

MAINE STATE LEGISLATURE

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LAWS
OF THE
STATE OF MAINE

AS PASSED BY THE

ONE HUNDRED AND TWENTIETH LEGISLATURE

SECOND REGULAR SESSION
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J.S. McCarthy Company
Augusta, Maine
2002

CHAPTER 664

S.P. 619 - L.D. 1799

An Act to Strengthen the Certificate
of Need Law

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

Sec. 1. 22 MRSA c. 103, as amended, is re-
pealed.

Sec. 2. 22 MRSA c. 103-A is enacted to read:

CHAPTER 103-ACERTIFICATE OF NEED§326. Short title

This chapter may be known and cited as the
"Maine Certificate of Need Act of 2002."

§327. Declaration of findings and purposes

The Legislature makes the following statements
of findings and purposes.

1. Findings. The Legislature finds that unneces-
sary construction or modification of health care
facilities and duplication of health services are
substantial factors in the cost of health care and the
ability of the public to obtain necessary medical
services.

2. Purposes. The purposes of this chapter are to:

A. Support effective health planning;

B. Support the provision of quality health care in
a manner that ensures access to cost-effective
services;

C. Support reasonable choice in health care ser-
vices while avoiding excessive duplication;

D. Ensure that state funds are used prudently in
the provision of health care services;

E. Ensure public participation in the process of
determining the array, distribution, quantity,
quality and cost of these health care services;

F. Improve the availability of health care ser-
vices throughout the State;

G. Support the development and availability of
health care services regardless of the consumer's
ability to pay;

H. Seek a balance, to the extent a balance assists
in achieving the purposes of this subsection,

between competition and regulation in the provi-
sion of health care; and

I. Promote the development of primary and sec-
ondary preventive health care services.

§328. Definitions

As used in this chapter, unless the context other-
wise indicates, the following terms have the following
meanings.

1. Access to care. "Access to care" means the
ability to obtain in a timely manner needed personal
health services to achieve the best possible health
outcomes balanced by the health system's resource
limitations. Access to care may be influenced by many
factors, including, without limitation, travel, distance,
waiting time, available resources, availability of a
source of care and the health status of the population
served.

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

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

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

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

6. Expenditure minimum for annual operat-
ing costs. "Expenditure minimum for annual
operating costs" means, for services commenced after
October 1, 1998, \$400,000 for the 3rd fiscal year,
including a partial first year.

7. Generally accepted accounting principles.
"Generally accepted accounting principles" means
accounting principles approved by the American

Institute of Certified Public Accountants or a successor organization.

8. Health care facility. "Health care facility" means a hospital, psychiatric hospital, nursing facility, kidney disease treatment center including a freestanding hemodialysis facility, rehabilitation facility, ambulatory surgical facility, independent radiological service center, independent cardiac catheterization center or cancer treatment center. "Health care facility" does not include the office of a private physician or physicians or a dentist or dentists, whether in individual or group practice.

9. Health maintenance organization. "Health maintenance organization" means a public or private organization that:

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

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

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

10. Health need. "Health need" means a situation or a condition of a person, expressed in health outcome measures such as mortality, morbidity or disability, that is considered undesirable and is likely to exist in the future.

11. Health planning. "Health planning" means data assembly and analysis, goal determination and the formulation of action recommendations regarding health services.

12. Health services. "Health services" means clinically related services that are diagnostic, treatment, rehabilitative services or nursing services provided by a nursing facility. "Health services" includes alcohol abuse, drug abuse and mental health services.

13. Health status. "Health status" means patient or population measures, or both, of good and poor health practices, rates of death and disease, both chronic and infectious, and the prevalence of symptoms or conditions, or both, of illness and wellness.

14. Hospital. "Hospital" means an institution that primarily provides to inpatients, by or under the supervision of physicians, diagnostic services and therapeutic services for medical diagnosis, treatment and care of injured, disabled or sick persons or rehabilitation services for the rehabilitation of injured, disabled or sick persons. "Hospital" also includes psychiatric and tuberculosis hospitals.

15. Hospital swing bed. "Hospital swing bed" means an acute care bed licensed by the Bureau of Medical Services, Division of Licensing and Certification for the use also as a nursing care bed. Swing beds may be established only in rural hospitals with fewer than 100 licensed acute care beds.

16. Major medical equipment. "Major medical equipment" means a single unit of medical equipment or a single system of components with related functions used to provide medical and other health services that costs \$1,200,000 or more. "Major medical equipment" does not include medical equipment acquired by or on behalf of a clinical laboratory to provide clinical laboratory services if the clinical laboratory is independent of a physician's office and a hospital and has been determined to meet the requirements of the United States Social Security Act, Title XVIII, Section 1861(s), paragraphs 10 and 11. In determining whether medical equipment costs more than \$1,200,000, the cost of studies, surveys, designs, plans, working drawings, specifications and other activities essential to acquiring the equipment must be included. If the equipment is acquired for less than fair market value, the term "cost" includes the fair market value.

