

Lawyers  
Alfred Clayton Jr  
Peter M. Diemer  
Elizabeth Slattery  
Amy H. Robinson

# Clayton & Diemer LLC

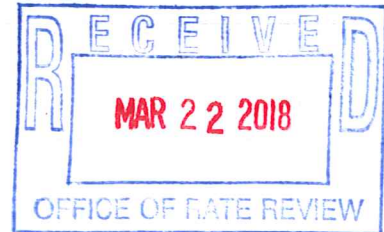
500 L Street | Suite 200 | Anchorage, Alaska 99501  
T 907.276.2999 | F 907.276.2956 | www.cdllaw.pro

Of Counsel  
Maryanne Boreen

March 21, 2018

VIA HAND DELIVERY

VIA CERTIFIED MAIL



Ms. Alexandria Hicks, Coordinator  
State of Alaska  
Department of Health and Social Services  
Certificate of Need Program  
3601 C Street, Suite 978  
Anchorage, Alaska 99503

Re: Request for Reconsideration of the DHSS' Determination dated February 20, 2018  
Our File No. 3240-7

Dear Ms. Hicks,

## I. INTRODUCTION

We represent Muldoon ASC, LLC (Muldoon), ASC North, LLC (North), and South Anchorage Surgery Center, LLC (SASC) (hereinafter collectively the "Requestors") for the limited purpose of this Request for Reconsideration. Please direct all communications regarding this request to us. Thank you.

Pursuant to 7 AAC 07.031(a), Requestors seek reconsideration of the Department of Health and Social Services' (DHSS) Determination dated February 20, 2018. As more fully discussed below, Requestors' proposed relocation is exempt from the Alaska Certificate of Need (CON) statutes pursuant to AS 18.07.031(c).

## II. PROPOSED REORGANIZATION AND RELOCATION

Muldoon, North, and SASC are all currently licensed ambulatory surgery centers within Anchorage. North and SASC have one operating room each, and Muldoon operates as a co-located but temporally separated facility from North in accordance with the DHSS determination dated January 6, 2016. Thus, the current combined number of operating rooms of Muldoon, North and SASC is two.

Muldoon, North, and SASC desire to engage in business reorganization in accordance with either AS 10.55.201 or AS 10.55.301 *et seq.* of the 2014 Alaska Entity Transaction Act. AS 10.55.201 and AS 10.55.301 provide that one or more domestic entities may engage in a merger or interest exchange with one or more domestic or foreign entities into a domestic or foreign surviving entity. Through an exchange of interests or merger, North<sup>1</sup>, as the proposed surviving entity, will assume ownership of the two existing ambulatory surgery centers currently located at the North and SASC locations and the combined number of operating rooms will remain at two.

In an effort to avoid redundancy and reduce costs after the reorganization, Requestors propose that North, the surviving entity and owner of the two ambulatory surgery centers, will relocate the two existing licensed ambulatory surgery center sites to a single ambulatory surgery center site located within the same community of the Municipality of Anchorage. The proposed ambulatory surgery center owned by North located at the new Anchorage site will have the same number of operating rooms (two) and the same categories of health services (ambulatory surgery services) as the two currently existing sites. The cost of the relocation is expected to exceed \$1.5 million dollars.

### **III. DESCRIPTION OF THE DETERMINATION FOR WHICH RECONSIDERATION IS SOUGHT**

By letter dated December 18, 2017, Requestors requested a determination by the DHSS that the proposed business reorganization and relocation as described above is exempt from the CON statutes pursuant to AS 18.07.031(c). By letter dated January 9, 2018, the DHSS requested a certified cost estimate of the proposed relocation which was provided by Requestors by letter dated January 26, 2018. On February 20, 2018, the DHSS determined that Requestors' proposed activity is subject to CON laws, and that a CON application must be submitted and approved before Requestors begin their proposed activity.

The DHSS determined that AS 18.07.031(c) does not apply for two reasons: first, the DHSS concluded that the exception applies only to a single "person" and a single "ambulatory surgical facility" and does not contemplate the relocation of more than one facility to a single site. Second, the DHSS concluded that the relocation increases the bed capacity. The DHSS acknowledged that "the overall bed capacity in Anchorage would not change", but considered it significant that "the facility itself would change."

