

# MAINE STATE LEGISLATURE

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2 Date: 6/13/07

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3 HEALTH AND HUMAN SERVICES

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5 STATE OF MAINE

6 HOUSE OF REPRESENTATIVES

7 123RD LEGISLATURE

8 FIRST REGULAR SESSION

9 COMMITTEE AMENDMENT "A" to H.P. 1229, L.D. 1763, Bill, "An Act To  
10 Amend the Maine Certificate of Need Act of 2002"

11 Amend the bill by striking out everything after the enacting clause and before the  
12 emergency clause and inserting the following:

13 'Sec. 1. 22 MRSA §328, sub-§18-A is enacted to read:

14 18-A. Nursing facility MaineCare funding pool. "Nursing facility MaineCare  
15 funding pool" means that limit established in accordance with section 333-A for nursing  
16 facility projects.

17 Sec. 2. 22 MRSA §329, sub-§2, as amended by PL 2003, c. 469, Pt. C, §7, is  
18 repealed.

19 Sec. 3. 22 MRSA §329, sub-§2-A is enacted to read:

20 2-A. Acquisitions of major medical equipment. Acquisitions of major medical  
21 equipment. The following provisions apply to acquisitions of major medical equipment.

22 A. The cost of all major medical equipment must be declared at fair market value.

23 (1) If an entity purchases major medical equipment from an unrelated entity, the  
24 purchase price is assumed to reflect the fair market value.

25 (2) If an entity purchases major medical equipment from a related entity and the  
26 department finds that the fair market value is greater than the purchase price, the  
27 department may revise the cost of the major medical equipment to reflect the  
28 correct fair market value.

29 B. The following acquisitions of major medical equipment do not require a  
30 certificate of need:

31 (1) Major medical equipment being replaced by the owner; and

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1           (2) The use of major medical equipment on a temporary basis in the case of a  
2           natural disaster, major accident or major medical equipment failure.

3           C. All replaced major medical equipment must be removed from service.

4           **Sec. 4. 22 MRSA §329, sub-§4-A** is enacted to read:

5           **4-A. New health care facility.** The construction, development or other  
6           establishment of a new health care facility.

7           **Sec. 5. 22 MRSA §329, sub-§7, ¶A,** as enacted by PL 2001, c. 664, §2, is  
8           amended to read:

9           A. Any proposed use of major medical equipment to serve inpatients of a hospital,  
10           if the equipment is not located in a health care facility and was acquired without a  
11           certificate of need, except acquisitions exempt from review under subsection 2 or 3;  
12           or

13           **Sec. 6. 22 MRSA §329, sub-§7, ¶B,** as enacted by PL 2001, c. 664, §2, is  
14           amended to read:

15           B. If a person adds a health service not subject to review under subsection 4,  
16           ~~paragraph A and not subject to review under subsection 4, paragraph B~~ at the time it  
17           was established and not reviewed and approved prior to establishment at the request  
18           of the applicant, and its actual 3rd fiscal year operating cost exceeds the expenditure  
19           minimum for annual operating costs in the 3rd fiscal year of operation following  
20           addition of these services; and

21           **Sec. 7. 22 MRSA §332,** as amended by PL 2001, c. 710, §9, is repealed and the  
22           following enacted in its place:

23           **§332. Subsequent review**

24           **1. Subsequent review following approval.** When the commissioner has approved  
25           an application filed unconditionally or subject to conditions pursuant to section 335,  
26           subsection 8, the commissioner may conduct a subsequent review to ensure compliance  
27           with any terms or conditions of approval within 3 years after the approved activity is  
28           undertaken. In this subsequent review, the commissioner may hold a public hearing and  
29           may consider any material or significant changes in factors or circumstances relied upon  
30           by the commissioner in approving the application and significant and relevant  
31           information that either is new or was withheld by the applicant at the time of the process  
32           under section 335. If, upon review, the commissioner determines that any terms or  
33           conditions of the approval have not been met, the commissioner may take enforcement  
34           action consistent with subsection 3 and other applicable provisions of this Act.

35           **2. Subsequent review following determination of nonapplicability.** The  
36           commissioner may hold a public hearing to determine whether the proponent of the  
37           expenditure knowingly withheld significant and relevant information or made any  
38           material misrepresentations at the time the nonapplicability determination was rendered.  
39           The commissioner may take enforcement action consistent with the provisions of this Act  
40           if, upon review, the commissioner determines that:

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1 A. At the time the nonapplicability determination was rendered the proponent of the  
2 expenditure knowingly withheld significant and relevant information or made any  
3 material misrepresentations; and

4 B. If the proponent had provided proper information, a certificate of need would  
5 have been required for the expenditure or action.