17. Modification. "Modification" means the alteration, improvement, expansion, extension, renovation or replacement of a health care facility or health maintenance organization or portions thereof, including the initial equipment, and the replacement of equipment or existing buildings.

18. Nursing facility. "Nursing facility" means any facility defined under section 1812-A.

19. Obligation. An "obligation" for a capital expenditure that is considered to be incurred by or on behalf of a health care facility:

A. When a contract, enforceable under the law of the State, 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 the applicable law of the State.

20. Offer. "Offer," when used in connection with "health services," means that the health care facility or health maintenance organization holds itself out as capable of providing or having the means to provide a health service.

21. Person. "Person" means an individual; trust or estate; partnership; corporation, including associations, joint stock companies and insurance companies; the State or a political subdivision or instrumentality of the State, including a municipal corporation of the State; or any other legal entity recognized by state law.

22. Person directly affected by a review. "Person directly affected by a review" includes:

A. The applicant;

B. A group of 10 persons residing or located within the health service area served or to be served by the applicant;

C. A health care facility, a health maintenance organization or a health care practitioner that demonstrates that it provides similar services or, by timely filing a letter of intent with the department for inclusion in the record, indicates an intention to provide similar services in the future to patients residing in the health service area and whose services would be directly and substantially affected by the application under review;

D. A 3rd-party payor, including, without limitation, a health maintenance organization, that pays health care facilities for services in the health service area in which the project is proposed to be located and whose payments would be directly and substantially affected by the application under review; and

E. A person who demonstrates a direct and substantial effect upon that person's health care as a result of the application under review.

23. Predevelopment activity. "Predevelopment activity" means any appropriately capitalized expenditure by or on behalf of a health care facility made in preparation for the offering or development of a new health service for which a certificate of need would be required and arrangements or commitments made for financing the offering or development of the new health service and includes site acquisitions, surveys, studies, expenditures for architectural designs, plans, working drawings and specifications.

24. Project. "Project" means any acquisition, capital expenditure, new health service or change in a

health service, predevelopment activity or other activity that requires a certificate of need under section 329.

25. Rehabilitation facility. "Rehabilitation facility" means an inpatient facility that is operated for the primary purpose of assisting in the rehabilitation of disabled persons through an integrated program of medical services and other services that are provided under competent professional supervision.

26. Replacement equipment. "Replacement equipment" means a piece of capital equipment that replaces another piece of capital equipment that performs essentially the same functions as the replaced equipment.

§329. Certificate of need required

A person may not enter into any commitment for financing a project that requires a certificate of need or incur an expenditure for the project without having sought and received a certificate of need, except that this prohibition does not apply to obligations for replacement conditioned upon the receipt of a certificate of need or to obligations for predevelopment activities.

A certificate of need from the department is required for:

1. Transfer of ownership; acquisition by lease, donation, transfer; acquisition of control. Any transfer of ownership or acquisition under lease or comparable arrangement or through donation or any acquisition of control of a health care facility under lease, management agreement or comparable arrangement or through donation that would have required review if the transfer or acquisition had been by purchase, except in emergencies when that acquisition of control is at the direction of the department;

2. Acquisitions of certain major medical equipment. Acquisitions of major medical equipment with a cost in the aggregate of \$1,200,000 or more. The use of major medical equipment on a temporary basis in the case of a natural disaster, major accident or equipment failure and the use of replacement equipment do not require a certificate of need;

3. Capital expenditures. Except as provided in subsection 6, the obligation by or on behalf of a health care facility of any capital expenditure of \$2,400,000 or more. Capital expenditures in the case of a natural disaster, major accident or equipment failure for replacement equipment or for parking lots and garages, information and communications systems and physician office space do not require a certificate of need;

4. New health service. The offering or development of any new health service. For purposes of this section, "new health service" includes only the following:

A. The obligation of any capital expenditures by or on behalf of a health care facility of \$110,000 or more that is associated with the addition of a health service that was not offered on a regular basis by or on behalf of the health care facility within the 12-month period prior to the time the services would be offered; or

B. The addition of a health service that is to be offered by or on behalf of a health care facility that was not offered on a regular basis by or on behalf of the health care facility within the 12-month period prior to the time the services would be offered and that, for the 3rd fiscal year of operation, including a partial first year, following addition of that service, is projected to entail incremental annual operating costs directly attributable to the addition of a new health service of at least \$400,000.

