

# MAINE STATE LEGISLATURE

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# **Certificate of Need**

*Simplifying the Process*

Public Law 2011  
Chapter 424

Final Report  
January 2012

**Report to the Maine State Legislature**

Maine Department of Health and Human Services  
Division of Licensing and Regulatory Services

This report was prepared by:  
The Division of Licensing and Regulatory Services  
Department of Health and Human Services  
41 Anthony Avenue  
11 State House Station  
Augusta, ME 04333-0011

For further information, please contact:  
Phyllis Powell, Acting Director  
(207) 287-9300  
[Phyllis.Powell@maine.gov](mailto:Phyllis.Powell@maine.gov)

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## I. STAKEHOLDER GROUP: REVIEW CERTIFICATE OF NEED PROCESS

**125<sup>th</sup> Maine Legislature.** Public Law 2011, chapter 424, directed the Department of Health and Human Services (DHHS) to convene a stakeholder group to review ways to improve the certificate of need process and to make any necessary recommendations for changes in law or rule for the benefit of the regulated entities and the people of the state of Maine. It instructed DHHS to submit the recommendations to the Maine State Legislature no later than January 15, 2012. Attachment 1 includes the text of PL 11, ch 424.

**Membership.** The certificate of need (CON) workgroup membership included participants from a range of groups, including the Maine Medical Association, the Maine Hospital Association, the Maine Health Care Association, private attorneys who have practiced in the field of certificate of need law, an association of not-for-profit, long-term care providers of services to the elderly in Maine and New Hampshire and a physician-owned multi-specialty medical practice based in Portland. Attachment 2 includes the membership list.

**Charge.** The CON stakeholder workgroup was established (1) to review ways to improve the certificate of need process; and (2) to make any necessary recommendations to the Legislature for changes in law or rule for the benefit of the regulated entities and the people of Maine.

As directed by the Legislature, DHHS convened the CON legislative workgroup and facilitated their meetings.

This report, prepared by DHHS, represents the workgroup's recommendations and their draft legislation for consideration by the Maine Legislature. The CON legislative group met on September 19, October 24, November 7 and December 5, 2011. On December 19, 2011, there was a meeting of a subcommittee formed by the group to draft the report. The draft report was distributed to group members and their comments accepted until January 9, 2012. The subcommittee reviewed comments for inclusion in this report.

## II. RECOMMENDATIONS

Based on its discussions, research and meetings, the stakeholders' made the following recommendations. The attached draft legislation includes language to implement these recommendations.

**1. Simplify the CON process.** Keep the general framework of the current CON statute and maintain a process that provides for public comment while amending the language to include the following changes:

**1-A** CON simplified review process. All CON reviews are *simplified reviews*, unless certain criteria are met.

- 1-B** CON expanded review process. Based on criteria set out in rules, the project may be subject to an extended review process.
- 1-C** CON subsequent review process. After a CON is issued, the subsequent review process as set out in the law is maintained except for provider-friendly amendments to the process.
- 1-D** CON expedited review process. Based on criteria set out in rules, emergency projects and necessary projects may be subject to an expedited review process.
- 1-E** Prior approval process to transfer beds. A nursing facility may delicense and sell or transfer beds to a residential care facility for the purpose of

permitting the residential care facility to add MaineCare-funded beds to

meet identified needs for such beds. Such a transfer does not require a CON but is subject to prior approval of the department on an expedited basis. It is a “prior approval” process and not a “CON” process because nursing facilities are subject to the CON law and residential care facilities are not subject to the CON law.

## **2. Procedural changes.**

- 2-A** Application cycles discontinued. A new law recently enacted has already begun to simplify the CON process. Providers may submit applications at any time of the year based on action taken by the 125<sup>th</sup> Maine Legislature during its first regular session. Rules have been proposed and are proceeding toward adoption in compliance with the rulemaking process set out in the Maine Administrative Procedure Act. Prior to this change, health care applications could only be submitted in January and April of each year. Applications for nursing facility CON projects have never been subject to this limitation.
- 2-B** Optional technical assistance meeting after submitting a Letter of Intent. A new law recently enacted has already begun to simplify the CON process. After filing a Letter of Intent, providers may choose to *waive* the technical assistance (TA) meeting with the department based on action taken by the 125<sup>th</sup> Maine Legislature during its first regular session. Rules have been proposed and are proceeding toward adoption in compliance with the rulemaking process set out in the Maine Administrative Procedure Act. Prior to this change, the technical assistance meeting with the department was mandatory.