---

<sup>1</sup> Or a new entity formed through an interest exchange of North, Muldoon and SASC (which is analogous to an asset sale). Further, Muldoon and SASC could simply sell their ambulatory surgery center assets to North or any other entity. Because there are multiple legal methods to achieve common ownership, and since the application of the 2014 Entities Transaction Act is not before the DHSS, we refer to North as the surviving entity for the sake of simplicity, and it is proposed that after the ambulatory surgery center facilities are under common North ownership, North may relocate the facilities per AS 18.07.031(c).

#### **IV. THE DHSS' DETERMINATION SHOULD BE REVERSED**

The DHSS' interpretation of AS 18.07.031(c) is contrary to well-settled rules of statutory construction, the plain language of the statute, common sense, legislative history and the statute's purpose. The statute at issue, AS 18.07.031(c), provides:

Notwithstanding (a) of this section, a person who is lawfully operating a health care facility that is an ambulatory surgical facility at a site may make an expenditure of any amount in order to relocate the services of that facility to a new site in the same community without obtaining a certificate of need as long as neither the bed capacity nor the number of categories of health services provided at the new site is greater.

Statutes are interpreted "according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose." *State, DHSS v. Gross*, 347 P.3d 116, 123 (Alaska 2015) (quoting *Louie v. BP Exploration (Alaska), Inc.*, 327 P.3d 204, 206 (Alaska 2014)). See also *Alaska Assoc. of Naturopathic Physicians v. State, DHSS*, P.3d (Alaska 2018), 2018 WL 1354429, \*5 ("The plainer the language of the statute, the more convincing any contrary legislative history must be . . . to overcome the statute's plain meaning.") (citation omitted)). Administrative regulations which are legislative in character are interpreted using the same principles applicable to statutes. *State, Dep't of Highways v. Green*, 586 P.2d 595, 603 n. 24 (Alaska 1978) (citations omitted).

##### **A. Words in the Singular Include the Plural.**

The term "person" is defined to include "the entities specified in AS 01.10.060(8)". 7 AAC 07.900(30). AS 01.10.060(8) defines "person" to include "a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person". The DHSS' conclusion that because the term "person" and "facility" is written in the singular, the statute excludes multiple persons or facilities is contrary to AS 01.10.050. AS 01.10.050 dictates how a statute is to be read and provides in pertinent part: "Words in the singular number include the plural, and words in the plural number include the singular." AS 01.10.050(b). See also *Municipality of Anchorage v. Brooks*, 397 P.3d 346, 348 (Alaska App. 2017) (citing to AS 01.10.050(b), the court stated "it was not the Municipality's burden to show that the legislative history of AS 12.55.135(a) offered some affirmative reason to think that the word 'convictions' include a single conviction. Rather, the burden of persuasion was on the party . . . who wanted to *limit* the meaning of 'convictions' so that it excludes a single conviction.") (emphasis in original)). Accordingly, AS 18.07.031(c) must be construed to include "persons" operating "facilities". Thus, persons lawfully operating ambulatory surgical facilities may relocate the services of the facilities to a new site or sites.

##### **B. Following the Reorganization, A Single Entity Will Own the Existing Ambulatory Surgery Centers.**

The DHSS' reasoning is also flawed since at the time of the proposed relocation, the ambulatory surgical facilities will in fact be lawfully owned by a single entity. Thus, even assuming, arguendo, that the term "person" means a single entity, the Requestors satisfy that

definition. Through an exchange of interests or merger, North, as the proposed surviving entity, will own the ambulatory surgery center assets of North, Muldoon and SASC. Thus, following the proposed reorganization, North will own and operate the two existing ambulatory surgery centers located at the North and SASC locations.