6 **3. Enforcement actions.** When the commissioner determines, following the  
7 procedures set forth in subsections 1 and 2, that the holder of a certificate of need when  
8 properly required has failed to meet the conditions set forth in the certificate of need  
9 approval or that a person covered by this Act has improperly obtained a nonapplicability  
10 ruling, the commissioner may take one or more of the following actions.

11 A. The commissioner may, pursuant to section 347, condition the person's license to  
12 prohibit the unauthorized activity and determine the ongoing conduct of that activity  
13 to be in violation of the respective chapter under which the person is licensed. A  
14 person that is subject to a ruling under this paragraph may request, and the  
15 commissioner shall grant pursuant to the Maine Administrative Procedure Act, a stay  
16 of the effect of any such determination to condition the person's license to prohibit  
17 the particular activity pending final agency action.

18 B. The commissioner may seek to enjoin the unlawful activity pursuant to section  
19 349.

20 C. The commissioner may impose civil penalties against the person pursuant to  
21 section 350.

22 D. The commissioner may, pursuant to section 348, petition the Superior Court to  
23 withhold prospectively the reimbursement, payment or other financial assistance,  
24 either directly or indirectly, from a state agency or other 3rd-party payor that is  
25 directly related to the project or activity that required a certificate of need.

26 E. In determining the appropriate sanction, the commissioner or the court shall  
27 consider a range of factors and public interests, as applicable to the circumstances,  
28 including but not limited to:

- 29 (1) The degree of negligent or intentional conduct;
- 30 (2) The clarity or vagueness of the relevant statute or rule;
- 31 (3) The clarity or vagueness of the prior approval or condition;
- 32 (4) The efforts of the person to maintain compliance;
- 33 (5) Whether the person knowingly withheld significant and relevant information  
34 or made any material misrepresentations at the time the nonapplicability  
35 determination was rendered;
- 36 (6) The public interest in maintaining the service; and
- 37 (7) All other proper factors at law and in equity.

38 **Sec. 8. 22 MRSA §333, sub-§1, as enacted by PL 2001, c. 664, §2, is amended to**  
39 **read:**

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1 **1. Procedures.** A nursing facility that voluntarily reduces the number of its licensed  
2 beds at any time prior to July 1, 2007, for any reason except to create private rooms may  
3 convert the beds back and thereby increase the number of nursing facility beds to no more  
4 than the previously licensed number of nursing facility beds, after obtaining a certificate  
5 of need in accordance with this section, as long as the nursing facility has been in  
6 continuous operation ~~and has not been purchased or leased~~ without material change of  
7 ownership. For purposes of this section and sections 333-A and 334-A, beds voluntarily  
8 removed from service prior to July 1, 2007 and available to be reinstated under this  
9 section are referred to as "reserved beds." Reserved beds remain facility property until  
10 they lapse as provided for in this section or are transferred. ~~To convert~~ reinstated reserved  
11 ~~beds back to nursing facility beds~~ under this subsection, the nursing facility must:

12 A. Give notice of its ~~intent to preserve conversion options to the department~~ the  
13 number of beds it is reserving no later than 30 days after the effective date of the  
14 license reduction; and

15 A-1. Beginning with anniversary dates occurring after July 1, 2007, annually provide  
16 notice to the department no later than 30 days after the anniversary date of the  
17 effective date of the license reduction of the nursing facility's intent to retain these  
18 reserved beds, subject to the time limitations set forth in subsection 2, paragraph B;  
19 and

20 B. Obtain a certificate of need to convert beds back under section 335, except that,  
21 if no construction is required for the conversion of beds back, the application must be  
22 processed in accordance with subsection 2.

23 **Sec. 9. 22 MRSA §333, sub-§2, ¶B,** as enacted by PL 2001, c. 664, §2, is  
24 amended to read:

25 B. Conversion of beds back under this section must be requested within 4 years of  
26 the effective date of the license reduction. ~~For good cause shown, the department~~  
27 ~~may extend the 4-year period for conversion for one additional 4-year period.~~ If the  
28 nursing facility fails to provide the annual notices required by subsection 1, paragraph  
29 B, the nursing facility's ability to convert beds back under this section lapses, and the  
30 beds must be treated as lapsed beds for purposes of this section and sections 333-A  
31 and 334-A.

