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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 §328, sub-§18-A is enacted to read:

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

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 C, §7, is repealed.

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

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

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

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

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

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

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

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

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

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

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

Sec. 6. 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. 7. 22 MRSA §332, as amended by PL 2001, c. 710, §9, is repealed and the following enacted in its place:

§ 332. Subsequent review

1. Subsequent review following approval. When the commissioner has approved an application filed unconditionally or subject to conditions pursuant to section 335, subsection 8, the commissioner may conduct a subsequent review to ensure compliance with any terms or conditions of approval within 3 years after the approved activity is undertaken. In this subsequent review, the commissioner may hold a public hearing and may consider any material or 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 subsection 3 and other applicable provisions of this Act.

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

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

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

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

- A. The commissioner may, pursuant to section 347, condition the person's license to prohibit the unauthorized activity and determine the ongoing conduct of that activity to be in violation of the respective chapter under which the person is licensed. A person that is subject to a ruling under this paragraph may request, and the commissioner shall grant pursuant to the Maine Administrative Procedure Act, a stay of the effect of any such determination to condition the person's license to prohibit the particular activity pending final agency action.
- B. The commissioner may seek to enjoin the unlawful activity pursuant to section 349.
- C. The commissioner may impose civil penalties against the person pursuant to section 350.
- D. The commissioner may, pursuant to section 348, petition the Superior Court to withhold prospectively the reimbursement, payment or other financial assistance, either directly or indirectly, from a state agency or other 3rd-party payor that is directly related to the project or activity that required a certificate of need.
- E. In determining the appropriate sanction, the commissioner or the court shall consider a range of factors and public interests, as applicable to the circumstances, including but not limited to:

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

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

1. Procedures. A nursing facility that voluntarily reduces the number of its licensed beds at any time prior to July 1, 2007, 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 without material change of ownership.~~ For purposes of this section and sections 333-A and 334-A, beds voluntarily removed from service prior to July 1, 2007 and available to be reinstated under this section are referred to as "reserved beds." Reserved beds remain facility property until they lapse as provided for in this section or are transferred. ~~To convert/reinstate reserved 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 the number of beds it is reserving no later than 30 days after the effective date of the license reduction; and

A-1. Beginning with anniversary dates occurring after July 1, 2007, annually provide notice to the department no later than 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 time limitations set forth in subsection 2, paragraph B; 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.

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

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

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

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

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

C. The nursing facility having the reserved beds is willing to convert them to meet a need identified in that project review. The department shall inquire of facilities having reserved beds in the area of the State to be served by a proposed project before determining whether reserved beds will be counted as available.

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

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

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

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

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

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

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

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

§ 334-A. Nursing facility projects

1. 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 grouped for competitive review purposes consistent with funds available from the nursing facility MaineCare funding pool. Except as set forth in subsection 2, a nursing facility project that is subject to review and proposes renovation, replacement or other actions affecting assets that have not been fully depreciated and that will increase MaineCare costs by more than the applicable threshold for review may be approved only if sufficient funds are available from the nursing facility MaineCare funding pool or are added to the pool by 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.

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

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

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

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

- A. Allow gross square footage per licensed bed of not less than 500 square feet unless the applicant specifies a smaller allowance for the project; and
- B. Exclude the projected incremental cost associated with replacement of equipment.

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

- E. Can be funded within the capital investment fund or, 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.

Sec. 15. 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. 16. 22 MRSA §335, sub-§3, as enacted by PL 2001, c. 664, §2, is amended to read:

3. Limited communications. ~~A~~ 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. 17. 22 MRSA §335, sub-§5, as amended by PL 2003, c. 469, Pt. C, §10, is repealed.

Sec. 18. 22 MRSA §335, sub-§5-A is enacted 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, 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. 19. 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 ~~55-A~~ first opens on the day the department publishes its notice that an application for a certificate of need has been filed ~~receives a letter of intent~~. 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 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.

The record is closed ~~10 days~~ 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 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.

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. 20. 22 MRSA §348, as 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 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 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 be subject to an enforcement action by the commissioner to withhold or deny reimbursement, in whole or in part, with respect to 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. 21. 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.

Effective June 27, 2007.