

# MAINE STATE LEGISLATURE

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# 123rd MAINE LEGISLATURE

## FIRST REGULAR SESSION-2007

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Legislative Document

No. 1763

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H.P. 1229

House of Representatives, March 27, 2007

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

(EMERGENCY)

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Submitted by the Department of Health and Human Services pursuant to Joint Rule 204.  
Reference to the Committee on Health and Human Services suggested and ordered printed.

*Millicent M. MacFarland*  
MILLICENT M. MacFARLAND  
Clerk

Presented by Representative MILLER of Somerville.

1       **Emergency preamble. Whereas,** acts and resolves of the Legislature do not  
2 become effective until 90 days after adjournment unless enacted as emergencies; and

3       **Whereas,** the Maine Certificate of Need Act of 2002 is an important tool in the  
4 planning and development of affordable health care services in the State; and

5       **Whereas,** the changes proposed in this legislation are necessary immediately for the  
6 enhancement of strength and clarity of the Maine Certificate of Need Act of 2002; and

7       **Whereas,** in the judgment of the Legislature, these facts create an emergency within  
8 the meaning of the Constitution of Maine and require the following legislation as  
9 immediately necessary for the preservation of the public peace, health and safety; now,  
10 therefore,

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

12       **Sec. 1. 22 MRSA §329, sub-§2,** as amended by PL 2003, c. 469, Pt. C, §7, is  
13 repealed and the following enacted in its place:

14       **2. Acquisitions of major medical equipment.** Acquisitions of major medical  
15 equipment.

16       A. Equipment being replaced by the owner of that equipment does not require a  
17 certificate of need if a certificate was obtained by the owner for the equipment that is  
18 being replaced.

19       B. Equipment being replaced by the owner of that equipment does require a  
20 certificate of need if a certificate was not obtained by the owner for the equipment  
21 that is being replaced.

22       C. When equipment or services have been provided under contract by or on behalf of  
23 a health care facility, that facility must obtain a certificate in order to acquire  
24 equipment to provide that service.

25       D. The use of major medical equipment on a temporary basis in the case of a natural  
26 disaster, major accident or equipment failure does not require a certificate of need.

27       Beginning September 30, 2004 and annually, after that date, the threshold amount for  
28 review must be updated by the commissioner to reflect the change in the Consumer Price  
29 Index medical index;

30       **Sec. 2. 22 MRSA §329, sub-§4-A** is enacted to read:

31       **4-A. New health care facility.** The construction, development or other  
32 establishment of a new health care facility;

33       **Sec. 3. 22 MRSA §329, sub-§5,** as enacted by PL 2001, c. 664, §2, is amended to  
34 read:

35       **5. Changes in bed complement.** An increase in the existing licensed bed  
36 complement or an increase in the licensed bed category of a health care facility, other

1 than a nursing facility, of greater than 10%. If a change of 10% or less results in a capital  
2 expenditure or 3rd fiscal year operating costs in excess of the applicable financial  
3 threshold that otherwise requires review or establishes a new health service that otherwise  
4 requires review, a certificate of need is required;

5 **Sec. 4. 22 MRSA §329, sub-§7, ¶B**, as enacted by PL 2001, c. 664, §2, is  
6 amended to read:

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

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

15 **8. Related projects.** Any ~~projects~~ expenditures that the department determines are  
16 related projects if ~~such the~~ projects, considered in the aggregate, would otherwise require  
17 a certificate of need under this section.

18 **Sec. 6. 22 MRSA §332**, as amended by PL 2001, c. 710, §9 and affected by §10,  
19 is repealed and the following enacted in its place:

20 **§332. Subsequent review**

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

31 This subsection applies to applications filed or approved on or after January 1, 1999.

32 **2. Subsequent review following determination of nonapplicability.** When the  
33 department determines that a certificate of need is not required for an expenditure or  
34 action, the department may conduct a review of its determination within 3 years after the  
35 expenditure or action is undertaken. The proponent of the expenditure or action shall  
36 provide records and other information determined necessary by the department to  
37 complete this review. If, upon review, the department determines that a certificate of  
38 need was required for the expenditure or action, it may take action consistent with this  
39 Act.

