WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1990

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ENROLLED

HOUSE BILL No. 4230

(By Delegate White and Warner)

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Passed March 10, 1990

In Effect 90 Days from Passage
ENROLLED
H. B. 4230
(By Delegates White and Warner)

[Passed March 10, 1990; in effect ninety days from passage.]

AN ACT to amend and reenact sections two and four, article two-d, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to the certificate of need program; restricting certificate of need exemption for private office practice for certain medical technologies; providing the health care cost review authority shall adopt rules on what technology can be exempted from the certificate of need program; requiring the health care cost review authority to annually review existing technologies to determine if shared services exemptions should be expanded.

Be it enacted by the Legislature of West Virginia:

That sections two and four, article two-d, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

ARTICLE 2D. CERTIFICATE OF NEED.
§16-2D-2. Definitions.
1 As used in this article, unless otherwise indicated by the context:
2 (a) "Affected person" means:
3 (1) The applicant;
4 (2) An agency or organization representing consumers;
(3) Any individual residing within the geographic area served or to be served by the applicant;

(4) Any individual who regularly uses the health care facilities within that geographic area;

(5) The health care facilities which provide services similar to the services of the facility under review and which will be significantly affected by the proposed project;

(6) The health care facilities which, prior to receipt by the state agency of the proposal being reviewed, have formally indicated an intention to provide similar services in the future;

(7) Third party payers who reimburse health care facilities similar to those proposed for services;

(8) Any agency which establishes rates for health care facilities similar to those proposed; or

(9) Organizations representing health care providers.

(b) "Ambulatory health care facility" means a facility which is free-standing and not physically attached to a health care facility and which provides health care to noninstitutionalized and nonhomebound persons on an outpatient basis. This definition does not include the private office practice of any one or more health professionals licensed to practice in this state pursuant to the provisions of chapter thirty of this code: Provided, That such exemption from review of private office practice shall not be construed to include such practices where major medical equipment otherwise subject to review under the provisions of this article is acquired, offered or developed: Provided, however, That such exemption from review of private office practice shall not be construed to include certain health services otherwise subject to review under the provisions of subdivision (1), subsection (a), section four, of this article.

(c) "Ambulatory surgical facility" means a facility which is free-standing and not physically attached to a health care facility and which provides surgical treat-
ment to patients not requiring hospitalization. This definition does not include the private office practice of any one or more health professionals licensed to practice surgery in this state pursuant to the provisions of chapter thirty of this code: Provided, That such exemption from review of private office practice shall not be construed to include such practices where major medical equipment otherwise subject to review under the provisions of this article is acquired, offered or developed: Provided, however, That such exemption from review of private office practice shall not be construed to include certain health services otherwise subject to review under the provisions of subdivision (1), subsection (a), section four, of this article.

(d) “Applicant” means: (1) The governing body or the person proposing a new institutional health service who is, or will be, the health care facility licensee wherein the new institutional health service is proposed to be located, and (2) in the case of a proposed new institutional health service not to be located in a licensed health care facility, the governing body or the person proposing to provide such new institutional health service. Incorporators or promoters who will not constitute the governing body or persons responsible for the new institutional health service may not be an applicant.

(e) “Bed capacity” means the number of beds for which a license is issued to a health care facility, or, if a facility is unlicensed, the number of adult and pediatric beds permanently staffed and maintained for immediate use by inpatients in patient rooms or wards.

(f) “Capital expenditure” means an expenditure:

(1) Made by or on behalf of a health care facility; and

(2) (A) Which (i) under generally accepted accounting principles is not properly chargeable as an expense of operation and maintenance, or (ii) is made to obtain either by lease or comparable arrangement any facility or part thereof or any equipment for a facility or part; and (B) which (i) exceeds the expenditure minimum, or (ii) is a substantial change to the bed capacity of the
facility with respect to which the expenditure is made, or (iii) is a substantial change to the services of such facility. For purposes of part (i), subparagraph (B), subdivision (2) of this definition, the cost of any studies, surveys, designs, plans, working drawings, specifications, and other activities, including staff effort and consulting and other services, essential to the acquisition, improvement, expansion, or replacement of any plant or equipment with respect to which an expenditure described in subparagraph (B), subdivision (2) of this definition is made shall be included in determining if such expenditure exceeds the expenditure minimum. Donations of equipment or facilities to a health care facility which if acquired directly by such facility would be subject to review shall be considered capital expenditures, and a transfer of equipment or facilities for less than fair market value shall be considered a capital expenditure for purposes of such subdivisions if a transfer of the equipment or facilities at fair market value would be subject to review. A series of expenditures, each less than the expenditure minimum, which when taken together are in excess of the expenditure minimum, may be determined by the state agency to be a single capital expenditure subject to review. In making its determination, the state agency shall consider: Whether the expenditures are for components of a system which is required to accomplish a single purpose; whether the expenditures are to be made over a two-year period and are directed towards the accomplishment of a single goal within the health care facility's long-range plan; or, whether the expenditures are to be made within a two-year period within a single department such that they will constitute a significant modernization of the department.

(g) "Expenditure minimum" means one million dollars for the twelve-month period beginning the first day of October, one thousand nine hundred eighty-seven. For each twelve-month period thereafter, the state agency may, by regulations adopted pursuant to section eight of this article, adjust the expenditure minimum to reflect the impact of inflation.
(h) "Health," used as a term, includes physical and mental health.

(i) "Health care facility" is defined as including hospitals, skilled nursing facilities, kidney disease treatment centers, including free-standing hemodialysis units, intermediate care facilities, ambulatory health care facilities, ambulatory surgical facilities, home health agencies, rehabilitation facilities and health maintenance organizations; community mental health and mental retardation facilities, whether under public or private ownership, or as a profit or nonprofit organization and whether or not licensed or required to be licensed in whole or in part by the state. For purposes of this definition, "community mental health and mental retardation facility" means a private facility which provides such comprehensive services and continuity of care as emergency, outpatient, partial hospitalization, inpatient and consultation and education for individuals with mental illness, mental retardation or drug or alcohol addiction.

(j) "Health care provider" means a person, partnership, corporation, facility or institution licensed or certified or authorized by law to provide professional health care service in this state to an individual during that individual's medical care, treatment or confinement.

(k) "Health maintenance organization" means a public or private organization, organized under the laws of this state, which:

1. Is a qualified health maintenance organization under Section 1310(d) of the Public Health Service Act, as amended, Title 42 United States Code Section 300e-9(d); or

2. (A) Provides or otherwise makes available to enrolled participants health care services, including substantially the following basic health care services: usual physician services, hospitalization, laboratory, X-ray, emergency and preventive services and out-of-area coverage; and
(B) Is compensated except for copayments for the provision of the basic health care services listed in subparagraph (2)(A), subdivision (k) of this definition to enrolled participants on a predetermined periodic rate basis without regard to the date the health care services are provided and which is fixed without regard to the frequency, extent or kind of health service actually provided; and

(C) Provides physicians' services primarily (i) directly through physicians who are either employees or partners of such organization, or (ii) through arrangements with individual physicians or one or more groups of physicians organized on a group practice or individual practice basis.

(l) "Health services" means clinically related preventive, diagnostic, treatment or rehabilitative services, including alcohol, drug abuse and mental health services.

(m) "Home health agency" is an organization primarily engaged in providing directly or through contract arrangements, professional nursing services, home health aide services, and other therapeutic and related services, including, but not limited to, physical, speech and occupational therapy and nutritional and medical social services to persons in their place of residence on a part-time or intermittent basis.

(n) "Hospital" means an institution which is primarily engaged in providing to inpatients, by or under the supervision of physicians, diagnostic and therapeutic services for medical diagnosis, treatment, and care of injured, disabled or sick persons, or rehabilitation services for the rehabilitation of injured, disabled or sick persons. This term also includes psychiatric and tuberculosis hospitals.

(o) "Intermediate care facility" means an institution which provides, on a regular basis, health-related care and services to individuals who do not require the degree of care and treatment which a hospital or skilled nursing facility is designed to provide, but who, because of their mental or physical condition require health
related care and services above the level of room and board.