A certificate of need is not required for a health care facility that extends a current service within the defined primary service area of the health care facility by purchasing within a 12-month time period new equipment costing in the aggregate less than \$1,200,000;

5. Changes in bed complement. An increase in the existing licensed bed complement or an increase in the licensed bed category of a health care facility, other than a nursing facility, of greater than 10%;

6. Nursing facilities. The obligation by a nursing facility, when related to nursing services provided by the nursing facility, of any capital expenditures of \$510,000 or more.

A certificate of need is not required for a nursing facility to convert beds used for the provision of nursing services to beds to be used for the provision of residential care services. If such a conversion occurs, public funds are not obligated for payment of services provided in the converted beds;

7. Other circumstances. The following circumstances:

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

B. If a person adds a health service not subject to review under subsection 4, paragraph A and

not subject to review under subsection 4, paragraph B at the time it was established and not reviewed and approved prior to establishment at the request of the applicant, and its actual 3rd fiscal year operating cost exceeds the expenditure minimum for annual operating costs in the 3rd fiscal year of operation following addition of these services; and

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

§330. Exceptions

Notwithstanding section 329, the requirements of this Act do not apply with respect to:

1. Healing through prayer. A health care facility operated by a religious group relying solely on spiritual means through prayer for healing;

2. Activities; acquisitions. Activities or acquisitions by or on behalf of a health maintenance organization or a health care facility controlled, directly or indirectly, by a health maintenance organization or combination of health maintenance organizations to the extent mandated by the National Health Policy, Planning and Resources Development Act of 1974, as amended, and its accompanying regulations;

3. Home health care services. Home health care services offered by a home health care provider;

4. Hospice. Hospice services and programs;

5. Assisted living. Assisted living programs and services regulated under chapter 1665;

6. Existing capacity. The use by an ambulatory surgical facility licensed on January 1, 1998 of capacity in existence on January 1, 1998; and

7. Critical access hospitals. Conversion by a critical access hospital of acute care beds to hospital swing beds.

§331. Subsequent review following changes in project

When a certificate of need has been issued and changes occur as specified in this section, a subsequent review is required.

1. Criteria for subsequent review. The following activities require subsequent review and approval if the department has previously issued a certificate of need and one or more of the following circumstances occur within 3 years after the approved activity is undertaken:

- A. There is a significant change in financing;
- B. There is a change affecting the licensed or certified bed capacity as approved in the certificate of need;
- C. There is a change involving the addition or termination of the health services proposed to be rendered;
- D. There is a change in the site or the location of the proposed health care facility; or
- E. There is a substantial change proposed in the design of the health care facility or the type of construction.

2. Procedures for subsequent review. Any person proposing to undertake any activity requiring subsequent review and approval shall file with the department, within 30 days of the time that person first has actual knowledge of the circumstances requiring subsequent review, a notice setting forth the following information:

- A. The nature of the proposed change;
- B. The rationale for the change including, where appropriate, an explanation of why the change was not set forth in the original application or letter of intent; and
- C. Other pertinent detail subject to the procedures and criteria set forth in section 335.

The department shall, within 30 days of receipt of the information, advise that person in writing whether the proposed change is approved. If not approved, the application must be treated as a new application under this Act. If approved, the department shall amend the certificate of need as appropriate.

§332. Subsequent review following approval

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

§333. Procedures after voluntary nursing facility reductions

1. Procedures. A nursing facility that voluntarily reduces the number of its licensed beds for any reason except to create private rooms may convert the beds back and thereby increase the number of nursing facility beds to no more than the previously licensed number of nursing facility beds, after obtaining a certificate of need in accordance with this section, as long as the nursing facility has been in continuous operation and has not been purchased or leased. To convert beds back to nursing facility beds under this subsection, the nursing facility must:

- A. Give notice of its intent to preserve conversion options to the department no later than 30 days after the effective date of the license reduction; and
- B. Obtain a certificate of need to convert beds back under section 335, except that, if no construction is required for the conversion of beds back, the application must be processed in accordance with subsection 2.

2. Expedited review. Except as provided in subsection 1, paragraph B, an application for a certificate of need to reopen beds reserved in accordance with this section must be processed on an expedited basis in accordance with rules adopted by the department providing for shortened review time and for a public hearing if requested by a directly affected person. The department shall consider and decide upon these applications as follows:

- A. Review of applications that meet the requirements of this section must be based on the requirements of section 335, subsection 7, except that the determinations required by section 335, subsection 7, paragraph B must be based on the historical costs of operating the beds and must consider whether the projected costs are consistent with the costs of the beds prior to closure, adjusted for inflation; and
- B. Conversion of beds back under this section must be requested within 4 years of the effective date of the license reduction. For good cause shown, the department may extend the 4-year period for conversion for one additional 4-year period.