**C. The Proposed Merger or Interest Exchange is Not Subject to the CON Statutes.**

The DHSS concludes that “[t]he statute clearly contemplates a single entity moving within the same community, not the merging of multiple entities into one.” A merger pursuant to AS 10.55.201 or an interest exchange pursuant to AS 10.55.301 of the three existing entities that currently lawfully own and operate ambulatory surgical facilities is not subject to the CON statutes and is not the issue before the DHSS. AS 10.55.201 provides that one or more domestic entities may merge with one or more domestic or foreign entities into a domestic or foreign surviving entity. AS 10.55.301 provides that a domestic entity may acquire all of one or more classes of interests of another domestic or foreign entity in exchange for any combination of interests, rights, or property of the acquiring entity. Through an exchange of interests or merger, North, as the proposed surviving entity, will assume ownership of North, Muldoon and SASC ambulatory surgery center assets and will lawfully own and operate the two existing ambulatory surgery centers currently located at the North and SASC locations. This proposed merger or interest exchange and new ownership of the ambulatory surgery centers is not subject to the CON statutes and regulations. *See* AS 18.07.031(a); *see also* *Determination in Re Purchase of AOIC Facilities* (November 3, 2008), attached hereto as Exhibit A.

The determination *in Re Purchase of AOIC Facilities* (November 3, 2008) is instructive. On September 9, 2008, Alaska Regional Hospital requested a determination that the purchase of Alaska Open Imaging Center, LLC (“AOIC”) assets does not require a CON. *See* Exhibit B, Request for Determination dated September 9, 2008. Galen Hospital owned and operated Alaska Regional Hospital. *Id.* An affiliate entity of Galen (“Buyer”) intended to purchase the assets of certain imaging facilities located in Wasilla, Anchorage and Soldotna owned and operated by AOIC. It was Buyer’s intent to purchase, own and operate the assets at the three facilities. Buyer stated, “In short, the AOIC facilities would operate very much as they have in the past except they would now be owned by Buyer and staffed by Buyer employees.” *Id.* at pg. 2. The cost to purchase the assets would exceed the CON threshold. *Id.*

AS 18.07.031 (a) provides:

Except as provided in (c) and (d) of this section, a person may not make expenditure of \$1,000,000 or more for any of the following unless authorized under the terms of a certificate of need issued by the department:

- (1) construction of a health care facility;
- (2) alteration of the bed capacity of a health care facility; or
- (3) addition of a category of health services provided by a health care facility.

The DHSS issued a Determination on November 3, 2008, concluding:

The statutes and regulations are silent on the issue of the purchase or change of ownership of health care facilities. As such, the purchase of the AOIC facilities in Anchorage (6911 DeBarr Road), Soldotna (35670 Kenai Spur Highway), and Wasilla (1751 East Gardner Way, Suite B) are not expenditures under AS 18.07.031 and there is no need to obtain a CON for this transaction.

Exhibit A (emphasis added). *See also* 1981 WL 38756 (Alaska A.G. September 9, 1981) (attached hereto as Exhibit C) (concluding that the portion of 7 AAC 07.010 which requires a CON before any person makes a capital expenditure in excess of \$150,000 to purchase a health care facility is ineffective as the requirement is beyond the scope of AS 18.07.031, and reasoning that “A review of the legislative history. . . shows that construction, purchase, and the scope of the certificate of need program were specifically discussed. As a result of that discussion a motion was made that proposed AS 18.07.031 be amended to include language that a certificate of need be required to construct or to acquire a health care facility. The amendment was voted down.”) (emphasis in original).

Likewise, the change of ownership of the Muldoon, North, and SASC ambulatory surgery centers through a business reorganization authorized under the 2014 Alaska Entity Transaction Act – without regard to the particular form – is not an expenditure under AS 18.07.031 and the transaction is not subject to the CON requirements. The merger or interest exchange is not the issue before the DHSS. Rather, the question for the DHSS’ determination is whether, after the reorganization, the entity owning and lawfully operating the two ambulatory surgical facilities may relocate those facilities to a new single site pursuant to AS 18.07.031(c). The answer to that question is “yes”. The circumstances of the instant matter are no different than a situation in which an entity that has purchased an existing ambulatory surgery center subsequently relocates that facility to a new site.