(p) “Long-range plan” means a document formally adopted by the legally constituted governing body of an existing health care facility or by a person proposing a new institutional health service. Each long-range plan shall consist of the information required by the state agency in regulations adopted pursuant to section eight of this article.

(q) “Major medical equipment” means a single unit of medical equipment or a single system of components with related functions which is used for the provision of medical and other health services and which costs in excess of seven hundred fifty thousand dollars, except that such term does not include medical equipment acquired by or on behalf of a clinical laboratory to provide clinical laboratory services if the clinical laboratory is independent of a physician’s office and a hospital and it has been determined under Title XVIII of the Social Security Act to meet the requirements of paragraphs ten and eleven of Section 1861(s) of such act, Title 42 United States Code Sections 1395x (10) and (11). In determining whether medical equipment costs more than seven hundred fifty thousand dollars, the cost of studies, surveys, designs, plans, working drawings, specifications, and other activities essential to the acquisition of such equipment shall be included. If the equipment is acquired for less than fair market value, the term “cost” includes the fair market value.

(r) “Medically underserved population” means the population of an urban or rural area designated by the state agency as an area with a shortage of personal health services or a population having a shortage of such services, after taking into account unusual local conditions which are a barrier to accessibility or availability of such services. Such designation shall be in regulations adopted by the state agency pursuant to section eight of this article, and the population so designated may include the state’s medically underserved population designated by the Federal Secretary of Health and Human Services under Section 330(b)(3) of the Public
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Health Service Act, as amended, Title 42 United States Code Section 254(b)(3).

(s) “New institutional health service” means such service as described in section three of this article.

(t) “Offer” when used in connection with health services, means that the health care facility or health maintenance organization holds itself out as capable of providing, or as having the means for the provision of, specified health services.

(u) “Person” means an individual, trust, estate, partnership, committee, corporation, association and other organizations such as joint-stock companies and insurance companies, a state or a political subdivision or instrumentality thereof or any legal entity recognized by the state.

(v) “Physician” means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the state.

(w) “Proposed new institutional health service” means such service as described in section three of this article.

(x) “Psychiatric hospital” means an institution which primarily provides to inpatients, by or under the supervision of a physician, specialized services for the diagnosis, treatment and rehabilitation of mentally ill and emotionally disturbed persons.

(y) “Rehabilitation facility” means an inpatient facility which is operated for the primary purpose of assisting in the rehabilitation of disabled persons through an integrated program of medical and other services which are provided under competent professional supervision.

(z) “Review agency” means an agency of the state, designated by the governor as the agency for the review of state agency decisions.

(aa) “Skilled nursing facility” means an institution or a distinct part of an institution which is primarily engaged in providing to inpatients skilled nursing care and related services for patients who require medical or
nursing care, or rehabilitation services for the rehabilitation of injured, disabled or sick persons.

(bb) “State agency” means the health care cost review authority created, established, and continued pursuant to article twenty-nine-b of this chapter.

(cc) “State health plan” means the document approved by the governor after preparation by the former statewide health coordinating council, or that document as approved by the governor after amendment by the health care planning council.

(dd) “Health care planning council” means the body established by section five-a of this article to participate in the preparation and amendment of the state health plan and to advise the state agency.

(ee) “Substantial change to the bed capacity” of a health care facility means a change, with which a capital expenditure is associated, in any two-year period of ten or more beds or more than ten percent, whichever is less, of the bed capacity of such facility that increases or decreases the bed capacity, or relocates beds from one physical facility or site to another, but does not include a change by which a health care facility reassigns existing beds as swing beds between acute care and long-term care categories. A series of changes to the bed capacity of a health care facility in any two-year period, each less than ten beds or ten percent of the bed capacity of such facility, but which when taken together comprise ten or more beds or more than ten percent of the bed capacity of such facility, whichever is less, is a substantial change to the bed capacity.

(ff) “Substantial change to the health services” of a health care facility means the addition of a health service which is offered by or on behalf of the health care facility and which was not offered by or on behalf of the facility within the twelve-month period before the month in which the service is first offered, or the termination of a health service which was offered by or on behalf of the facility, but does not include the providing of hospice care, ambulance service, wellness centers or programs, adult day care, or respite care by
324 acute care facilities.
325 (gg) "To develop," when used in connection with
326 health services, means to undertake those activities
327 which upon their completion will result in the offer of
328 a new institutional health service or the incurring of a
329 financial obligation, in relation to the offering of such
330 a service.

