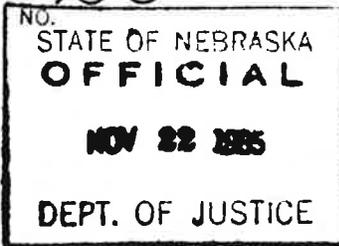


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509



ROBERT M. SPIRE  
Attorney General  
A. EUGENE CRUMP  
Deputy Attorney General

November 18, 1985

**SUBJECT:** Whether CON is needed to change from one level of ICF care to another.

**REQUESTED BY:** Gregg F. Wright, M.D., M.Ed., Director of Health, Department of Health, Lincoln, Nebraska

**OPINION BY:** Robert M. Spire, Attorney General  
Marilyn B. Hutchinson, Assistant Attorney General

**QUESTION:** Whether a certificate of need is necessary before a nursing home can move from one level of ICF care to another.

**ANSWER:** Assuming that only operating costs will be affected by such change, as discussed below, it depends on whether such costs will increase to or beyond the annual operating expenditure minimum specified in the Nebraska Health Care Certificate of Need Act.

Generally, the Nebraska Health Care Certificate of Need Act (Act) requires a certificate of need only if there are capital expenditures involved. See, Neb.Rev.Stat. §71-5830(1), (4)-(7) (Supp. 1984). A capital expenditure is one "not properly chargeable as an expense of operation and maintenance." Neb.Rev.Stat. §71-5805 (Supp. 1984).

One exception to such general rule is in Neb.Rev.Stat. §71-5830(2) (Supp. 1984). It requires a certificate of need before "[o]ffering a new institutional health service . . . which will entail operating expenditures for the twelve-month period immediately following initiation of the new service in excess of the annual operating expenditure minimum." That minimum is \$250,000, adjusted as provided in Neb.Rev.Stat. §71-5821.01 (Supp. 1984). Institutional health services "shall mean health services provided in or through health care facilities."

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Neb.Rev.Stat. §71-5813 (Supp. 1984). Health care facilities include intermediate care facilities. Neb.Rev.Stat. §71-5810 (Supp. 1984).

The three levels of intermediate care facilities now provided for under Neb.Rev.Stat. §71-2017.01(11)-(13) (Supp. 1985) are distinguished by the level of licensure and presence required of staff, not by the physical plant requirements. Thus, a change in licensure from one level of ICF facility to another probably will affect operating costs, but not capital costs.

In conclusion, assuming that no capital expenditures are proposed which would trigger certificate of need review under other sections of Neb.Rev.Stat. §71-5830, a nursing home proposing to change from one level of ICF care to another must apply for and receive a certificate of need only if the new health service to be provided will entail additional annual operating expenditures of \$250,000, as adjusted, or more. If this occurs, it will probably only be when a facility moves to a higher ICF classification.

Very truly yours,

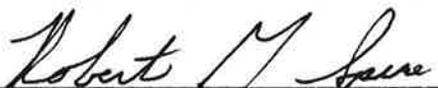
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APPROVED:

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