32 **Sec. 10. 22 MRSA §333, sub-§3,** as enacted by PL 2001, c. 664, §2, is repealed  
33 and the following enacted in its place:

34 **3. Effect on other review proceedings.** Lapsed beds may not be treated as available  
35 nursing facility beds for the purpose of evaluating need under section 335. Reserved beds  
36 must be counted as available nursing facility beds for the purpose of evaluating need  
37 under section 335 only if:

38 A. The nursing facility retains the ability to convert the reserved beds back to  
39 nursing facility use under the terms of this section;

40 B. The nursing facility having the reserved beds is located within a reasonable  
41 distance of the population projected to be served by the project under review; and

42 C. The nursing facility having the reserved beds is willing to convert them to meet a  
43 need identified in that project review. The department shall inquire of facilities

1 having reserved beds in the area of the State to be served by a proposed project  
2 before determining whether reserved beds will be counted as available.

3 **Sec. 11. 22 MRSA §333-A is enacted to read:**

4 **§333-A. Procedures for allowing reallocation of nursing facility capacity**

5 **1. Nursing facility MaineCare funding pool.** Savings to the MaineCare program  
6 as a result of delicensing of nursing facility beds on or after July 1, 2005, including  
7 savings from lapsed beds but excluding savings from reserved beds, must be credited to  
8 the nursing facility MaineCare funding pool, which must be maintained by the  
9 department to provide for the development of new beds or other improvements requiring  
10 a certificate of need. The balance of the nursing facility MaineCare funding pool, as  
11 adjusted to reflect current costs consistent with the rules and statutes governing  
12 reimbursement of nursing facilities, serves as a limit on the MaineCare share of all  
13 incremental 3rd-year operating costs of nursing facility projects requiring review under  
14 this chapter, except as set forth in section 334-A, subsection 2.

15 **2. Procedure.** The balance of the nursing facility MaineCare funding pool must be  
16 used for development of additional nursing facility beds in areas of the State where  
17 additional beds are needed to meet the community need. The department must assess  
18 needs throughout the State and issue requests for proposals for the development of  
19 additional beds in areas where need has been identified by the department. Proposals  
20 must be evaluated based on consideration of quality of care and cost, and preference must  
21 be given to existing nursing facilities in the identified need area that may increase  
22 licensed capacity by adding on to or renovating the existing facility. Projects that exceed  
23 the review thresholds require a certificate of need, but no additional assessment of need  
24 will be conducted as part of that process. Except as set forth in section 334-A, subsection  
25 2, a project requiring certificate of need approval may not increase MaineCare costs  
26 beyond the total amount appropriated for nursing facility care plus the available balance  
27 of the nursing facility MaineCare funding pool.

28 **3. Emergencies.** In the event of an emergency, the department may allocate savings  
29 calculated in accordance with section 2 by the sole source process.

30 **4. Rulemaking.** The department may establish rules regarding the award of pooled  
31 savings. Rules adopted pursuant to this subsection are routine technical rules as defined  
32 in Title 5, chapter 375, subchapter 2-A.

33 **Sec. 12. 22 MRSA §334, as amended by PL 2003, c. 416, §1, is repealed.**

34 **Sec. 13. 22 MRSA §334-A is enacted to read:**

35 **§334-A. Nursing facility projects**

36 **1. Projects that expand current bed capacity.** Nursing facility projects that  
37 propose to add new nursing facility beds to the inventory of nursing facility beds within  
38 the State may be grouped for competitive review purposes consistent with funds available  
39 from the nursing facility MaineCare funding pool. Except as set forth in subsection 2, a  
40 nursing facility project that is subject to review and proposes renovation, replacement or  
41 other actions affecting assets that have not been fully depreciated and that will increase  
42 MaineCare costs by more than the applicable threshold for review may be approved only

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1 if sufficient funds are available from the nursing facility MaineCare funding pool or are  
2 added to the pool by act of the Legislature, except that the department may approve,  
3 without available funds from the pool, projects to reopen beds previously reserved by a  
4 nursing facility through a voluntary reduction pursuant to section 333 if the annual total  
5 of reopened beds approved does not exceed 100.

6 **2. Projects to relocate beds.** Nursing facility projects that do not add new nursing  
7 facility beds to the inventory of nursing facility beds within the State, but instead propose  
8 to relocate beds from one facility to another existing or new facility:

9 A. May also propose renovation, replacement or other actions requiring certificate of  
10 need review; and

11 B. May be approved by the department upon a showing by the petitioner that the  
12 petitioner has acquired bed rights from another facility or facilities that agree to  
13 delicense beds, or that are ceasing operations, and that the MaineCare revenues  
14 associated with these acquired bed rights are sufficient to cover the additional  
15 requested MaineCare costs associated with the project.