3. Effect on other review proceedings. Nursing facility beds that have been voluntarily reduced under this section must be counted as available nursing facility beds for the purpose of evaluating need under section 335 as long as the nursing facility retains the ability to convert them back to nursing facility use under the terms of this section, unless the nursing facility indicates, in response to an inquiry

from the department in connection with an ongoing project review, that it is unwilling to convert them to meet a need identified in that project review.

4. Rulemaking. Rules adopted pursuant to this section are major substantive rules as defined by Title 5, chapter 375, subchapter II-A.

§334. Nursing facility projects

Nursing facility projects that propose to add new nursing facility beds to the inventory of nursing facility beds within the State may be grouped for competitive review purposes consistent with appropriations made available for that purpose by the Legislature. A nursing facility project that proposes renovation, replacement or other actions that will increase Medicaid costs may be approved only if appropriations have been made by the Legislature expressly for the purpose of meeting those costs, except that the department may approve, without a prior appropriation for the express purpose, projects to reopen beds previously reserved by a nursing facility through a voluntary reduction pursuant to section 333, if the annual total of reopened beds approved does not exceed 100.

§335. Approval; record

This section applies to determinations by the commissioner under this chapter.

1. Basis for decision. Based solely on a review of the record maintained under subsection 6, the commissioner shall approve an application for a certificate of need if the commissioner determines that the project meets the conditions set forth in subsection 7.

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

3. Limited communications. A person who is not a department employee may not communicate with any department staff regarding the merits of a certificate of need application except for the purpose of placing that person's views in the application record. All communications with department staff responsible for the certificate of need program from

any person who is not a department employee that the department staff reasonably believes is intended to influence the analyses relating to or the decision regarding any application for certificate of need must be noted by that department staff and that notation must be made part of the application record.

4. Decision. The commissioner's decision must be in writing and must contain appropriate references to the record. If the application is denied, the decision must specifically address comments received and made part of the record that favor granting the application. If the application is approved, the decision must specifically address comments received and made part of the record that favor denial of the application.

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

A. The application and all other materials submitted by the applicant for the purpose of being made part of the record;

B. All information generated by or for the department in the course of gathering material to assist the commissioner in determining whether the conditions for granting an application for a certificate of need have or have not been met. This information may include, without limitation, the report of consultants, memoranda of meetings or conversations with any person interested in commenting on the application, letters, memoranda and documents from other interested agencies of State Government and memoranda describing officially noticed facts;

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

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

E. Any documents submitted by any person for the purpose of being made part of the record regarding any application for a certificate of need or for the purpose of influencing the outcome of any analyses or decisions regarding an application for certificate of need, except documents that have been submitted anonymously. Such source-identified documents automatically become part of the record upon receipt by the department; and

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

6. Maintenance of the record. The record created pursuant to subsection 5 first opens on the day the department publishes its notice that an application for a certificate of need has been filed. From that day, all of the record is a public record, and any person may examine that record and purchase copies of any or all of that record during the normal business hours of the department.

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

7. Review; approval. Except as provided in section 336, the commissioner shall issue a certificate of need if the commissioner determines and makes specific written findings regarding that determination that:

A. The applicant is fit, willing and able to provide the proposed services at the proper standard of care as demonstrated by, among other factors, whether the quality of any health care provided in the past by the applicant or a related party under the applicant's control meets industry standards;

B. The economic feasibility of the proposed services is demonstrated in terms of the:

(1) Capacity of the applicant to support the project financially over its useful life, in light of the rates the applicant expects to be able to charge for the services to be provided by the project; and

(2) Applicant's ability to establish and operate the project in accordance with existing and reasonably anticipated future changes in federal, state and local licensure and other applicable or potentially applicable rules;

C. There is a public need for the proposed services as demonstrated by certain factors, including, but not limited to:

(1) Whether, and the extent to which, the project will substantially address specific health problems as measured by health needs in the area to be served by the project;

(2) Whether the project will have a positive impact on the health status indicators of the population to be served;

(3) Whether the services affected by the project will be accessible to all residents of the area proposed to be served; and

(4) Whether the project will provide demonstrable improvements in quality and outcome measures applicable to the services proposed in the project; and

D. The proposed services are consistent with the orderly and economic development of health facilities and health resources for the State as demonstrated by:

(1) The impact of the project on total health care expenditures after taking into account, to the extent practical, both the costs and benefits of the project and the competing demands in the local service area and statewide for available resources for health care;

(2) The availability of state funds to cover any increase in state costs associated with utilization of the project's services; and

(3) The likelihood that more effective, more accessible or less costly alternative technologies or methods of service delivery may become available.

8. Conditional approvals. The commissioner may grant an application subject to conditions that relate to the criteria for approval of the application.