- 2-C** Add technical assistance meeting prior to department publication of preliminary analysis. The attached draft legislation would amend the current statute by adding a second TA meeting. This second TA meeting is strategically placed prior to the department's publication of its preliminary analysis of a CON application. This gives providers an opportunity to hear from the department whether the CON application is likely to be recommended for approval or denial and gives providers an opportunity to offer to 'fix' or 'clarify' identified issues. This TA meeting gives providers an opportunity to provide input that the department may incorporate into its preliminary analysis and may at times help providers avoid lengthy and costly delays when seeking an approved CON.
- 2-D** Simplify reports required after a CON is issued. The statutory language is cumbersome and impedes the implementation of clear, standard reporting requirements after a CON is issued. The CON workgroup understands the need to comply with reporting requirements while also requesting simplification and standardization. The multiple, diverse reporting periods will be simplified and standardized in rules. The attached draft legislation would amend the law to state: *"The department may require periodic, summary, or cost and utilization reports for no longer than three years following the completion of the project."* This will streamline the reporting requirements while not eliminating the reports.

3. **Draft legislation.** The legislative CON stakeholders group recommends submitting the attached draft legislation to the 125<sup>th</sup> Legislature for their consideration. The draft legislation incorporates the stakeholders' recommendations. (Attachment 3).

### III. OTHER ISSUES

During its review of ways to improve the certificate of need process, stakeholders identified the following related issues as needing to be addressed in the future even though they are not part of the CON law. Some issues may not require legislation or rulemaking.

1. **Projects involving only “residential care.”** The stakeholders suggest that DHHS consider administrative changes to assure better coordination when handling “residential care only” projects that do not involve nursing facility beds and the CON process. Nursing facilities/residential care facilities are concerned about “residential care only” projects. Currently, one DHHS division handles nursing facility certificate of need projects and another DHHS office handles residential care facilities that are reviewed pursuant to principles of reimbursement. Residential care projects are not subject to CON review. Stakeholders would like to suggest to DHHS that these projects should be handled in one place within the Department and the stakeholders recommend the Division of Licensing and Regulatory Services as the appropriate location.
2. **Nursing facility MaineCare funding pool.** This pool is inadequately funded to support any expansion of nursing facility beds.
  - The funding for this pool comes from lapsed nursing facility beds or legislative action.
  - As of February 2012, the current balance in this pool is \$119,569.
  - The stakeholders request that DHHS and the Governor's office work with the Maine Health Care Association (MHCA) and others to determine the appropriate funding level that is needed for realistic bed need projections.
3. **State Health Improvement Plan.** The stakeholders are very interested to learn more about the Governor's proposed State Health Improvement Plan. Any such Plan should address both nursing facility and residential care bed need. The stakeholders seek active involvement.
  - What is status of the proposed State Health Improvement Plan? What is timeline? What is the process? Who is responsible for preparing? Is there a draft version? Can it be shared?

- How does the Governor's Office and DHHS plan on obtaining input from affected groups?
- Will the Plan, and its goals, be factored into CON decisions? If so, legislative action is needed to reincorporate references to this new State Health Improvement Plan as an operative standard in the CON law. The stakeholders seek substantive involvement in all aspects of the Plan that relate to long-term care.

**4. The Lewin Study and other future need studies.** What is the status of the Lewin Study? Are there any other DHHS studies of "future needs" underway? Will there be a Long Term Care Bed Need Study for upcoming years? Are there other studies underway? Is the DHHS, Office of Elder Services (OES), carrying out other studies? The stakeholders seek to learn status and have active involvement.

## ATTACHMENT 1

### **PART C of Public Law 2011, Chapter 424, Section C-2**

Here is the link to the entire public law:

[http://www.mainelegislature.org/legis/bills/bills\\_125th/chapdocs/PUBLIC424.rtf](http://www.mainelegislature.org/legis/bills/bills_125th/chapdocs/PUBLIC424.rtf)

### **PART C**

(Unallocated language) **Sec. C-2. Review of certificate of need.** The Department of Health and Human Services shall convene a stakeholder group no later than October 15, 2011 to review ways to improve the certificate of need process under the Maine Revised Statutes, Title 22, chapter 103-A and the rules that implement certificate of need laws. The department shall make any necessary recommendations for changes in law or rule for the benefit of the regulated entities and the people of the State to the Legislature no later than January 15, 2012. The department shall invite participants from a range of groups, including, but not limited to, the Maine Medical Association, the Maine Hospital Association, the Maine Health Care Association, private attorneys who have practiced in the field of certificate of need law, an association of not-for-profit, long-term care providers of services to the elderly in Maine and New Hampshire and a physician-owned multi-specialty medical practice based in Portland.