**D. AS 18.07.031(c) Does Not Preclude the Relocation of Two Ambulatory Surgery Centers to a Single Site Within the Same Anchorage Community.**

AS 18.07.031(c) provides that “a person who is lawfully operating a health care facility that is an ambulatory surgical facility at a site may make an expenditure of any amount to relocate the services of that facility to a new site in the same community without obtaining a certificate of need as long as neither the bed capacity nor the number of categories of health services provided at the new site is greater.” Here, a person will lawfully operate a health care facility that is an ambulatory surgical facility at the existing North site and at the existing SASC site. That person intends to relocate the services of the North facility to a new site in the same Anchorage community. That person also intends to relocate the services of the SASC facility to a new site in the same Anchorage community. Neither the plain language nor a common-sense reading of AS 18.07.031(c) precludes the proposed relocation of the existing North facility and existing SASC facility simply because both facilities will be relocated to the same newly remodeled site located in Anchorage.<sup>2</sup>

---

<sup>2</sup> SASC’s ambulatory surgery center is currently located at 1917 Abbott Road, Suite 100, Anchorage, Alaska. The proposed remodeled facility to which North, Muldoon and SASC will relocate is located on the first floor of an existing medical building located at 1917 Abbott Road, Anchorage, Alaska; however, the Requestors may relocate to another suitable site within Anchorage, Alaska.

Further, the DHSS' construction of AS 18.07.031(c) undermines the purpose of the CON program. "The CON program is a review process used to promote responsive health facility and service development, rational health planning, health care quality, access to health care, and health care cost containment." *Mat-Su Valley Medical Center v. State, DHSS*, Case No. 3AN-16-10186 CI, Decision and Order at pg. 3 (Alaska Superior Court October 19, 2017). Requestors commendably desire to reduce costs and efficiently provide affordable needed health care to the public. Muldoon, North, and SASC are all currently licensed ambulatory surgery centers within Anchorage. North and SASC have one operating room each, and Muldoon operates as a co-located but temporally separated facility from North. Following the lawful reorganization, the surviving entity intends to contain health care costs by relocating the separate facilities to a new single site and thereby eliminate the inefficiencies of the unnecessary redundancies inherent in separate facilities.

**E. Neither the Bed Capacity Nor the Number of Categories of Health Services Provided at the New Site is Greater.**

The DHSS mistakenly determined that the proposed relocation increases the bed capacity. The DHSS concluded that "While the overall bed capacity in Anchorage would not change, the facility itself would change." The DHSS' determination conflicts with the plain meaning of the statute, common sense, the purpose of the statute and legislative history.

The plain language of the statute provides, in relevant part: "as long as neither the bed capacity nor the number of categories of health services provided at the new facility is greater." Here, neither the bed capacity nor the number of categories of health services provided at the new site is greater than the bed capacity and categories of health services provided prior to the relocation. Accordingly, the proposed relocation complies with the plain language of the statute.

The basic requirement of the CON program is that any health care facility that expends a certain amount of money to build, construct or alter facilities for its services is required to obtain a CON before starting the project. *Mat-Su Valley Medical Center v. State, DHSS*, Case No. 3AN-16-10186 CI, Decision and Order at pg. 3 (Alaska Superior Court October 19, 2017). The DHSS approves CONs based on the projected need for healthcare services in the service area where the facility is located. *Id.* at pg. 4. In *Mat-Su Valley Medical Center v. State, DHSS*, the superior court stated:

The framework for the legislature's discussion surrounding AS 18.07.031(c) was the following analysis. Since a CON determines whether or not there is a need for medical services, a facility should be able to move to a new location within a community without obtaining a new CON because the move does not increase services in that community.

*Id.* (citing Minutes of House State Affairs Standing Committee Meeting, March 16, 2000). In the legislative committee meeting concerning the potential enactment of AS 18.07.031(c), there was discussion of the clause "as long as there is no alteration of bed capacity" which Representative Kerttula explained means no addition or elimination of a category. *See* Minutes of House State Affairs Standing Committee Meeting, March 16, 2000. Mr. Lindstrom, Special Assistant DHSS,



replied "that it was the department's suggestion that the proposed CS limit its application to situations where there would be increased capacity as the department is not concerned about less capacity." *Id.*

Here, Muldoon, North, and SASC are each currently licensed ambulatory surgery centers within Anchorage. ASC North and SASC have one operating room each, and Muldoon operates as a co-located but temporally separated facility from North. The current combined number of operating rooms of Muldoon, North and SASC is two. The relocation will not increase the services provided in the Anchorage community. The proposed ambulatory surgery center located at the new Anchorage site will have the same number of operating rooms (two) and the same categories of health services (ambulatory surgery services) as the two currently existing sites. Thus, the proposed relocation conforms with the legislative purpose of AS 18.07.031(c). The facilities should be able to expend any amount of money to move to a new location within the Anchorage community without obtaining a CON because the move does not increase services in the Anchorage community.

