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

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

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

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

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

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

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 C, §7, is repealed and the following enacted in its place:

2. Acquisitions of major medical equipment. Acquisitions of major medical equipment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 332. Subsequent review

1. 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.

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

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

Sec. 7. 22 MRSA §335, sub-§2, as enacted by PL 2001, c. 664, §2, is 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 337~~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.

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

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 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.

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

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 making those documents 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, 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;
- 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 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;

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

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

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

The Superintendent of Insurance may request additional information from the applicant for the purpose of reviewing an 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 superintendent's 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.

Paragraph H does not apply to nursing facility projects.

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

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~~After an application is certified as complete, all of the record is a public record under Title 1, chapter 13, and any a 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.

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

6. Public necessity. ~~The~~Notwithstanding the provisions set forth in subsection 5, the department may delay action on an otherwise complete application for ~~up to an additional~~ up to an additional 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.

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

§ 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 a state agency or other 3rd-party payor, either directly or indirectly, for any a capital expenditure or operating costs attributable to any project for which a certificate of need is required by this chapter only if the certificate of need has been obtained. Reimbursement, payment or other financial assistance, either directly or indirectly, from a state agency or other 3rd-party payor may not be made for a project granted a certificate of need when the commissioner determines that the applicant fails to meet any of the conditions set forth in the certificate of need approval, in accordance with the procedures set forth in section 332. 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.

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

§ 350-A. 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~~publish revised figures to correspond to changes in the Consumer Price Index medical index ~~by adopting rules setting the new figures.~~

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

SUMMARY

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

1. Current law exempts from review replacement of major medical equipment. This bill requires review when a certificate of need had not been obtained for the equipment that is being replaced.
2. It requires review of an increase in bed complement or bed category of less than 10% if it results in 3rd fiscal year operating costs or capital expenditures in excess of applicable thresholds or results in the addition of a new health service.
3. It allows the aggregation of capital expenditures in determining whether projects are related.
4. It improves the ability of the Department of Health and Human Services to monitor the implementation of projects that were determined not subject to review.

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

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

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

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

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

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