1       **Sec. 7. 22 MRSA §335, sub-§2**, as enacted by PL 2001, c. 664, §2, is amended to  
2 read:

3       **2. Communications.** Except as otherwise provided in this Act, only a person who is  
4 a full-time employee of the department with responsibilities for the certificate of need  
5 program, a consultant to the project or a policy expert pursuant to section ~~337~~ 338 may  
6 communicate with the commissioner regarding any application for a certificate of need or  
7 any letter of intent. Nothing in this section limits the authority or obligation of the staff  
8 of the department with responsibility for the certificate of need program to meet with, or  
9 otherwise communicate with, any person who is not a department employee and who  
10 wants to provide information to be considered in connection with an application for a  
11 certificate of need.

12       **Sec. 8. 22 MRSA §335, sub-§3**, as enacted by PL 2001, c. 664, §2, is amended to  
13 read:

14       **3. Limited communications.** A Except as otherwise provided in this chapter, a  
15 person who is not a department employee may not communicate with any department  
16 staff regarding the merits of a certificate of need application except for the purpose of  
17 placing that person's views in the application record. All communications with  
18 department staff responsible for the certificate of need program from any person who is  
19 not a department employee that the department staff reasonably believes is intended to  
20 influence the analyses relating to or the decision regarding ~~any~~ an application for  
21 certificate of need must be noted by that department staff and that notation must be made  
22 part of the application record.

23       **Sec. 9. 22 MRSA §335, sub-§5**, as amended by PL 2003, c. 469, Pt. C, §10, is  
24 further amended to read:

25       **5. Record.** The record created by the department in the course of its review of an  
26 application must contain the following:

27       A. The application and all other materials submitted by the applicant for the  
28 purpose of making those documents part of the record;

29       B. All information generated by or for the department in the course of gathering  
30 material to assist the commissioner in determining whether the conditions for  
31 granting an application for a certificate of need have or have not been met. This  
32 information may include, without limitation, the report of consultants, including  
33 reports by panels of experts assembled by the department to advise it on the  
34 application, memoranda of meetings or conversations with any person interested in  
35 commenting on the application, letters, memoranda and documents from other  
36 interested agencies of State Government and memoranda describing officially noticed  
37 facts;

38       C. Stenographic or electronic recordings of any public hearing held by the  
39 commissioner or the staff of the department at the direction of the commissioner  
40 regarding the application;

1 D. Stenographic or electronic recording of any public informational meeting held  
2 by the department pursuant to section 337, subsection 5;

3 E. Any documents submitted by any person for the purpose of making those  
4 documents part of the record regarding any application for a certificate of need or for  
5 the purpose of influencing the outcome of any analyses or decisions regarding an  
6 application for certificate of need, except documents that have been submitted  
7 anonymously. Such source-identified documents automatically become part of the  
8 record upon receipt by the department;

9 F. Preliminary and final analyses of the record prepared by the staff; ~~and~~

10 G. ~~Written assessments~~ A written assessment by the Director of the ~~Bureau of~~  
11 ~~Health and the Superintendent of Insurance assessing~~ Maine Center for Disease  
12 ~~Control and Prevention of the impact of the application on the health care system or~~  
13 ~~cost of health insurance in the State of Maine citizens. This assessment is not~~  
14 ~~required for projects related to nursing facility services; and~~

15 H. A written assessment by the Superintendent of Insurance of the impact of the  
16 project on the cost of health insurance in the region and the State.

17 The Superintendent of Insurance may request additional information from the applicant  
18 for the purpose of reviewing an application; any such request must be transmitted through  
19 the department and becomes part of the official record. The applicant shall respond to the  
20 request within 30 days; any such response must be transmitted through the department  
21 and becomes part of the official record. The inability of the superintendent to complete  
22 the superintendent's review of the application due to the failure of the applicant to  
23 respond timely must be noted in the superintendent's assessment filed with the department  
24 and may be cause for the commissioner to delay consideration of the application until the  
25 next review cycle or to deny approval of the project.

26 Paragraph H does not apply to nursing facility projects.

27 **Sec. 10. 22 MRSA §335, sub-§6**, as enacted by PL 2001, c. 664, §2, is amended  
28 to read:

29 **6. Maintenance of the record.** The record created pursuant to subsection 5 first  
30 opens on the day the department publishes its notice that an application for a certificate of  
31 need has been filed. ~~From that day, all of the record is a public record~~ After an  
32 application is certified as complete, all of the record is a public record under Title 1,  
33 chapter 13, and any a person may examine that record and purchase copies of any or all  
34 of that record during the normal business hours of the department.