## V. CONCLUSION

For the reasons discussed above, the Department's February 20, 2018 determination that Requestor's proposed activity must comply with the CON statutes is incorrect. The pre-relocation business reorganization of Muldoon, North, and SASC ambulatory surgery centers through a reorganization authorized under the 2014 Alaska Entity Transaction Act or purchase is not an expenditure under AS 18.07.031 and the transaction is not subject to the CON requirements. Further, Requestors' proposed post-reorganization relocation is exempt from the CON statutes pursuant to AS 18.07.031(c). The surviving or acquiring entity is allowed to relocate its ambulatory surgery centers to a new location within the Anchorage community without obtaining a new CON because the move does not increase services in the Anchorage community.

We believe that this request for reconsideration contains all of the information necessary for the DHSS to reconsider its determination; however, we are happy to provide additional information upon reasonable request. We look forward to your positive response.

Sincerely,

CLAYTON & DIEMER, LLC



Peter M. Diemer

PMD:njc  
Attachments

# STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES  
OFFICE OF THE COMMISSIONER

SARAH PALIN, GOVERNOR

P.O. BOX 110601  
JUNEAU, ALASKA 99811-0601  
PHONE: (907) 465-3030  
FAX: (907) 465-3068

November 3, 2008

**Certified, Return Receipt Requested**

Paul Morris, CFO  
Alaska Regional Hospital  
2801 Debarr Road  
Anchorage, AK 99508

Dear Mr. Morris:

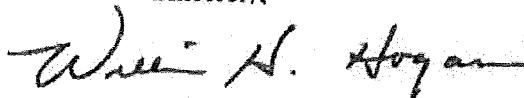
Thank you for your letter dated September 9, 2008, requesting a determination as to the need for a Certificate of Need (CON) for the purchase of three Alaska Open Imaging Centers (AOIC) facilities. In addition, you have requested a determination on whether the purchase of an MRI scanner owned by AOIC and located in Fairbanks that will be moved to Wasilla requires a CON.

The statutes and regulations are silent on the issue of the purchase or change of ownership of health care facilities. As such, the purchase of the AOIC facilities in Anchorage (6911 DeBarr Road), Soldotna (35670 Kenai Spur Highway), and Wasilla (1751 East Gardner Way, Suite B) are not expenditures under AS 18.07.031 and there is no need to obtain a CON for this transaction.

However, the issue of the purchase of the AOIC MRI scanner in Fairbanks and relocation to Wasilla is subject to CON review under AS 18.07.031 if the total costs are above the CON threshold of \$1.2 million. Upon review of the certified cost estimates submitted on October 16, 2008, I have determined that the certified cost estimate of \$973,650.00 to purchase the MRI, relocate it from Fairbanks to Wasilla, and renovate the Wasilla facility to accommodate the MRI is below the threshold established in CON statute that requires submission of a CON application. Therefore, a CON is not required.

If plans and/or costs change regarding the MRI that is being relocated from Fairbanks, and the cost increases to an amount that is over the \$1.2 million CON threshold, you must notify this office and a CON review may be required. If you are dissatisfied with this determination you may request reconsideration under 7 AAC 07.033, or may appeal this decision under 7 AAC 07.080. An appeal or request for determination must be postmarked no later than 30 days after publication of the public notice of this decision.