## ATTACHMENT 2

As required by Public Law 2011, chapter 424, DHHS, Division of Licensing and Regulatory Services convened a CON Stakeholder workgroup to review ways to improve the Certificate of Need process. Workgroup members included:

1. Jeff Austin, Maine Hospital Association
2. Bethany Allen, Legislative Aide
3. William Boeschstein, Commissioner's Office
4. Glen Cyr, North Country Associates
5. John Doyle, Preti Flaherty
6. Rick Erb, Maine Health Care Association
7. Rep. Les Fossel, District 53
8. Katie Fullam Harris, MaineHealth
9. Chuck Gill, Central Maine Health Care
10. David Landry, Spectrum
11. Rep. John Martin, District 1
12. Rep. Jon McKane, District 51
13. Richard Linehan, Maine Medical Center
14. Andrew B. MacLean, Maine Medical Association
15. Lisa McPherson, Eastern Maine Healthcare Systems
16. Jean Mellett, Eastern Maine Healthcare Systems
17. Craig Nelson, Nelson & Doyle
18. Wanda Pelkey, First Atlantic Healthcare
19. Scott Perkins, Commissioner's Office
20. Phyllis Powell, Department Representative
21. Ann Robinson, Preti & Flaherty
22. Gordon Smith, Maine Medical Association
23. Rep. Meredith Strang Burgess, District 108
24. Katrin Teel, Governor's Office
25. Catherine Valcourt, Department Representative
26. John Watson, The Cedars
27. Kevin Wells, Department Representative
28. David Winslow, Maine Hospital Association

## ATTACHMENT 3

### DRAFT LEGISLATION

#### “AN ACT TO SIMPLIFY THE CERTIFICATE OF NEED PROCESS AND LESSEN THE REGULATORY BURDEN ON PROVIDERS”

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

Sec. 1. 22 M.R.S.A. §328 (22), as amended by . . . , is further amended to read:

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

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

A. The applicant;

B. A group of ~~40~~ 5 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.

Sec. 2. 22 M.R.S.A. §333 (1)(A-1), as amended by . . . , is further amended to read:

A-1. ~~(TEXT EFFECTIVE 2/15/12)~~ Beginning with anniversary dates occurring after July 1, 2007, annually provide notice to the department no later than July 1 of each calendar year~~30 days after the anniversary date of the effective date of the license reduction~~ of the nursing facility's intent to retain these reserved beds, subject to the limitations set forth in subsection 2, paragraph B; The filing of such notice shall operate to preserve these reserved beds through June 30 of the following calendar year. The annual notice on reserved beds may be filed by an individual facility or in the alternative the annual notice may be filed on behalf of

multiple facilities by a single filing by a department-approved membership organization; and

**Sec. 3. 22 M.R.S.A. §333 (2)**, as amended by . . . , is further amended to read:

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 directly affected by a review. 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. (TEXT EFFECTIVE UNTIL 2/15/12) Conversion of beds back under this section must be requested within 4 years of the effective date of the license reduction. If the nursing facility fails to provide the annual notices required by subsection 1, paragraph B, the nursing facility's ability to convert beds back under this section lapses, and the beds must be treated as lapsed beds for purposes of this section and sections 333-A and 334-A.~~

~~B. (TEXT EFFECTIVE 2/15/12) If the nursing facility fails to provide the annual notices required by subsection 1, paragraph B, the nursing facility's ability to convert beds back under this section lapses, and the beds must be treated as lapsed beds for purposes of this section and~~

~~sections 333-A and 334-A.~~

**Sec. 4. 22 M.R.S.A. §333-A (3-A)**, as amended by . . . , is further amended to read:

~~3-A. (TEXT EFFECTIVE 2/15/12) **Transfers between nursing facility and residential care facility.** A nursing facility may delicense and sell or transfer beds to a residential care facility for~~

~~the purpose of permitting the residential care facility to add MaineCare-funded beds to meet~~

~~identified needs for such beds. Such a transfer does not require a certificate of need but is subject to prior approval of the department on an expedited basis. The divisions within the department that are responsible for licensing and MaineCare reimbursement for nursing facilities and residential care facilities shall work cooperatively to review and approve such transfers on an~~

\_\_\_\_\_When the average then current occupancy rate for existing state-funded residential care beds within 30 miles of the applicant facility is 80% or less, the department in its review under section 335 shall evaluate the impact that the proposed additional state-funded residential care beds would have on these existing state-funded residential care beds and facilities. Beds and MaineCare resources transferred pursuant to this subsection are not subject to the nursing facility MaineCare funding pool. In order for the department to approve delicensing, selling or transferring under this subsection, the department must determine that any increased MaineCare residential care costs associated with the converted beds are fully offset by reductions in the MaineCare costs from the reduction in MaineCare nursing facility costs associated with the converted beds.

