



Boothbay Region Health & Wellness Foundation

REORGANIZATION OF LINCOLN COUNTY HEALTHCARE

Comments on the LCH Certificate of Need Preliminary Analysis-The Legal Issues

We maintain that the CON statute does not provide the legal authority to DHHS to retroactively approve a Certificate of Need. This issue was raised in correspondence to the Maine Attorney General on January 21, 2014, and again on March 3, 2014 asking: *Where in the CON law is it stipulated that the DHHS has the legal authority to retroactively approve a Certificate of Need?* The issue was reiterated in a letter to the Governor on January 6, 2014. Although we have yet to receive a response from the Attorney General, we received a response from Governor LePage dated March 19, 2014. The Governor states, **“In retrospect, it should have been ordered a CON (application) be done and defined the disposition back at the original owner transfer. It is still in question whether current law allows for the current CON.”** The indication is that the Governor has spoken to the Attorney General about this question.

We also maintain the aforementioned question requires that the DHHS refer this matter to the Attorney General for adjudication. Further, *Title 22, Chapter 103A, Subsection 349* states, **“The AG upon the request of the department shall seek to enjoin any project for which a certificate of need, as required by this chapter has not been obtained and shall take any action as may be appropriate to enforce this chapter.”**

Further, if DHHS intends to submit any report or recommendations, the report should cite by what statutory authority they are doing so. What specific provision of the statute provides the legal authority to DHHS to retroactively approve any action for which a Certificate of Need was required by clear statement of law. Further, the Analysis should include specifics as to the authority of DHHS to act when a healthcare provider does not seek a CON determination, and the specifics as to how, when, how much, and by whom penalties were and will be levied.

The Maine Legislature passed the CON law with the intent to insure that DHHS would provide oversight and insure that healthcare providers seek permission BEFORE they act. MaineHealth is seeking approval for actions taken **6 years after they violated the law.** We think this is now the responsibility of the Attorney General, not DHHS.

MaineHealth maintains they received verbal approval for their 2007 merger. However in 2007 they never submitted a letter of intent, nor sought a written ruling on this matter before they changed ownership, merged the governance, and combined the members of the boards of the two hospitals. Their explanation is that they didn't think they needed to obtain a CON. The law is clear that, at the very least, they should have submitted a non-applicability determination. As stated in the Preliminary Analysis, on Page 6 by the CONU: **“We have not found—nor have you provided—any documentation establishing that MaineHealth or Lincoln County Healthcare sought or received a non-applicability determination regarding that (2007) transaction.”**

Similarly, according to law, a CON should have been requested and issued, with public commentary, before St. Andrews Hospital in Boothbay Harbor and Miles Memorial in Damariscotta were reorganized on October 1, 2013 to form LincolnHealth.

It stretches credulity that a multi-billion dollar corporation, with significant legal resources at its disposal, decided to rely on an oral representation from a regulatory body to which it is accountable, without seeking written confirmation. Also, MaineHealth did not request a determination that a CON was not required for its 2013 reorganization until October 1, 2013—the day of the action. **We believe both actions were purposeful and intended to circumvent the law. They did not want DHHS to conduct public hearings. They did not allow any community input. They did not allow anyone to question their intentions.**

RAMIFICATIONS OF ALLOWING RETROACTIVE CON APPROVALS

If there is retroactive approval for MaineHealth's actions, this will set a precedent. What will stop other providers from feigning ignorance of the law and embarking on unauthorized healthcare initiatives in the future? We, on the Boothbay Peninsula, went to the Maine Legislature to seek a law to permit us to create a Hospital Administrative District in order to operate a community hospital. We were unsuccessful. What if we had decided to create a hospital without permission and 6 years later asked permission?

THE ATTORNEY GENERAL SHOULD ACT

We believe that the Maine Attorney General's office should intervene and address the 2007 illegal creation of a new owner for St. Andrews Hospital and the subsequent illegal reorganization of the two hospitals in 2013. The law was broken, intentionally or not. **The right of the people to have public hearings, guaranteed by law, was denied.** We, in the Boothbay Region, have suffered the consequences of these illegal actions. The people were not given due process in being able to comment on, or to question either the 2007 change in ownership or the 2013 reorganization, or to provide input to the decision-making.

The Attorney General's office has the responsibility to insure that non-profit corporations are meeting their legal obligations in order to maintain their non-profit tax-exempt status. Maine's Attorney General stated (letter on 6/13/13 to Rep. Bruce MacDonald) that: "there is no legal basis for us to challenge the process or the decisions of the St. Andrews Hospital Board of Directors or Lincoln County Healthcare's board". **However, now it is clear that it was not legal for LCH to be created in 2007 without a CON nor for the St. Andrews Hospital and Miles Memorial to be reorganized in 2013 without a CON.**

In her letter of June 3, 2013, Attorney General Janet Mills states that "The Attorney General is not allowed to second guess the judgments of *properly constituted* boards or to determine the best use of charitable assets." This was in answer to questions about the closure of St. Andrews Hospital's Emergency Department. The fact is that the Lincoln County Health board was *illegally* constituted; therefore, the Attorney General has the authority to act. **Since the Lincoln County Health board was created as a result of an illegal change of ownership it was not properly constituted, and therefore, that board's decision can be challenged by the Maine Attorney General.**

The governance of St. Andrews Hospital should be returned to a board that represents the members of the community St. Andrews hospital was chartered to serve. We maintain that MaineHealth should not be given CON approval because they have shown complete disregard for the community and the law.

DOES CURRENT LAW ALLOW FOR THE CURRENT CON?

The commissioner of DHHS has no legal authority to retroactively approve this transaction. This matter should be referred to the Attorney General for disposition. Again, we reference Governor LePage's letter to the President of the Boothbay Health and Wellness Foundation, in which he states, **"It is still in question whether current law allows for the current CON"**. Given this uncertainty, we would expect the Attorney General to issue a ruling on this matter. If the Attorney General chooses not to do so, she should refer this to the Court for an opinion.