Sincerely,



William H. Hogan  
Commissioner



## OUR MISSION STATEMENT

*Our mission is  
to make the  
health care  
experience an  
Alaska  
Partnership  
and one that is  
competent,  
respectful,  
caring,  
compassionate  
and treats our  
patients,  
physicians,  
guests and  
each other as  
we ourselves  
would want to  
be treated.  
We are honest,  
ethical and  
fiscally  
responsible in  
all of our  
dealings.*



## Fax Transmittal Sheet

Administration  
2801 DeBarr Road  
PO Box 143889  
Anchorage, Alaska 99514-3889

Phone: (907) 264-1713 FAX: (907) 264-1143

RECEIVED  
SEP 09 2008  
CON Program

TO THE ATTENTION OF: Honorable Bill Hogan, Commissioner

COMPANY: Dept. of Health & SS FAX NUMBER: 907-465-3068

DATE: 9/9/08 TIME: 10:35 PHONE NUMBER:

COMMENTS/REMARKS:

NO. PAGES  
Including  
Cover  
6

SENT BY: Paul Morris, CFO

DEPARTMENT: Administration

If You Do Not Receive The Entire Document, Please Let Us Know.

ASK FOR: Charlyn 264-2991

### CONFIDENTIALITY NOTICE:

This facsimile contains confidential information/protected health information; which may also be legally privileged and which is intended only for the use of the individual or entity named above. If the reader of the facsimile is not the intended recipient, you are hereby notified that you are in possession of confidential and privileged information. Any dissemination, distribution, or copying of this facsimile is strictly prohibited. If you have received this facsimile in error, please immediately notify the sender by telephone and return the original to the sender at the above address via U.S. Postal Service. Postage will be reimbursed.



September 09, 2008

VIA US MAIL AND FACSIMILE (907) 465-3068

Honorable Bill Hogan, Commissioner  
Department of Health & Social Services  
P.O. Box 110601  
Juneau, Alaska 99811-0601

RECEIVED  
SEP 09 2008  
CON Program

Re: **Request for Determination, 7 AAC 07.031**  
Purchase of certain Alaska Open Imaging Center, LLC Assets

Dear Commissioner Hogan:

Galen Hospital Alaska, Inc. ("Galen") is the legal entity that owns and operates Alaska Regional Hospital ("ARH"). An affiliate entity of Galen ("Buyer") intends to purchase the assets of certain imaging facilities currently owned and operated by Alaska Open Imaging Centers ("AOIC"). It is Buyer's intent to purchase, own and operate the assets at the three facilities identified below. For the reasons stated below, Buyer believes that no certificate of need ("CON") is required to purchase, own and operate the AOIC assets at these facilities. Nevertheless, Buyer wants to make sure that there are no CON issues that would prevent its purchase of the AOIC facilities or negatively impact their subsequent operation of the AOIC facilities. Thus, Buyer submits this request asking for a letter of determination holding that a CON review is not required in order for Buyer to purchase, own, and operate the AOIC assets at the facilities.

In addition to purchasing the assets of the three AOIC facilities identified below, Buyer also intends to purchase used Magnetic Resonance Imaging equipment ("MRI") from AOIC. As you may know, AOIC no longer operates a facility in Fairbanks. However, AOIC still owns an MRI in Fairbanks which it is leasing to a physician's office. Buyer intends to purchase this used Fairbanks MRI and install it in the Wasilla facility. The total cost of purchasing the MRI and transporting and installing it in Wasilla will be less than \$1,200,000. The Buyer believes that the purchase and installation of this MRI does not trigger a CON review since the total purchase and installation cost is less than \$1,200,000.

### AOIC Assets to be Purchased

Currently, AOIC owns assets and operates three facilities in Alaska in Wasilla, Anchorage, and Soldotna. Buyer intends to purchase the assets of these three facilities. Specifically, Buyer intends to purchase the assets of the following three AOIC facilities:

- 1) Wasilla: 1751 East Gardner Way, Suite B, Wasilla, Alaska 99654.
- 2) Anchorage: 6911 DeBarr Road, Anchorage, Alaska 99504.
- 3) Soldotna: 35670 Kenai Spur Highway, Suite 104, Soldotna, Alaska 99669.

For purposes of this letter the term "the AOIC facilities" refers only to the three facilities listed above.