16 **3. Evaluating costs.** Beginning with all applications pending on January 1, 2003, in  
17 evaluating whether a project will increase MaineCare expenditures for a nursing facility  
18 for the purposes of this section, the department shall:

19 A. Allow gross square footage per licensed bed of not less than 500 square feet  
20 unless the applicant specifies a smaller allowance for the project; and

21 B. Exclude the projected incremental cost associated with replacement of equipment.

22 **Sec. 14. 22 MRSA §335, sub-§1, ¶E,** as enacted by PL 2003, c. 469, Pt. C, §8, is  
23 amended to read:

24 E. Can be funded within the capital investment fund or, in the case of a nursing  
25 facility, is consistent with the nursing facility MaineCare funding pool and other  
26 provisions of sections 333-A and 334-A.

27 **Sec. 15. 22 MRSA §335, sub-§2,** as enacted by PL 2001, c. 664, §2, is amended  
28 to read:

29 **2. Communications.** Except as otherwise provided in this Act, only a person who is  
30 a full-time employee of the department with responsibilities for the certificate of need  
31 program, a consultant to the project or a policy expert pursuant to section 337 338 may  
32 communicate with the commissioner regarding any application for a certificate of need or  
33 any letter of intent. Nothing in this section limits the authority or obligation of the staff  
34 of the department with responsibility for the certificate of need program to meet with, or  
35 otherwise communicate with, any person who is not a department employee and who  
36 wants to provide information to be considered in connection with an application for a  
37 certificate of need.

38 **Sec. 16. 22 MRSA §335, sub-§3,** as enacted by PL 2001, c. 664, §2, is amended  
39 to read:

40 **3. Limited communications.** —A— Except as otherwise provided in this chapter, a  
41 person who is not a department employee may not communicate with any department  
42 staff regarding the merits of a certificate of need application except for the purpose of

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1 placing that person's views in the application record. All communications with  
2 department staff responsible for the certificate of need program from any person who is  
3 not a department employee that the department staff reasonably believes is intended to  
4 influence the analyses relating to or the decision regarding any an application for  
5 certificate of need must be noted by that department staff and that notation must be made  
6 part of the application record.

7 **Sec. 17. 22 MRSA §335, sub-§5**, as amended by PL 2003, c. 469, Pt. C, §10, is  
8 repealed.

9 **Sec. 18. 22 MRSA §335, sub-§5-A** is enacted to read:

10 **5-A. Record.** The record created by the department in the course of its review of an  
11 application must contain the following:

12 A. The letter of intent described in section 337, subsection 1, all other materials  
13 submitted by the applicant relating to the letter of intent and any written materials  
14 relating to the letter of intent;

15 B. The application and all other materials submitted by the applicant for the purpose  
16 of making those documents part of the record;

17 C. All information generated by or for the department in the course of gathering  
18 material to assist the commissioner in determining whether the conditions for  
19 granting an application for a certificate of need have or have not been met. This  
20 information may include, without limitation, the report of consultants, including  
21 reports by panels of experts assembled by the department to advise it on the  
22 application, memoranda of meetings or conversations with any person interested in  
23 commenting on the application, letters, memoranda and documents from other  
24 interested agencies of State Government and memoranda describing officially noticed  
25 facts;

26 D. Stenographic or electronic recordings of any public hearing held by the  
27 commissioner or the staff of the department at the direction of the commissioner  
28 regarding the application;

29 E. Stenographic or electronic recording of any public informational meeting held by  
30 the department pursuant to section 337, subsection 5;

31 F. Any documents submitted by any person for the purpose of making those  
32 documents part of the record regarding any application for a certificate of need or for  
33 the purpose of influencing the outcome of any analyses or decisions regarding an  
34 application for certificate of need, except documents that have been submitted  
35 anonymously. Such source-identified documents automatically become part of the  
36 record upon receipt by the department;

37 G. Preliminary and final analyses of the record prepared by the staff;

38 H. Except with regard to a project related to nursing facility services, a written  
39 assessment by the Director of the Maine Center for Disease Control and Prevention  
40 of the impact of the project on the health of Maine citizens; and

41 I. Except with regard to a project related to nursing facility services, a written  
42 assessment by the Superintendent of Insurance of the impact of the project on the cost

# COMMITTEE AMENDMENT



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1 of insurance in the region and the State. The superintendent may request additional  
2 information from the applicant for the purpose of reviewing the application. Any  
3 such request must be transmitted through the department and becomes part of the  
4 official record. The applicant shall respond to the request within 30 days. Any such  
5 response must be transmitted through the department and becomes part of the official  
6 record. The inability of the superintendent to complete the review of the application  
7 due to the failure of the applicant to respond timely must be noted in the  
8 superintendent's assessment filed with the department and may be cause for the  
9 commissioner to delay consideration of the application until the next review cycle or  
10 to deny approval of the project.