**Sec. 5. 22 M.R.S.A. §334-A (1-A) (B) (2)**, as amended by . . . , is further amended to read:

**1-A. (~~TEXT EFFECTIVE 2/15/12~~) Projects that expand current bed capacity.** Nursing facility projects that propose to add new nursing facility beds to the inventory of nursing facility beds within the State may be considered under either of the following 2 options:

A. These projects may be grouped for competitive review purposes consistent with funds available from the nursing facility MaineCare funding pool and may be approved if sufficient funds are available from the nursing facility MaineCare funding pool or are added to the pool by an act of the Legislature, except that the department may approve, without available funds from the pool, 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; or

B. Petitioners proposing such projects may elect not to participate in a competitive review under paragraph A and the projects may be approved if:

(1) The petitioner, or one or more nursing facilities or residential care facilities or combinations thereof under common ownership or control, has agreed to delicense a sufficient number of beds from the total number of currently licensed or reserved beds, or is otherwise reconfiguring the operations of such facilities, so that the MaineCare savings associated with such actions are sufficient to fully offset any incremental MaineCare costs that would otherwise arise from implementation of the certificate of need project and, as a result, there are no net incremental MaineCare costs arising from

implementation of the certificate of need project; or

(2) The petitioner, or one or more nursing facilities or residential care facilities or combinations thereof under common ownership or control, has acquired bed rights from another nursing facility or facilities or residential care facility or facilities or combinations thereof that agree to delicense beds or that are ceasing operations or otherwise reconfiguring their operations, and the MaineCare revenues associated with these acquired bed rights and related actions are sufficient to cover the additional requested MaineCare costs associated with the project. The divisions within the department that are responsible for licensing and MaineCare reimbursement for nursing facilities and residential care facilities shall work cooperatively to review and approve such projects.

With respect to the option described in this paragraph, when the average then current occupancy rate for existing nursing facility beds at facilities within 30 miles of the applicant facility exceeds 85%, the department in its review under section 335 shall evaluate the impact that the proposed additional nursing facility beds would have on those existing nursing facility beds and facilities and shall determine whether to approve the request based on current certificate of need criteria and methodology.

Certificate of need projects described in this paragraph are not subject to or limited by the nursing facility MaineCare funding pool.

**Sec. 6. 22 M.R.S.A. §335 (1) (C), (D) and (E)** as amended by . . . , is further amended to read:

**1. ~~(TEXT EFFECTIVE 2/15/12)~~ 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:

A. Meets the conditions set forth in subsection 7;

B. [2011, c. 90, Pt. J, §5 (RP).]

~~B. [2011, c. 90, Pt. J, §5 (RP).]~~

C. With respect to projects that propose additional or expanded services, ensures ~~Ensures~~ high-quality outcomes and does not negatively affect the quality of care delivered by existing service providers;

D. With respect to projects that propose additional or expanded services, does ~~Does~~ not result in inappropriate increases in service utilization, according to the principles of evidence-based medicine adopted by the Maine Quality Forum, as established in Title 24-A, section 6951, when the principles adopted by the Maine Quality Forum are directly applicable to the application; and

E. ~~(FUTURE CONFLICT: Text as amended by PL 2011, c. 213, §3) In the case of a nursing~~

facility, is consistent with the nursing facility MaineCare funding pool and other provisions of sections 333-A and 334-A.

E. (FUTURE CONFLICT: Text as repealed by PL 2011, c. 424, Pt. B, §15; Pt. E, §1)

F. In the case of a nursing facility project that proposes to add new nursing facility beds to the inventory of nursing facility beds within the State, is consistent with the nursing facility

MaineCare funding pool and other applicable provisions of sections 333-A and 334-A.

**Sec. 7. 22 M.R.S.A. §335 (1-A)**, as amended by . . . , is further amended to read:

**1-A. ~~Review cycle~~ Competitive review.** The commissioner ~~shall~~ may review applications ~~periodically on a competitive basis where they propose the same or similar services.~~

**Sec. 8. 22 M.R.S.A. §335 (2) and (3)**, as amended by . . . , is further amended to read:

**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 338 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.** ~~Except as otherwise provided in this chapter, 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 regarding any letter of intent or application with the commissioner or~~ 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 an application for certificate of need must be made part of the record described in subsection 5-A of this section. Where such communications are not in written form or part of public meetings, these communications must be noted in writing by the commissioner or that department staff and that notation must be made part of the application record.

**Sec. 9. 22 M.R.S.A. §335 (5-A) (I)**, as amended by . . . , is further amended to read:

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

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

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

C. 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, including reports by panels of experts assembled by the department to advise it on the application, 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;

D. 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;

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

F. Any documents submitted by any person for the purpose of making those documents 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;

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

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

I. Except with regard to a project related to nursing facility services, or a non-expanded simplified review project under section 336, the commissioner may require a written assessment by the Superintendent of Insurance of the impact of the project on the cost of insurance in the region and the State. The superintendent may request additional information from the applicant for the purpose of reviewing the application. Any such request must be transmitted through the department and becomes part of the official record. The applicant shall respond to the request within 30 days. Any such response must be transmitted through the department and becomes part of the official record. The inability of the superintendent to complete the review of the application due to the failure of the applicant to respond timely

must be noted in the superintendent's assessment filed with the department and may be cause for the commissioner to ~~delay consideration of the application until the next review cycle or~~ to deny approval of the project.