9. Emergency certificate of need. Upon the written or oral request of an applicant asserting that an emergency situation exists, the department shall immediately determine whether an emergency situation exists and upon finding that an emergency situation does exist shall issue a certificate of need for a project necessary on account of the emergency situation. The scope of the certificate of need may not exceed that which is necessary to remedy or otherwise effectively address the emergency situation. The certificate of need may be subject to conditions consistent with the purpose of this Act that do not interfere with the applicant's ability to respond effectively to the emergency.

The commissioner shall find an emergency situation exists whenever the commissioner finds that an applicant has demonstrated:

A. The necessity for immediate or temporary relief due to a natural disaster, a fire, an unforeseen safety consideration, a major accident, equipment failure, foreclosure, receivership or an action of the department or other circumstances determined appropriate by the department;

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 adopted by the department; and

C. The lack of substantial change in the facility or services that existed before the emergency situation.

§336. Simplified review and approval process

Notwithstanding the requirements set forth in section 335, the department shall conduct a simplified review and approval process in accordance with this section.

1. Maintenance projects. The commissioner shall issue a certificate of need for a project that primarily involves the maintenance of a health facility if the commissioner determines that the project:

A. Will result in no or a minimal additional expense to the public or to the health care facility's clients;

B. Will be in compliance with other applicable state and local laws and regulations; and

C. Will significantly improve or, in the alternative, not significantly adversely affect the health and welfare of any person currently being served by the health care facility.

2. Life safety codes; previous certificate of need. The commissioner shall issue a certificate of need for a project that is required solely to meet federal, state or local life safety codes if the project involves a health facility, major medical equipment or a new health service that has previously received a certificate of need.

3. Acquisition of control. The commissioner shall issue a certificate of need for a project that involves the acquisition of control of a health facility when the acquisition consists of a management agreement or similar arrangement and primarily involves the day-to-day operation of the facility in its current form if the commissioner determines that the project meets the requirements of section 335, subsection 7, paragraph B and that the project is economically feasible in light of its impact on:

A. The operating budget of the facility and the applicant; and

B. The applicant's ability to operate the facility without increases in the facility's rates beyond those that would otherwise occur absent the acquisition.

4. Capital expenditures. The commissioner shall issue a certificate of need for a proposed capital expenditure upon determining that:

A. The capital expenditure is required to eliminate or prevent imminent safety hazards, as defined by applicable fire, building or life safety codes and regulations; to comply with state licensure standards; or to comply with accreditation or certification standards that must 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 Title XIX of that Act;

B. The economic feasibility of the project is demonstrated in terms of its effects on the operating budget of the applicant, including its existing rate structure;

C. There remains a public need for the service to be provided; and

D. The corrective action proposed by the applicant is the most cost-effective alternative available under the circumstances.

§337. Application process for certificate of need

1. Letter of intent. Prior to filing an application for a certificate of need, an applicant shall file a letter of intent with the department. The letter of intent forms the basis for determining the applicability of this chapter to the proposed expenditure or action. A letter of intent is deemed withdrawn one year after receipt by the department, unless sooner superseded by an application, except that the applicant is not precluded from resubmitting the same letter of intent.

2. Application filed. Paragraphs A to C apply in the given order to the application process for certificate of need.

A. After receiving the letter of intent, the department shall issue a letter or checklist, or both, to an applicant that stipulates and clarifies what will be required in the application.

B. Within 30 days of filing the letter of intent, the applicant shall meet with the department staff in order to assist the department in understanding the application and to receive technical assistance concerning the nature, extent and format of the documentary evidence, statistical data and financial data required for the department to evaluate the proposal. The department may not accept an application for review until the applicant has satisfied this technical assistance requirement.

C. After receiving notice from the department that a certificate of need is required for a proposed expenditure or action, if the applicant wishes to proceed with the project, the applicant must file an application for a certificate of need.

3. Application content. An application for a certificate of need must describe with specificity how the proposed project meets each of the conditions for granting a certificate of need required by this chapter. A statement or statements that the project will meet the conditions without supporting facts backed by relevant documentation and analysis constitute sufficient cause to deny the application. An application subject to full review must contain, if available and relevant to the particular service or technology, information on health status, public health need for the service or technology, quality assurance processes and prevention programs.

4. Application complete. An application is certified as complete when the applicant delivers to the department a certification in writing that states that the application should be considered complete by the department. Subsequent to the applicant's certification under this subsection, the applicant may submit information that is responsive to any concern, issue, question or allegation of facts contrary to those in the application made by the department or any other person.