§16-2D-4. Exemptions from certificate of need program.

1 (a) Except as provided in subdivision (h), section three
2 of this article, nothing in this article or the rules and
3 regulations adopted pursuant to the provisions of this
4 article may be construed to authorize the licensure,
5 supervision, regulation or control in any manner of: (1)
6 Private office practice of any one or more health
7 professionals licensed to practice in this state pursuant
8 to the provisions of chapter thirty of this code: Provided,
9 That such exemption from review of private office
10 practice shall not be construed to include such practices
11 where major medical equipment otherwise subject to
12 review under the provisions of this article is acquired,
13 offered or developed: Provided, however, That such
14 exemption from review of private office practice shall
15 not be construed to include the acquisition, offering or
16 development of one or more health services, including
17 ambulatory surgical facilities or centers, lithotripsy,
18 magnetic resonance imaging and radiation therapy by
19 one or more health professionals. The state agency shall
20 adopt rules pursuant to section eight of this article
21 which specify the health services acquired, offered or
22 developed by health professionals which are subject to
23 certificate of need review; (2) dispensaries and first-aid
24 stations located within business or industrial establish-
25 ments maintained solely for the use of employees:
26 Provided further, That such facility does not contain
27 inpatient or resident beds for patients or employees who
28 generally remain in the facility for more than twenty-
29 four hours; (3) establishments, such as motels, hotels and
30 boardinghouses, which provide medical, nursing person-
31 nel and health related services; and (4) the remedial care
32 or treatment of residents or patients in any home or
33 institution conducted only for those who rely solely upon
treatment by prayer or spiritual means in accordance
with the creed or tenets of any recognized church or
religious denomination.

(b) (1) A certificate of need is not required for the
offering of an inpatient institutional health service or
the acquisition of major medical equipment for the
provision of an inpatient institutional health service or
the obligation of a capital expenditure for the provisions
of an inpatient institutional health service, if with
respect to such offering, acquisition or obligation, the
state agency has, upon application under subdivision (2),
subsection (b) of this section, granted an exemption to:

(A) A health maintenance organization or a combina-
tion of health maintenance organizations if (i) the
organization or combination of organizations has, in the
service area of the organization or the service areas of
the organizations in the combination, an enrollment of
at least fifty thousand individuals, (ii) the facility in
which the service will be provided is or will be
geographically located so that the service will be
reasonably accessible to such enrolled individuals, and
(iii) at least seventy-five percent of the patients who can
reasonably be expected to receive the institutional
health service will be individuals enrolled with such
organization or organizations in the combination;

(B) A health care facility if (i) the facility primarily
provides or will provide inpatient health services, (ii) the
facility is or will be controlled, directly or indirectly, by
a health maintenance organization or a combination of
health maintenance organizations which has, in the
service area of the organization or service areas of the
organizations in the combination, an enrollment of at
least fifty thousand individuals, (iii) the facility is or will
be geographically located so that the service will be
reasonably accessible to such enrolled individuals, and
(iv) at least seventy-five percent of the patients who can
reasonably be expected to receive the institutional
health service will be individuals enrolled with such
organization or organizations in the combination; or

(C) A health care facility, or portion thereof, if (i) the
facility is or will be leased by a health maintenance
organization or combination of health maintenance
organizations which has, in the service area of the
organization or the service areas of the organizations in
the combination, an enrollment of at least fifty thousand
individuals and on the date the application is submitted
under subdivision (2), subsection (b) of this section, at
least fifteen years remain in the term of the lease, (ii)
the facility is or will be geographically located so that
the service will be reasonably accessible to such enrolled
individuals, and (iii) at least seventy-five percent of the
patients who can reasonably be expected to receive the
new institutional health service will be individuals
enrolled with such organization.