**Sec. 10. 22 M.R.S.A. §335 (6)**, as amended by . . . , is further amended to read:

**6. Maintenance of the record.** The record created pursuant to subsection 5-A first opens on the day the department receives a certificate of need application. From that day, all of the record is a public record, except that the letter of intent becomes a public record upon the receipt of the letter and is available for review from the date of receipt. Any person may examine all or part of the public record and purchase copies of any or all of that record during the normal business hours of the department.

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

**B. Technical assistance meeting prior to publication of preliminary analysis.** A technical assistance meeting with the department shall be scheduled at least 10 days before the department publishes the preliminary analysis of a certificate of need application. The technical assistance meeting gives providers an opportunity to hear from the department whether the certificate of need application is likely to be approved or denied and gives providers an opportunity to address issues and concerns expressed by the department regarding compliance with this chapter. The technical assistance meeting gives providers an opportunity to offer additional information to the department. The additional information submitted by the provider becomes part of the public record. The department completes its review after the technical assistance meeting and publishes the preliminary analysis.

**C. Public notice of completion of preliminary analysis.** The department shall give notice that the preliminary analysis is complete and part of the public record by publication 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.

**D. Comment deadline after publication of the preliminary analysis.** The public and the applicant may submit comments on the preliminary analysis for 15 business days after the notice is published. ~~The record will reopen for 10 business days following the publication that the preliminary staff review is complete and will close 10 business days after a public notice of the closing of the record has been published as long as the notice is not published until after the preliminary staff analysis of the application is made part of the record.~~

**E. Reopen record: submission of additional information.** The department may also determine to reopen the record in other circumstances that it determines to be appropriate for a limited time to permit submission of additional information, as long as the department gives

public notice consistent with the provisions of this subsection.

**Sec. 11. 22 M.R.S.A. §335 (7)**, as amended by . . . , is further amended to read:

**7. Expanded review process Review; approval.** Except as provided in section 333-A (3) or 334-A (2-B) with respect to emergency nursing facility projects, section 336 with respect to the simplified review process or subsection 9 of this section, the commissioner, or the commissioner's designee in the case of a simplified review under Section 336 or an emergency review, shall issue a certificate of need if the commissioner or the commissioner's designee 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; Where the applicant is an existing Maine licensed provider, the applicant shall be deemed to have fulfilled the requirements of this paragraph where the services previously provided in Maine by the applicant are consistent with pertinent licensing and certification 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; Where the applicant is an existing Maine licensed provider, the applicant shall be deemed to have fulfilled the requirements of this paragraph where the services provided in Maine by the applicant during the most recent three-year period are of similar size and scope and are consistent with pertinent licensing and certification standards;

C. With respect to projects that propose additional or expanded services, there 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. Projects that do not provide additional or expanded services but continue existing services shall be deemed to fulfill the public need provisions of this paragraph;

D. With respect to projects that propose additional or expanded services, the ~~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; and

E. The project meets the criteria set forth in subsection 1.

In making a determination under this subsection, the commissioner ~~shall~~ may use data from the Maine Health Data Organization established in chapter 1683 and other information available to the commissioner to the extent such data and information is applicable to the determination being made. Particular weight must be given ~~The commissioner may give appropriate weight~~ to information that indicates that the proposed health services are innovations in high-quality health care delivery, that the proposed health services are not reasonably available in the proposed area and that the facility proposing the new health services is designed to provide excellent quality health care.

**Sec. 12. 22 M.R.S.A. §336**, as amended by . . . , is further amended to read:

Notwithstanding the requirements set forth in section 335, the department shall conduct a simplified review and approval process in accordance with this section. The department shall by rule set forth this simplified review and approval process. To the extent practicable, a simplified review must be completed and the commissioner shall make a decision within 60 days after the application has been certified as complete by the applicant pursuant to Section 337(4), unless a hearing is requested by a person directly affected by a review or the commissioner determines to hold a hearing. The following projects may qualify for a simplified review process:

**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, or transfers ownership to a licensed Maine provider 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 for compliance or quality improvement.** 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; to provide demonstrable improvements in patient safety or quality of care; 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. With respect to projects that propose additional or expanded services, there ~~There~~ remains a public need for the service to be provided; and

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

**5. Major medical equipment.** The commissioner shall issue a certificate of need for replacement of major medical equipment that is not otherwise exempt from review pursuant to section 329, subsection 2-A, paragraph B, subparagraph (1) upon determining that a project meets the requirements of section 335, subsection 7.

**6. Other projects.** The commissioner may by rule identify other categories of projects that

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section and will foster timely review and approval for qualifying projects.