5. Public notice; public informational meeting. Within 5 business days of the filing of a certificate by an applicant that a complete certificate of need application is on file with the department, public notice that the application has been filed and that a public informational meeting must be held regarding the application must be given by publication in a newspaper of general circulation in Kennebec County and in a newspaper published within the service area in which the proposed expenditure will occur. The notice must also be provided to all persons who have requested notification by means of asking that their names be placed on a mailing list maintained by the department for this purpose. This notice must include:

- A. A brief description of the proposed expenditure or other action;
- B. A description of the review process and schedule;
- C. A statement that any person may examine the application, submit comments in writing to the department regarding the application and examine the entire record assembled by the department at any time from the date of publication of the notice until the application process is closed for comment; and

D. The time and location of the public informational meeting and a statement that any person may appear at the meeting to question the applicant regarding the project or the department regarding the conditions that the applicant must satisfy in order to receive a certificate of need for the project.

The department shall make an electronic or stenographic record of the public informational meeting.

6. Voluntary withdrawal of application. During the review period, prior to the date that department staff submits a final report to the commissioner, an applicant may withdraw an application without prejudice by filing written notice of the withdrawal with the department. A withdrawn application may be resubmitted and will be processed as an entirely new application under this chapter.

7. Filing fee. The department shall adopt rules setting minimum and maximum filing fees under this chapter. A nonrefundable filing fee must be paid at the time an application is filed with the department. If the approved capital expenditure or operating cost upon which the fees were based is higher than the initially proposed capital expenditure, then the filing fee must be recalculated and the difference in fees, if any, must be paid before the certificate of need may be issued.

§338. Consultation

1. Consultation on new technologies and needs. In connection with the development of policies and procedures to implement this Act, the commissioner may, from time to time, consult with persons with relevant skills and experience regarding:

- A. New medical technologies and the impact of those technologies on the health care delivery system in the State; and
- B. Unmet need for health care services in the State.

§339. Review process; public hearing

1. Review process. The review process consists of an evaluation of the project application for a certificate of need by the department in light of:

- A. The application itself;
- B. Material collected or developed by or for the department staff to test the assertions in the application;
- C. All comments received by any person regarding the project; and
- D. Any other material made part of the record.

2. Public hearing. The following provisions apply to a public hearing under this chapter.

A. The commissioner or the commissioner's designee may hold a public hearing regarding the application.

B. The commissioner, or the commissioner's designee, shall hold a public hearing if 5 persons residing or located within the health service area to be served by the applicant request, in writing, that such a public hearing be held and the request is received by the commissioner no later than 30 days following the informational hearing on the application conducted pursuant to section 337, subsection 5.

C. An electronic or stenographic record of the public hearing must be made part of the record.

3. Preliminary staff analyses. As soon as practicable, the department staff shall provide the preliminary analyses of the application and the record to the applicant, the commissioner and any person who requests the analyses and record. Notice of the availability of the analyses must be published in a newspaper in general circulation in Kennebec County and a newspaper of general circulation serving the area in which the project is to be located and on the department's publicly accessible site on the Internet.

4. Final department staff analysis. A final department staff analysis must be submitted to the commissioner, together with the documentary record described in section 335, subsection 2, as soon as practicable after the closing of the record.

5. Reviews. To the extent practicable, a review must be completed and the commissioner shall make a decision within 90 days after the application has been certified as complete by the applicant. The department shall 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 may extend the review period for up to an additional 60 days.

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

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

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

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

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

§340. Reconsideration

Any person directly affected by a review under this chapter may, for good cause shown, request in writing a hearing for the purpose of reconsideration of the decision of the department to issue or to deny a certificate of need.

1. Timing for request. A request for hearing for reconsideration under this section must be received within 30 days of the department's decision.

2. Hearing. If the department determines that good cause for a hearing under this section has been demonstrated, the department shall commence a hearing within 30 days of receipt of the request. For purposes of this section, a request for a hearing is considered to show good cause if it:

A. Presents significant, relevant information not previously considered by the department;

B. Demonstrates that there have been significant changes in factors or circumstances relied upon by the department in reaching its decision;

C. Demonstrates that the department has materially failed to follow its adopted procedures in reaching its decision; or

D. Provides other bases for a hearing that the department has determined constitute good cause.

3. Decision. A decision must be rendered within 60 days of the commencement of a hearing under this section, except that the parties may agree to a longer time period.

§341. Remedy

Any person aggrieved by a final decision of the department made under the provisions of this Act is entitled to review in accordance with this chapter and with Title 5, chapter 375, subchapter VII.

1. Finality. A decision of the department to issue a certificate of need or to deny an application for a certificate of need is not considered final until the department has taken final action on a request for reconsideration under section 340. A decision by the department is not final when opportunity for reconsid-

eration exists with respect to matters involving new information or changes in circumstances pursuant to section 340, subsection 2, paragraphs A and B.