35 The record is closed 10 days after a public notice of the closing of the record has been  
36 published in a newspaper of general circulation in Kennebec County, in a newspaper  
37 published within the service area of the project and on the department's publicly  
38 accessible site on the Internet, as long as the notice is not published until after the  
39 preliminary staff analysis of the application is made part of the record.

40 **Sec. 11. 22 MRSA §339, sub-§6**, as enacted by PL 2001, c. 664, §2, is amended  
41 to read:

1           **6. Public necessity.** ~~The~~ Notwithstanding the provisions set forth in subsection 5,  
2 the department may delay action on an otherwise complete application for ~~up to an~~  
3 additional 180 days from the time the application has been certified as complete by the  
4 applicant if the department finds that a public necessity exists. The department shall  
5 provide written notice of the delay to the applicant and any other person who has  
6 requested in writing information regarding the application. For purposes of this  
7 subsection, the department shall find that a public necessity exists if:

8           A. The application represents a new service or technology not previously provided  
9 within the State;

10          B. The application represents a potential significant impact on health care system  
11 costs;

12          C. The application represents a new service or technology for which a health care  
13 system need has not been previously established; or

14          D. There are several applications for the same or similar projects before the  
15 department.

16           **Sec. 12. 22 MRSA §348,** as enacted by PL 2001, c. 664, §2 and corrected by RR  
17 2001, c. 2, Pt. A, §29, is amended to read:

18           **§348. Withholding of funds**

19           A health care facility or other provider may be eligible to apply for or receive ~~any~~  
20 reimbursement, payment or other financial assistance from ~~any a~~ state agency or other  
21 3rd-party payor, either directly or indirectly, for ~~any a~~ capital expenditure or operating  
22 costs attributable to any project for which a certificate of need is required by this chapter  
23 only if the certificate of need has been obtained. Reimbursement, payment or other  
24 financial assistance, either directly or indirectly, from a state agency or other 3rd-party  
25 payor may not be made for a project granted a certificate of need when the commissioner  
26 determines that the applicant fails to meet any of the conditions set forth in the certificate  
27 of need approval, in accordance with the procedures set forth in section 332. For the  
28 purposes of this section, the department shall determine the eligibility of a facility to  
29 receive reimbursement for all projects subject to the provisions of this chapter.

30           **Sec. 13. 22 MRSA §350-A,** as reallocated by RR 2001, c. 2, Pt. A, §30, is  
31 amended to read:

32           **§350-A. Cost-of-living adjustment**

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

37           **Emergency clause.** In view of the emergency cited in the preamble, this  
38 legislation takes effect when approved.

## SUMMARY

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This bill makes the following changes to the Maine Certificate of Need Act of 2002.

1. Current law exempts from review replacement of major medical equipment. This bill requires review when a certificate of need had not been obtained for the equipment that is being replaced.

2. It requires review of an increase in bed complement or bed category of less than 10% if it results in 3rd fiscal year operating costs or capital expenditures in excess of applicable thresholds or results in the addition of a new health service.

3. It allows the aggregation of capital expenditures in determining whether projects are related.

4. It improves the ability of the Department of Health and Human Services to monitor the implementation of projects that were determined not subject to review.

5. It requires that communication between applicants and the Bureau of Insurance goes through the Department of Health and Human Services and becomes part of the official record.

6. It exempts both the Bureau of Insurance assessment of impact and the health assessment impact from the Maine Center for Disease Control and Prevention for nursing facility projects.

7. It clarifies that prior to an application's being certified as complete, the record is not a public document. After it is certified as complete, it is governed by the freedom of access laws.

8. It clarifies when additional time may be taken to complete a review.

9. It prohibits any state agency or other 3rd-party payor from reimbursing a provider or making payments or providing other financial assistance to a provider who fails to meet the conditions established by the Commissioner of Health and Human Services.

10. It allows the Department of Health and Human Services to publish revised thresholds using a specified index without having to adopt new rules.