**Sec. 13. 22 M.R.S.A. §337 (2)(B) and (3)**, as amended by . . . , is further amended to read:

**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. ~~(TEXT EFFECTIVE 2/15/12)~~ Within 15 days of filing the letter of intent, unless the applicant waives having the technical assistance meeting, the applicant shall schedule a meeting 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.~~

**3. Application content: department-approved forms.** An application for a certificate of need must describe with specificity how the proposed project meets each of the ~~conditions~~ standards for granting a certificate of need ~~required by this chapter~~ that are applicable to such project. 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~~ an expanded 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.

A. Multiple project-specific department-approved certificate of need forms shall be available on the department's webpage for at least the following certificate of need categories:

1. Nursing facility projects;
2. Hospital projects; and
3. Projects proposed by other providers subject to review.

B. The department-approved forms shall set forth differential application elements that are relevant to each category and shall elicit the information and data reasonably necessary to permit the department to carry out the review and approval process in a timely and cost effective manner, with due regard for the costs and burdens imposed on applicants.

C. Where the applicant is an existing Maine licensed provider of health care services of similar size and scope, the applicant may reference and rely upon its record

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(1) and (7).

- D. Submission of completed applicable department-approved forms, required information, together with other information that is appropriate to the application, and the applicant's certification that the application is complete pursuant to Section 337(4) shall provide a sufficient record for the department to make a determination regarding the application for a certificate of need, unless a hearing is requested by the department or a person directly affected by a review.
- E. Where an application is contested by another provider or a person directly affected by a review or the department determines to hold a public hearing pursuant to Section 339(2), additional information may be required by the department.

**Sec. 14. 22 M.R.S.A. §337 (5)**, as amended by . . . , is further amended to read:

**5. (TEXT EFFECTIVE 2/15/12) 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. The notice must also be published on the department's website. 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. Where a public informational meeting is being held, the ~~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; and that a public hearing may be requested by any person directly affected by the review if the request is received by the commissioner within 15 days following the public informational meeting pursuant to the provisions of subsection 2 of Section 339; and
- E. Where a public informational meeting is not being held, that a public hearing may be requested by any person directly affected by a review if the request is received by the

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been filed.

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

A public informational meeting is not required for the simplified review and approval process in section 336-, unless requested by the applicant, the department or a person directly affected by a review.

**Sec. 15. 22 M.R.S.A. §337 (6-A) and (7),** is enacted to read:

**6-A. Suspension of review.** Any applicant may request and be granted a suspension of the review process prior to the date on which the department staff submits its final analysis to the Commissioner.

1. A request for suspension of the review process shall be for specific periods of no less than 10 days and not greater than one twelve month period in duration.
2. Where there are no competing applicants, a request shall be granted upon request.
3. Where there are competing applicants, the request shall be reviewed and approved or disapproved within 3 business days taking into account the interests of the public and of competing applicants.
4. If a request to suspend the CON review is granted, the department shall determine:
  - a. Whether the suspension shall operate to suspend review of all competing applications; or
  - b. Whether the suspension shall have no effect on competing applications, which shall continue to be reviewed without interruption.
5. Failure to reactivate within the department-approved time period shall result in automatic withdrawal of the suspended application.
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.
  - A. **Other fees.** In addition to filing fees, the department shall adopt rules to establish reasonable and necessary fees to carry out the provisions of this chapter. All fees received

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accordance with this chapter.

**Sec. 16. 22 M.R.S.A. §338**, as amended by . . . , is further amended to read:

**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;
- B. Unmet need for health care services in the State; ~~and~~
- C. The quality of health care; and
- D. Need to replace, renovate or upgrade health care facilities to meet current and future needs.

**Sec. 17. 22 M.R.S.A. §339 (2)(B) and (D)**, as amended by . . . , is further amended to read:

B. ~~(TEXT EFFECTIVE 2/15/12)~~ 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~~ any person directly affected by a review (as defined in Section 328 (22)) requests, in writing, that such a public hearing be held and the request is timely received by the commissioner. Where a public informational meeting on the application is conducted pursuant to section 337, subsection 5, the request for a public hearing must be received by the commissioner no later than 15 days following the informational hearing, on the application conducted pursuant to section 337, subsection 5. Where no public informational meeting is conducted, the request for a public hearing must be received within 15 days following the publication of the public notice required by section 337, subsection 5.

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

D. A public hearing is not required for the simplified review and approval process set forth in section 336; unless requested by the applicant, the department or a person directly affected by a review.