2. Competitive reviews. If a person or persons file for review under Title 5, chapter 375, regarding competitive reviews of proposals to construct new nursing facility beds, the court shall require the party seeking judicial review to give security in such sums as the court determines proper for the payment of costs and damages that may be incurred or suffered by any other party who is found to have been wrongfully delayed or restrained from proceeding to implement the certificate of need, except that, for good cause shown and recited in the order, the court may waive the giving of security. A surety upon a bond or undertaking under this subsection submits the surety to the jurisdiction of the court and irrevocably appoints the clerk of the court as the agent for the surety upon whom any papers affecting liability on the bond or undertaking may be served. The liability of the surety may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall mail copies to the persons giving the security if their addresses are known.

§342. Rules

The department shall adopt any rules, standards, criteria, plans or procedures that may be necessary to carry out the provisions and purposes of this Act. The department shall provide for public notice and hearing on all proposed rules, standards, criteria, plans, procedures or schedules pursuant to Title 5, chapter 375. Unless otherwise provided by this chapter, rules adopted pursuant to this chapter are routine technical rules as defined by Title 5, chapter 375, subchapter II-A.

§343. Public information

The department shall prepare and publish at least annually a report on its activities conducted pursuant to this Act. The annual report must include information on all certificates of need granted and denied. With regard to all certificates granted on a conditional basis, the report must include a summary of information reported pursuant to section 332 and any accompanying statements by the commissioner or department staff submitted regarding the reports.

§344. Conflict of interest

In addition to the limitations of Title 5, section 18, a member or employee of the department who has a substantial economic or fiduciary interest that 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 interest would be so affected is ineligible to participate in the review,

recommendation or decision-making process with respect to any application for which the conflict of interest exists.

§345. Division of project to evade cost limitation prohibited

A health care facility or other party required to obtain a certificate of need may not 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 329.

§346. Scope of certificate of need

1. Application determinative. A certificate of need is valid only for the defined scope, premises and facility or person named in the application and is not transferable or assignable.

2. Maximum expenditure. In issuing a certificate of need, the department shall specify the maximum capital expenditures that may be obligated under this certificate. The department shall adopt rules regarding the determination of capital expenditure maximums, procedures to monitor capital expenditures obligated under certificates and procedures to review projects for which the capital expenditure maximum is exceeded or expected to be exceeded.

3. Periodic review. After the issuance of a certificate of need, the department shall periodically review the progress of the holder of the certificate in meeting the timetable for making the service or equipment available or for completing the project specified in the approved application. 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 the certificate. In addition, if on the basis of its periodic review of progress under the certificate the department determines that the holder of a certificate is not otherwise meeting the timetable and is not making a good faith effort to meet it, the department may, after a hearing, withdraw the certificate of need. The applicant shall issue to the department periodic reports as designated in the certificate of need approval notification on the impact of the service on the health status, quality of care and health outcomes of the population served. These reports may not be in less than 12-month intervals following the start of service approved in the certificate of need. The department shall adopt rules for the withdrawal of certificates of need.

§347. Withholding of license

A new health care facility, as defined in section 328, is eligible to obtain a license under the applicable state law if the facility has obtained a certificate of need as required by this chapter. The license of any facility does not extend to include and may not otherwise be deemed to allow the delivery of any services, the use of any equipment that has been acquired, the use of any portion of a facility or any other change for which a certificate of need as required by this chapter has not been obtained. Any unauthorized delivery of services, use of equipment or a portion of a facility or other change is in violation of the respective chapter under which the facility is licensed.

§348. Withholding of funds

A health care facility or other provider may be eligible to apply for or receive any reimbursement, payment or other financial assistance from any state agency or other 3rd-party payor, either directly or indirectly, for any capital expenditure or operating costs attributable to any project for which a certificate of need as required by this chapter only if the certificate of need has been obtained. For the purposes of this section, the department shall determine the eligibility of a facility to receive reimbursement for all projects subject to the provisions of this chapter.

§349. Injunction

The Attorney General, upon the request of the department, shall seek to enjoin any project for which a certificate of need as required by this chapter has not been obtained and shall take any other action as may be appropriate to enforce this chapter.

§350. Penalty

Whoever violates any provision of this chapter or any rate, rule or regulation pursuant to this chapter is subject to a civil penalty payable to the State of not more than \$5,000 to be recovered in a civil action. The department may hold these funds in a special revenue account that may be used only to support certificate of need reviews, such as for hiring expert analysts on a short-term consulting basis.

§351. Cost-of-living adjustment

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

§352. Federal funding

The department is authorized to accept any federal funds to be used for the purposes of carrying out this chapter.

§353. Implementation reports

The holder of a certificate of need shall make written reports as provided in this section and as required by rule adopted by the department.