(2) (A) A health maintenance organization, combina-
tion of health maintenance organizations, or other health
care facility is not exempt under subdivision (1),
subsection (b) of this section from obtaining a certificate
of need unless:

(i) It has submitted, at such time and in such form
and manner as the state agency shall prescribe, an
application for such exemption to the state agency;

(ii) The application contains such information respect-
ing the organization, combination or facility and the
proposed offering, acquisition or obligation as the state
agency may require to determine if the organization or
combination meets the requirements of subdivision (1),
subsection (b) of this section or the facility meets or will
meet such requirements; and

(iii) The state agency approves such application.

(B) The state agency shall approve an application
submitted under subparagraph (A), subdivision (2),
subsection (b) of this section, if it determines that the
applicable requirements of subdivision (1), subsection
(b) of this section, are met or will be met on the date
the proposed activity for which an exemption was
requested will be undertaken.

(3) A health care facility, or any part thereof, or
medical equipment with respect to which an exemption
was granted under subdivision (1), subsection (b) of this section, may not be sold or leased and a controlling interest in such facility or equipment or in a lease of such facility or equipment may not be acquired and a health care facility described in subparagraph (C), subdivision (1), subsection (b) of this section, which was granted an exemption under subdivision (1), subsection (b) of this section, may not be used by any person other than the lessee described in subparagraph (C), subdivision (1), subsection (b) of this section, unless:

(A) The state agency issues a certificate of need approving the sale, lease, acquisition or use; or

(B) The state agency determines, upon application, that the entity to which the facility or equipment is proposed to be sold or leased, which intends to acquire the controlling interest in or to use the facility is:

(i) A health maintenance organization or a combination of health maintenance organizations which meets the enrollment requirements of part (i), subparagraph (A), subdivision (1), subsection (b) of this section, and with respect to such facility or equipment, the entity meets the accessibility and patient enrollment requirements of parts (ii) and (iii), subparagraph (A), subdivision (1), subsection (b) of this section; or

(ii) A health care facility which meets the inpatient, enrollment and accessibility requirements of parts (i), (ii) and (iii), subparagraph (B), subdivision (1), subsection (b) of this section and with respect to its patients meets the enrollment requirements of part (iv), subparagraph (B), subdivision (1), subsection (b) of this section.

(4) In the case of a health maintenance organization or an ambulatory care facility or health care facility which ambulatory or health care facility is controlled, directly or indirectly, by a health maintenance organization or a combination of health maintenance organizations, the certificate of need requirements apply only to the offering of inpatient institutional health services, the acquisition of major medical equipment, and the obligation of capital expenditures for the offering of
inpatient institutional health services and then only to
the extent that such offering, acquisition or obligation
is not exempt under subdivision (1), subsection (b) of this
section.

(5) The state agency shall establish the period within
which approval or disapproval by the state agency of
applications for exemptions under subdivision (1),
subsection (b) of this section, shall be made.

(c) (1) A health care facility is not required to obtain
a certificate of need for the acquisition of major medical
equipment to be used solely for research, the addition
of health services to be offered solely for research, or the
obligation of a capital expenditure to be made solely for
research if the health care facility provides the notice
required in subdivision (2), subsection (c) of this section,
and the state agency does not find, within sixty days
after it receives such notice, that the acquisition,
offering or obligation will, or will have the effect to:

(A) Affect the charges of the facility for the provision
of medical or other patient care services other than the
services which are included in the research;

(B) Result in a substantial change to the bed capacity
of the facility; or

(C) Result in a substantial change to the health
services of the facility.

(2) Before a health care facility acquires major
medical equipment to be used solely for research, offers
a health service solely for research, or obligates a capital
expenditure solely for research, such health care facility
shall notify in writing the state agency of such facility's
intent and the use to be made of such medical equip-
ment, health service or capital expenditure.

(3) If major medical equipment is acquired, a health
service is offered, or a capital expenditure is obligated
and a certificate of need is not required for such
acquisition, offering or obligation as provided in
subdivision (1), subsection (c) of this section, such
equipment or service or equipment or facilities acquired
through the obligation of such capital expenditure may
(4) For purposes of this subsection, the term "solely for research" includes patient care provided on an occasional and irregular basis and not as part of a research program.