**Sec. 18. 22 M.R.S.A. §339 (5)**, as amended by . . . , is further amended to read:

**5. ~~(TEXT EFFECTIVE 2/15/12)~~ Reviews.** To the extent practicable, a review shall be completed and the commissioner shall make a decision within ~~45~~ 60 days after the application has been certified as complete by the applicant for a simplified review, or within 90 days for an expanded review. The department shall establish criteria for determining when it is not

practicable to complete a review within ~~45 days~~ these timeframes. Whenever it is not practicable to complete a review within ~~45 days~~ these timeframes, the department may extend the review period for up to an additional 30 days.

**Sec. 19. 22 M.R.S.A. §339 (6)**, as amended by . . . , is further amended to read:

**6. ~~(TEXT EFFECTIVE 2/15/12)~~ Public necessity.** The department may delay action on an otherwise complete application for up to ~~90~~ 120 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.

**Sec. 20. 22 M.R.S.A. §346 (3)**, as amended by . . . , is further amended to read:

**3. Issued certificate: duration and expiration ~~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~~ 24 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 based on 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.~~

**Sec. 21. 22 M.R.S.A. §350-C**, as amended by . . . , is further amended to read:

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. Reports. 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. The department may require periodic reports, summary reports, and cost and utilization reports as well as reports regarding the impact of the project on the health status, quality of care and health outcomes of the population for no longer than three years following the completion of the project as set out in rule.~~

~~**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~~ the department on a timely basis. The department shall review services that fall below the required volume and quality standards of a certificate of need.

## SUMMARY

This bill amends the Maine Certificate of Need Act of 2002 as follows:

Section 1. Amends Section 328 (22) to modify the definition of “person directly affected by a review” to conform to provisions in Section 339 (2) that permit five persons in service area to request a hearing.

Section 2. Amends Section 333 (1) (A-1) to standardize and simplify the process for submission of a department-approved annual report form on “reserved beds.” The report must be submitted on or before July 1 of each year. Annual reports may be submitted by an individual facility or on behalf of multiple facilities by a single filing by a department-approved membership organization. This change will eliminate the requirement that facilities submit multiple reports on multiple dates throughout the year on the anniversary date the facility established the bed as a “reserved bed.”

Section 3. Amends Section 333 (2). Housekeeping amendment to use language of definition

in Section 328 (22) for a “person directly affected by a review.”

- Section 4. Amends Section 333-A (3-A) to require divisions within the Department of Health and Human Services that are responsible for licensing and MaineCare reimbursement for nursing facilities and residential care facilities to work cooperatively to review and approve transfers between nursing facilities and residential care facilities on an expedited basis. This amendment is needed because residential care beds are managed by the Office of Elder Services and nursing facility beds are managed by the Division of Licensing and Regulatory Services.
- Section 5. Amends Section 334-A (1-A)(B)(2) (Projects that expand current nursing facility bed capacity). Ensures that divisions within DHHS that are responsible for licensing and MaineCare reimbursement for nursing facilities and residential care facilities work cooperatively to review and approve projects that expand nursing facility bed capacity on an expedited basis. This amendment is needed because residential care beds are managed by the Office of Elder Services and nursing facility beds are managed by the Division of Licensing and Regulatory Services.
- Section 6. Amends Section 335 (1)(C) and (D) to clarify that projects that propose additional or expanded services must ensure high-quality outcomes; must not negatively affect the quality of care delivered by existing service providers; and must not result in inappropriate increases in service utilization. Projects that replace or renovate existing facilities are not subject to these review criteria.
- Amends Section 335 (1)(E) (Housekeeping Amendment). This subsection was repealed by PL 2011, chapter 424, Pt. B, §15; Pt. E, §1.
- Section 7. Amends Section 335(1)(A). Clarifies that projects may be reviewed on a competitive basis when they propose the same or similar services.
- Section 8. Amends 335 (2) and (3). Modifies permitted communications to permit contacts with the Commissioner so long as these communications are made part of the record.
- Section 9. Amends Section 335 (5-A)(I). Exempts from the Bureau of Insurance actuarial analysis, in addition to nursing facility projects, any project that qualifies for simplified review under Section 336. Removes reference to review cycles, consistent with Section C-1 of Public Law 424, LD 360 as enacted.
- Section 10. Amends Section 335 (6). Adds a second technical assistance meeting to the process prior to the department’s publication of its preliminary analysis to encourage dialogue regarding whether the application is likely to be approved so that the applicant will be given the opportunity to comment on the department’s proposed findings before they are formally issued in the form of the Preliminary Analysis. The other technical assistance meeting in the CON process is after submission of the Letter of Intent.

