MRSA § 306, sub-§ 4, as enacted by PL 1977, c. 687, § 1, is repealed.

Sec. 8. 22 MRSA § 306, sub-§ 4-A is enacted to read:

4-A. **Information requirements.** The department or the Health Systems Agency may require the following information.

A. After a review has begun, the department or the agency may, on one occasion, require the applicant to submit additional information. That agency shall give the applicant at least 15 days to submit the information and upon request of the applicant, the department shall extend its review period at least 15 days.

This extension applies to all other applications which have been batched with the application for which additional information is required. Following submission of that additional information, the department or agency may seek clarification limited in scope to the additional information requested.

B. Persons subject to a review shall submit to the department or agency, in the form and manner and containing the information which the department shall prescribe and publish, pursuant to section 312, any information that the department may require concerning the subject of the review, subject to the following limitations.

(1) The information requirements may vary according to the purpose for which a particular review is being conducted or the type of health service being reviewed.

(2) The department may request, but may not require information of a person subject to review which is not prescribed and published as being required.

(3) The department shall develop procedures to ensure that requests for information in connection with a review under this chapter are limited only to that information which is necessary for the department to perform the review.

Sec. 9. 22 MRSA § 307, sub-§ 1, first sentence, as enacted by PL 1977, c. 687, § 1, is amended to read:

Upon determination that an application is complete receipt of the application or, subject to subsection 7, the batching of the application with other pending applications, for purposes of competitive review, the department shall provide for written notification of the beginning of a review.

Sec. 10. 22 MRSA § 307, sub-§ 1, ¶D, as enacted by PL 1977, c. 687, § 1, is amended by adding at the end a new sentence to read:

The notice shall also be provided to all persons who have requested notification by means of asking that their name be placed on a mailing list maintained by the department for this purpose.

Sec. 11. 22 MRSA § 307, sub-§ 2, as enacted by PL 1977, c. 687, § 1, is amended to read:

2. Public hearing. A public hearing shall be held during the course of a review by either the department or the Health Systems Agency, or both, if requested by persons directly affected by the review pursuant to subsection 1.

Sec. 12. 22 MRSA § 307, sub-§ 2, ¶¶A-D are enacted to read:

A. The department or agency shall provide notice of the hearing in accordance with the procedure adopted in subsection 1.

B. Findings, recommendations, reports, analyses and related documents prepared by the staff of the agency or the department shall be in final form and be made available to affected persons at least 10 business days prior to any hearing.

C. In a hearing, any person shall have the right to be represented by counsel or to present oral or written arguments and evidence relevant to the matter which is the subject of the hearing. Any person affected by the matter may conduct reasonable questioning of persons who make relevant factual allegations.

D. The department or agency shall maintain a verbatim record of the hearing.

E. The department or agency may not impose fees at the hearing.

Sec. 13. 22 MRSA § 307, sub-§ 3, as enacted by PL 1977, c. 687, § 1, is repealed and the following enacted in its place:

3. Reviews. To the extent practicable and subject to subsection 7, a review shall be completed and the department shall make its decision within 90 days after the date of notification under subsection 1. The department may extend any

review period up to an additional 60 days, for projects in excess of \$6,000,000 or proposals to construct, add or replace more than 50 hospital beds or more than 120 skilled nursing or intermediate care facility beds. Any review period may be extended with the written consent of the applicant.

Sec. 14. 22 MRSA § 307, sub-§ 5, as enacted by PL 1977, c. 687, § 1, is repealed and the following enacted in its place:

5. Review by department. The department shall review applications and make its decisions as follows.

A. After reviewing each application and after considering the recommendations of the Health Systems Agency, the department shall make a decision either to issue a certificate of need or to deny the application for a certificate of need. Notice of the decision shall be sent to the applicant and to the Health Systems Agency. This notice shall state the basis of the decision.

B. This decision shall incorporate written findings which state the basis for any final decision made by the department. When a certificate of need is to be issued, these findings shall include the finding of need.

C. The department may not make its final decision subject to any condition unless the condition directly relates to criteria established under federal laws and regulations or criteria prescribed by regulation by the department in accordance with section 312.

D. The department shall send written findings to the applicant and to the Health Systems Agency for the health service area in which the project is proposed and shall make them available to others upon request.

E. In the case of a project proposed by a health maintenance organization, the department shall also send these written findings to the appropriate regional office of the United States Department of Health and Human Services at the time these are sent to the applicant.

F. If the decision is not consistent with the recommendations of the Health Systems Agency, the department shall provide a detailed statement of the reasons for the inconsistency.