11 **Sec. 19. 22 MRSA §335, sub-§6**, as enacted by PL 2001, c. 664, §2, is amended  
12 to read:

13 **6. Maintenance of the record.** The record created pursuant to subsection 5 ~~5-A~~ first  
14 opens on the day the department publishes its notice that an application for a certificate of  
15 need has been filed receives a letter of intent. From that day, all of the record is a public  
16 record, and any person may examine that record and purchase copies of any or all of that  
17 record during the normal business hours of the department.

18 The department must receive public comments and additional information from the  
19 applicant for a period of 30 days after the public informational meeting held under section  
20 337, subsection 5, or the public hearing held under section 339, subsection 2, whichever  
21 is later. The record will then close until public notice that the preliminary staff analysis  
22 has been made part of the record.

23 ~~The record is closed 10 days~~ will reopen for 10 business days following the publication  
24 that the preliminary staff review is complete and will close 10 business days after a public  
25 notice of the closing of the record has been published in a newspaper of general  
26 circulation in Kennebec County, in a newspaper published within the service area of the  
27 project and on the department's publicly accessible site on the Internet, as long as the  
28 notice is not published until after the preliminary staff analysis of the application is made  
29 part of the record.

30 The department may also determine to reopen the record in other circumstances that it  
31 determines to be appropriate for a limited time to permit submission of additional  
32 information, as long as the department gives public notice consistent with the provisions  
33 of this subsection.

34 **Sec. 20. 22 MRSA §348**, as corrected by RR 2001, c. 2, Pt. A, §29, is amended to  
35 read:

36 **§348. Withholding of funds**

37 A health care facility or other provider may be eligible to apply for or receive any  
38 reimbursement, payment or other financial assistance from any state agency or other 3rd-  
39 party payor, either directly or indirectly, for any capital expenditure or operating costs  
40 attributable to any project for which a certificate of need is required by this chapter only  
41 if the certificate of need has been obtained. Reimbursement, payment or other financial  
42 assistance, either directly or indirectly, from a state agency or other 3rd-party payor may  
43 be subject to an enforcement action by the commissioner to withhold or deny

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1 reimbursement, in whole or in part, with respect to a project granted a certificate of need  
2 when the commissioner determines that the applicant fails to meet any of the conditions  
3 set forth in the certificate of need approval in accordance with the procedures set forth in  
4 section 332. For the purposes of this section, the department shall determine the  
5 eligibility of a facility to receive reimbursement for all projects subject to the provisions  
6 of this chapter.

7 **Sec. 21. 22 MRSA §350-A**, as reallocated by RR 2001, c. 2, Pt. A, §30, is  
8 amended to read:

9 **§350-A. Cost-of-living adjustment**

10 Every 2 years, beginning January 1, 2005, the department shall review the monetary  
11 figures contained in this chapter. The department shall ~~revise those~~ publish revised  
12 figures to correspond to changes in the Consumer Price Index medical index by adopting  
13 rules setting the new figures.

14 **SUMMARY**

15 This amendment replaces the bill. It amends the certificate of need law with regard  
16 to acquisitions of major medical equipment, the funding of new nursing facility beds,  
17 nursing facility bed banking, subsequent review of certificate of need projects and  
18 determinations of nonapplicability of certificate of need, the description of what  
19 constitutes the record in a certificate of need proceeding and the maintenance of the  
20 record and the authorization of the Department of Health and Human Services to  
21 withhold funds with regard to a project for which a certificate of need was approved.

22 **FISCAL NOTE REQUIRED**  
23 (See attached)



Approved: 06/08/07 *MAC*

# 123rd MAINE LEGISLATURE

LD 1763

LR 1060(02)

An Act To Amend the Maine Certificate of Need Act of 2002

Fiscal Note for Bill as Amended by Committee Amendment "A"  
Committee: Health and Human Services  
Fiscal Note Required: Yes

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## Fiscal Note

Minor cost increase - General Fund

### Fiscal Detail and Notes

Any additional costs to the Department of Health and Human Services can be absorbed by the department utilizing existing budget resources.