1. Final plans and specifications. A holder of a certificate of need that has been issued for the construction or modification of a facility or portion of a facility shall file final plans and specifications for the project as required by the department to determine that the plans and specifications are in compliance with the certificate of need and with applicable licensure, life safety code and accreditation standards.

2. Periodic reports. Periodic reports must be filed at the end of each 6-month period following the issuance of a certificate of need under section 335, subsection 7 or section 336 regarding implementation activities, obligations incurred and expenditures made and any other matters as the department may require.

3. Summary report. A summary report must be made when the service or services for which a certificate of need was issued become operational.

4. Cost and utilization reports. For a period of one year following the implementation of the service or services for which a certificate of need was granted, the holder of the certificate of need shall file, at 6-month intervals, reports concerning the costs and utilization.

5. Department action. The department may revoke any certificate of need the department 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. The department shall review services that fall below the required volume and quality standards of a certificate of need.

Sec. 3. Rules review. The Department of Human Services shall review its rules concerning Certificate of Need Health Care Facility/Agency Space and Needs Guidelines for which the department's Bureau of Medical Services, Division of Licensing and Certification has established service-specific licensure requirements and revise them as necessary to ensure that those guidelines are identical to the licensure requirements. Rules adopted pursuant to this provision are routine technical rules as defined in the Maine Revised Statutes, Title 5, chapter 375, subchapter II-A.

Sec. 4. Revisor's review; cross-references. The Revisor of Statutes shall review the Maine Revised Statutes and include in the errors and

inconsistencies bill submitted to the First Regular Session of the 121st Legislature pursuant to Title 1, section 94, any sections necessary to correct and update any cross-references in the statutes to provisions of law repealed in this Act.

See title page for effective date.

CHAPTER 665

H.P. 1468 - L.D. 1969

An Act Concerning Custody and Visitation for Sex Offenders

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

Sec. 1. 19-A MRSA §1653, sub-§3, ¶O, as amended by PL 1999, c. 702, §2, is further amended to read:

O. A parent's prior willful misuse of the protection from abuse process in chapter 101 in order to gain tactical advantage in a proceeding involving the determination of parental rights and responsibilities of a minor child. Such willful misuse may only be considered if established by clear and convincing evidence, and if it is further found by clear and convincing evidence that in the particular circumstances of the parents and child, that willful misuse tends to show that the acting parent will in the future have a lessened ability and willingness to cooperate and work with the other parent in their shared responsibilities for the child. The court shall articulate findings of fact whenever relying upon this factor as part of its determination of a child's best interest. The voluntary dismissal of a protection from abuse petition may not, taken alone, be treated as evidence of the willful misuse of the protection from abuse process; ~~and~~

Sec. 2. 19-A MRSA §1653, sub-§3, ¶P, as enacted by PL 1999, c. 702, §3, is amended to read:

P. If the child is under one year of age, whether the child is being breast-fed; ~~and~~

Sec. 3. 19-A MRSA §1653, sub-§3, ¶Q is enacted to read:

Q. The existence of a parent's conviction for a sex offense or a sexually violent offense as those terms are defined in Title 34-A, section 11203.

Sec. 4. 19-A MRSA §1653, sub-§6-A is enacted to read:

6-A. Custody and contact limited; convictions for sexual offenses. The award of primary residence and parent-child contact with a person who has been convicted of a child-related sexual offense is governed by this subsection.

A. For the purposes of this section, "child-related sexual offense" means the following sexual offenses if, at the time of the commission of the offense, the victim was under 18 years of age:

(1) Sexual exploitation of a minor, under Title 17, section 2922;

(2) Gross sexual assault, under Title 17-A, section 253;

(3) Sexual abuse of a minor, under Title 17-A, section 254;

(4) Unlawful sexual contact, under Title 17-A, section 255;

(5) Visual sexual aggression against a child, under Title 17-A, section 256;

(6) Sexual misconduct with a child under 14 years of age, under Title 17-A, section 258; or

(7) An offense in another jurisdiction, including, but not limited to, that of a state, federal, military or tribal court, that includes the essential elements of an offense listed in subparagraph (1), (2), (3), (4), (5) or (6).

B. A court may award primary residence of a minor child or parent-child contact with a minor child to a parent who has been convicted of a child-related sexual offense only if the court finds that contact between the parent and child is in the best interest of the child and that adequate provision for the safety of the child can be made.

C. In an order of parental rights and responsibilities, a court may require that parent-child contact between a minor child and a person convicted of a child-related sexual offense may occur only if there is another person or agency present to supervise the contact. If the court allows a family or household member to supervise parent-child contact, the court shall establish conditions to be followed during that contact. Conditions include, but are not limited to, those that:

(1) Minimize circumstances when the family of the parent who is a sex offender