

Testimony of Matthew Warner, lawyer for Maine Veterans Homes, against LD 2001

Senator Hickman, Representative Caiazzo, members of the Committee,

I am a lawyer at Preti Flaherty representing Maine Veterans Homes. I am here to outline why LD 2001 is illegal. As you've heard today from leadership at Maine Veterans Homes, the difficult decision to close the Caribou and Machias facilities was made after years of deliberation by the all-veteran board of directors. These deliberations were based on MVH's legal rights under state and federal law, legal rights that LD 2001 proposes to upend.

Under existing law, Maine Veterans Homes has the unilateral right to close the Machias facility and the residential care portion of the Caribou facility without approval from state government. Specifically, for a Level IV Residential Care PNMI Facility, such as the Machias facility and portions of the Caribou facility, state law requires only that MVH provide 30 days advance notice to patients and "governmental units or institutions who are primarily responsible for the welfare of those patients." *See* 22 M.R.S. § 1822. In this case, Maine Veterans Homes has provided advance notice to the Department of Health and Human Services on February 11, 2022 that the Caribou and Machias facilities are closing, and is working diligently to ensure all residents of these facilities are transferred to another qualified facility according to their needs and wishes. State government has no authority to reject this notice or compel these facilities to remain open.

There is a separate portion of the Caribou facility that is licensed as a skilled nursing home. Skilled nursing facilities are regulated by state and federal law and, under the federal Social Security Act, cannot close until the state determines that "all residents ... have been successfully relocated to another facility or an alternative home and community-based setting." 42 U.S.C. § 1320a-7j; *see also* 42 CFR § 483.70(l). Beyond this limited, and important, inquiry the State has no authority or discretion to prevent the closure of the skilled nursing facility in Caribou. If the residents have been satisfactorily relocated (a task that MVH takes very seriously) the State has no authority to reject the closure.

This is the current legal landscape, shaped by the laws that existed when the Caribou and Machias facilities received their current licenses in 2021. LD 2001 would fracture this landscape in ways that Maine Veterans Homes could not have foreseen when it renewed its licenses last year, and in ways that are not permitted by the state and federal constitutions.

The state issued the current licenses for the Caribou and Machias facilities in 2021. Maine Veterans Homes has a constitutionally protected property right in these

licenses. *See, e.g., Barry v. Barchi*, 443 U.S. 55, 64 (1979) (state issued licenses create property interest protected by Due Process Clause). LD 2001 violates MVH's constitutional right to due process and equal protection by retroactively altering a material condition of its licenses; that is, the right to operate its facilities in the manner most-beneficial to Maine's veterans and the attendant right to close the Caribou and Machias facilities at its discretion, subject only to the limited role that statute currently gives the State in the closure process. *See Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557, 560 n. 7 (Me. 1981) ("The legislature has no constitutional authority to enact retroactive legislation if its implementation impairs vested rights or imposes liabilities that would result from conduct pre-dating the legislation").

Making LD 2001 retroactive to 2021 does not change the constitutional analysis. This is because amendments to statute can be made to apply to pending proceedings, *see* 1 M.R.S. § 302, but cannot impair vested rights by changing the statutory scheme that governs a previously-issued license. *Eastland Woolen Mills*, 430 A.2d at 560. Maine Veterans Homes has the right to close its facilities subject to the statutes in effect in 2021 and, even with retroactive language, LD 2001 cannot eliminate this right.

LD 2001 is also unconstitutional because it would force Maine Veterans Homes to continue operating all of its facilities, forever, until the Legislature relents. This would have the practical effect of forcing MVH to operate at a substantial loss, bleeding the organization of funds needed to operate other facilities and serve Maine's broader veteran population. The Legislature cannot bleed MVH dry in this way. The Supreme Court, for example, has observed that legislation compelling a railroad to operate one of its lines at a loss so significant as to jeopardize the railroad's broader operations "would be so inherently unreasonable as to constitute a violation of the due process and equal protection clauses of the 14th Amendment." *Atl. Coast Line R. Co. v. N. Carolina Corp. Comm'n*, 206 U.S. 1, 26 (1907). LD 2001 is equally as unreasonable, and equally as unconstitutional.

Maine Veterans Homes' constitutional rights cannot be sidestepped by reinstating the requirement that MVH operate homes in Caribou and Machias. The Legislature abandoned this requirement in 2016 when it enacted LD 1524, Public Law 397, which repealed and replaced prior language that had imposed geographic location requirements. All subsequent license renewals were subject to the revised Maine code provisions that allow the closure of skilled nursing facilities and residential care facilities in these locations.

LD 2001 is unconstitutional and should not become law. Even if this bill did become law, it would be invalid and have no effect on the ability of Maine Veterans Homes to close its Machias and Caribou facilities in the interest of Maine's broader veterans population. Thank you for your consideration and the opportunity to testify.

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/s/ Matthew Warner