(d) (1) The state agency may adopt regulations pursuant to section eight of this article to specify the circumstances under which a certificate of need may not be required for the obligation of a capital expenditure to acquire, either by purchase or under lease or comparable arrangement, an existing health care facility: Provided, That a certificate of need shall be required for the obligation of a capital expenditure to acquire, either by purchase or under lease or comparable arrangement, an existing health care facility if:

(A) The notice required by subdivision (2), subsection (d) of this section is not filed in accordance with that subdivision with respect to such acquisition; or (B) the state agency finds, within thirty days after the date it receives a notice in accordance with subdivision (2), subsection (d) of this section, with respect to such acquisition, that the services or bed capacity of the facility will be changed by reason of said acquisition.

(2) Before any person enters into a contractual arrangement to acquire an existing health care facility, such person shall notify the state agency of his or her intent to acquire the facility and of the services to be offered in the facility and its bed capacity. Such notice shall be made in writing and shall be made at least thirty days before contractual arrangements are entered into to acquire the facility with respect to which the notice is given. The notice shall contain all information the state agency requires in accordance with subsections (e) and (s), section seven of this article.

(e) The state agency shall adopt regulations, pursuant to section eight of this article, wherein criteria are
established to exempt from review the addition of certain health services, not associated with a capital expenditure, that are projected to entail annual operating costs of less than the expenditure minimum for annual operating costs. For purposes of this subsection, "expenditure minimum for annual operating costs" means five hundred thousand dollars for the twelve-month period beginning the first day of October, one thousand nine hundred eighty-five, and for each twelve-month period thereafter, the state agency may, by regulations adopted pursuant to section eight of this article, adjust the expenditure minimum for annual operating costs to reflect the impact of inflation.

(f) The state agency may adopt regulations pursuant to section eight of this article to specify the circumstances under which and the procedures by which a certificate of need may not be required for the obligation of a capital expenditure to acquire, either by purchase or under lease or comparable arrangement, major medical equipment which merely replaces medical equipment which is already owned by the health care facility and which has become outdated, worn-out or obsolete.

(g) The state agency may adopt regulations pursuant to section eight of this article to specify the circumstances under which and the procedures by which a certificate of need may not be required for the obligation of a capital expenditure in excess of the expenditure minimum for certain items not directly related to the provision of health services. The state agency shall specify the types of items in the regulations which may be so exempted from review.

(h) The state agency shall adopt rules within ninety days of the effective date of the amendment of this section in the year one thousand nine hundred ninety pursuant to section eight of this article to specify the circumstances under which and the procedures by which a certificate of need may not be required for shared services between two or more acute care facilities providing services made available through existing technology that can reasonably be mobile. The
state agency shall specify the types of items in the
regulations and under what circumstances mobile MRI
and mobile lithotripsy may be so exempted from review.
In no case, however, will mobile cardiac catheterization
be exempted from certificate of need review. In
addition, if the shared services mobile unit proves less
cost effective than a fixed unit, the acute care facility
will not be exempted from certificate of need review.

On a yearly basis, the state agency shall review
existing technologies to determine if other shared
services should be included under this exemption.

(i) Nothing in this article shall be construed to require
the filing of a certificate of need application for any
expenditure, health service, or change in health service
which is exempt from review under this article.
However, the state agency may promulgate rules and
regulations pursuant to section eight of this article to
require the filing of a notice with the state agency by
a health care facility that proposes to make such an
expenditure, initiate a health service, or effect a change
in a health service for which the health care facility
claims an exemption from review. The state agency
shall, within ten days of a receipt of such notice, make
one of the following responses:

(1) Accept the claim of exemption;
(2) Require the health care facility to furnish the state
agency with additional information;
(3) Reject the claim of exemption; or
(4) Determine that a certificate of need application is
necessary for a review of the proposed expenditure, new
health service, or change in a health service in order to
determine if the claim of exemption may be upheld:

Provided, That when a new health service is proposed
to be developed, the state agency shall, within the ten
days of receipt of the required notice, determine
whether or not economic and geographic factors within
the geographic area of the proposed addition to service
are such that the proposed new health service will be
offered in competition with other health care facilities
providing the same or similar service. In the event that an affirmative determination is made on the issue of competition, then the state agency shall require a certificate of need application for the proposed new health service.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 3rd day of January, 1990.

Governor