- Section 11. Amends Section 335(7). Makes several changes:
- Permits the Commissioner to delegate CON decisions to a designee for certain projects – simplified reviews and expedited reviews of emergency projects;
  - Cross-references emergency nursing facility projects or other emergency projects as exceptions to the requirement for detailed findings;
  - Cross-references a more streamlined process for simplified reviews under Section 336 – where the multiple determinations applicable to an “expanded review” are not required for projects qualifying for simplified reviews under Section 336 unless requested by the applicant or deemed appropriate or desirable by the department;
  - §335 (7)(A) and (B) streamline the “fit, willing and able” and “economic feasibility” determinations for applicants whose prior services are consistent with pertinent licensing and certification standards;
  - §335 (7)(C) and (D) apply certain standards only to those projects that propose additional or expanded services; and
  - §335 (7)(E) modifies provisions requiring reliance on particular types of data in making a CON determination to permit wider range of permitted sources of authority and to recognize that data from the Maine Health Data Organization may not exist with respect to particular types of proposals, thus giving the Commissioner wider discretion in making determinations.
- Section 12. Amends Section 336. Defines simplified review through rule in which certificate of need approval will be forthcoming within 60 days after the applicant has submitted a certification of completeness, unless a hearing is requested by a person directly affected by a review or the Commissioner determines to hold a hearing. The simplified review process shall apply to project categories in section 336.
- §336 (2) allows simplified review projects that are required for code compliance, to also permit projects that address other needs in the same application;
  - §336(3) broadens simplified review and approval process to cover a wider range of projects, including transfers of ownership to existing in-state providers;
  - §336 (4) clarifies that eligible capital expenditure projects include those that foster compliance or quality improvement; and
  - §336 (6) gives Commissioner authority to delineate other projects that qualify for simplified review that are consistent with the purposes of the law and will foster timely review of qualifying projects.
- Section 13. Amends Section 337 (2) and (3). Modifies application process requirements as follows:
- §337 (2)(B) allows the applicant to waive having a technical assistance meeting with the department after filing the letter of intent;

- §337 (3)(A) requires the department to provide multiple project-specific application forms and other certificate of need forms on its webpage;
- §337 (3)(B). Project-specific application forms shall set forth different information requirements that elicit the information and data reasonably necessary to permit the department to carry out the review and approval process in a timely and cost effective manner, with due regard for the costs and burdens imposed on applicants;
- §337 (3)(C). When the applicant is an existing Maine licensed provider of health care services of similar size and scope for over 3 years, the applicant may reference and rely upon its track record under these programs for purposes of department review of the project;
- §337 (3)(D). The applicant's submission of completed project-specific application forms, required supporting documentation, other information, and the certification that the application is complete shall provide a sufficient record for the department to make a determination; and
- §337 (3)(E). The department may require additional information where an application is contested by another provider or another person directly affected by a review or the department determines that a public hearing shall be held.

Section 14. Amends Section 337 (5) to require DHHS to publish on the their CON website, as well as in the newspaper, the public notice that the applicant has filed a certification that the application is complete;

- §337 (5)(D). Within 15 days of the public informational meeting, a person directly affected by a review may request a public hearing;
- §337 (5)(E). When no public informational meeting is held, a person directly affected by the review may request a public hearing within 15 days of publication of the notice of filing of the certificate of completion; and
- §337 (last sentence) A public informational meeting is not required for the simplified review process unless requested by the applicant, the department or a person directly affected by a review.

Section 15. Adds Section 337 (6-A). Adds procedure for an applicant to request a suspension of the review process and permits suspensions of no less than 10 days and no greater than one twelve month period in duration.

Section 16. Adds Section 338 (1)(D). Adds that Commissioner may consult with persons with relevant skills and experience regarding the need to replace, renovate or upgrade health care facilities to meet current and future needs.

Section 17. Amends Section 339 (2)(B). Permits any person directly affected by a review, as defined in §328 (22), to request a public hearing, including other health care facilities, providers or insurers. The public hearing must be requested within 15

days of the public informational meeting. When no public informational meeting is held, a public hearing must be requested within 15 days of publication of the notice of filing of the certificate of completion.

Section 18. Amends Section 339 (5). Modifies timeframes to require that to the extent practicable, a review must be completed and the commissioner shall make a decision within 60 days after the application has been certified as complete by the applicant for a simplified review, or within 90 days for an expanded review.

Section 19. Amends Section 339 (6). Permits extension of review time to 120 days after application certified as complete in case of “public necessity.”

Section 20. Amends Section 346 (3) as follows:

- A certificate of need expires 24 months (instead of 12 months) following the issuance of the certificate if the project has not commenced. Since the exemption thresholds have been significantly increased, the projects for which a CON will be required will be larger and more time may be needed between the issuance of the certificate and the commencement of the project.
- Eliminates language regarding reports that are required after the CON is issued. It is out of place in this statutory section and more appropriately placed in Section 350-C.
- Changes the title of subsection 3 to better reflect its purpose.

Section 21. Amends Section 350-C as follows:

- Eliminates the three categories of reports.
- Eliminates the mandatory nature of the reports.
- Allows the department to seek reports on the project for up to 3 years following completion of the project.