Sec. 15. 22 MRSA § 307, sub-§ 6, as enacted by PL 1977, c. 687, § 1, is repealed and the following enacted in its place:

6. Review cycles. The department shall establish review cycles for the review of applications. There shall be at least 12 review cycles scheduled for each calendar year, the dates for which shall be published at least 3 months in advance. An application, unless held for batching, shall be reviewed during the next scheduled review cycle following the date on which the application is received.

Sec. 16. 22 MRSA § 307, sub-§§ 7, 8 and 9 are enacted to read:

7. Batching of application. The department may hold an application for up to 90

days following its receipt prior to providing written notification of the beginning of review pursuant to subsection 1 in cases when the department expects to receive one or more competing applications. Upon receipt of the competing application or applications, the department shall batch the applications for purposes of review and immediately provide written notification of the beginning of review pursuant to subsection 1.

8. Notification of the status of a review. The department shall provide timely notification, upon request, to providers of health service and other persons subject to review under this chapter of the status of the department review, findings made in the course of the review and other appropriate information respecting the review.

9. Action to require department to approve or disapprove application. If the department fails to approve or disapprove an application for a certificate of need or an exemption within the applicable period, under subsection 3, the applicant may, within 39 days following the expiration of that period, bring an action in the Superior Court to require the department to approve or disapprove the application. A certificate of need or an exemption may not be issued or denied solely because the department failed to reach a decision.

Sec. 17. 22 MRSA § 308, sub-§ 4 is enacted to read:

4. Required approval. The department shall issue certificates of need for capital expenditures as follows.

A. Except as provided in paragraph B the department shall issue a certificate of need for a proposed capital expenditure if:

(1) The capital expenditure is required:

- (a) To eliminate or prevent imminent safety hazards as defined by federal, state or local fire, building or life safety codes or regulations;
- (b) To comply with state licensure standards; or
- (c) To comply with accreditation or certification standards which shall be met to receive reimbursement under the United States Social Security Act, Title XVIII or payments under a state plan for medical assistance approved under the United States Social Security Act, Title XIX; and

(2) The department has determined that:

- (a) The facility or service for which the capital expenditure is proposed is needed; and
- (b) The obligation of the capital expenditure is not inconsistent with the state health plan.

B. Those portions of a proposed project which are not required to eliminate or prevent safety hazards or to comply with certain licensure, certification or

accreditation standards are subject to review using the criteria developed under section 312.

Sec. 18. 22 MRSA § 309, sub-§ 3 is enacted to read:

3. Separate categories to be considered. In determining bed need on a statewide, area-wide or institutional basis, the department shall recognize as separate categories and shall not lump together for review the following:

- A. Intermediate care facility beds;
- B. Skilled nursing facility beds;
- C. Acute care beds;
- D. Intensive care beds;
- E. Alcohol treatment beds; and
- F. Psychiatric beds.

Sec. 19. 22 MRSA § 317, as enacted by PL 1977, c. 687, § 1, is repealed and the following enacted in its place:

§ 317. Scope of certificate of need

1. Validity; expiration; extension. 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 expires if the project 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 project 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.

2. Maximum capital expenditure. In issuing a certificate of need, the department shall specify the maximum capital expenditure which may be obligated under the certificate. The department shall adjust the capital expenditure maximum applicable to a particular project to reflect any changes in the United States Department of Commerce Composite Construction Cost Index and shall:

- A. Establish procedures to monitor capital expenditures obligated under certificates; and
- B. Establish procedures to review projects for which the capital expenditure maximum is exceeded or expected to be exceeded.

STATEMENT OF FACT

These changes to the Maine Certificate of Need Act of 1978 are made pursuant to the National Health Planning and Resources Development Amendments of 1979, PL 96-79, which requires several changes in state health planning programs as a condition of eligibility for federal funding of health programs. This federal law also provides several standards within which states may exercise additional flexibility.

As authorized or required by federal law, this bill:

1. Applies \$150,000 as the threshold standard for reviewing capital expenditures, subject to annual adjustment based on the United States Department of Commerce Composite Construction Cost Index. This adjustment is necessary to allow health planning to focus on the most significant proposals and to deal with the impact of inflation;
2. Establishes a similar approach to review of new health services, with \$75,000 as the initial standard;
3. Eliminates full certificate of need review of acquisition of existing health care facilities so long as no change in beds or services was made;
4. Speeds review process by eliminating the procedure where applicants must await a determination that their application is complete, while explicitly allowing the department or Health Systems Agency to request additional information once during review. With construction costs increasing 1% per month any delay adds to ultimate costs and unnecessary delays should be eliminated;
5. Establishes "batching" of competitive applications which seek to provide similar services or add beds in the same geographic area;
6. Clarifies that an opportunity for hearing is afforded before the department or Health Systems Agency if requested by the applicant and provides an opportunity to present argument and evidence and conduct reasonable questioning; and
7. Eliminates a duplicative section relating to review conducted by the department pursuant to prior existing federal law.