Buyer will *not* be purchasing assets of the former AOIC facility in Fairbanks located at 3419 Airport Way, Suite D, Fairbanks, Alaska 99709. As used in this letter, the term "AOIC facilities" specifically *excludes* this Fairbanks facility. However, as noted above, Buyer will be purchasing a used MRI that is currently located in Fairbanks.

### Buyer Purchase of the AOIC Assets

Based on discussions to date, Buyer believes that the transaction with AOIC would be a complete purchase of the assets of the three AOIC facilities by Buyer. The total cost for the assets of the three AOIC facilities would exceed the expenditure threshold set in AS 18.07.031. No new facilities would be built. No new registered services would be added to the already existing ARH health services. In short, the AOIC facilities would operate very much as they have in the past except they would now be owned by Buyer and staffed by Buyer employees.

### A Certificate of Need Is Not Required for the Purchase of the AOIC Assets

The implementing statute for the CON program is AS 18.07.031:

(a) . . . a person may not make an expenditure of \$1,000,000<sup>1</sup> or more for any of the following unless authorized under the terms of a certificate of need issued by the department:

- (1) construction of a health care facility;
- (2) alteration of the bed capacity of a health care facility; or
- (3) addition of a category of health services provided by a health care facility.

<sup>1</sup> The overall statutory scheme provides for automatic escalation of this \$1,000,000 threshold so that the current threshold is \$1,200,000.

The purchase price of the AOIC assets exceeds \$1,200,000, the current threshold. However, the purchase of the AOIC assets does not fall within any of the three categories identified in AS 18.07.031 (a) (1)-(3), thus making this statute inapplicable.

The purchase of the AOIC assets does not constitute the "construction" of a health care facility under AS 18.07.031 (a)(1). The definition of "construction" only includes "erection, building, alteration, reconstruction, improvement, extension, or modification of a health care facility. . . ." AS 18.07.111 (6). Since all of the AOIC facilities are already built and have been in operation for many years, the purchase of the assets located at these facilities could not be considered "construction" as defined by AS 18.07.111 (6).

The purchase of the AOIC assets does not involve "the alteration of bed capacity" since none of the AOIC facilities have bed capacity. They are all outpatient facilities. Therefore, AS 18.07.031 (a)(2) does not apply.

The purchase of the AOIC assets does not involve the addition of a category of health services provided by a health care facility. ARH already supplies a wide variety of imaging services. The purchase of the AOIC assets increases ARH's capacity of a category of health services already provided by ARH, but it does not add a category of health services. Therefore, AS 18.07.031 (a)(3) does not apply.

Since none of the three subsections of AS 18.07.031(a) are met, the statute does not apply and Buyer should not be required to file a CON Application.

#### The AOIC Facilities Are Not "Health Care Facilities" Subject to CON Review

As you know, the current definition of "health care facility" includes independent diagnostic testing facilities ("IDTF"). See, AS 18.07.111 (8). However, when the AOIC facilities were constructed in Wasilla, Anchorage, and Soldotna, the definition of "health care facility" did not include IDTFs. Further, prior to the change in definition of "health care facility" to include IDTFs, the Department determined that imaging centers such as the AOIC facilities were not considered a "health care facility" under the then-existing definition. Thus, in October of 2000, AOIC contacted the Department of Health and Social Services with respect to its intent to purchase and operate imaging equipment in Wasilla, Alaska. The DHSS sent a determination letter dated October 31, 2000, to AOIC ruling that AOIC did not need to obtain a CON because they were not considered to be a "health care facility":

I received your letter of intent for the purchase of a Toshiba Spiral CT scanner that will be located at the Alaska Open Imaging Center at 1751 East Gardner Way in Wasilla. . . . [Y]our business is not considered a "health care facility" as defined by the State of Alaska certificate of need program. Therefore, **this project is not required to go through the**

certificate of need process because it is not for a "health care facility." (Emphasis added).

A copy of the October 2000 DHSS determination letter is attached hereto for your convenience.

Even though the DHSS determination is specific to AOIC's Wasilla facility, the same legal reasoning would apply to all three of the AOIC facilities involved in the transaction between AOIC and Buyer. All three of the AOIC facilities were built and placed in operation many years prior to any change in the definition of a "health care facility" that could even arguably include any of these three facilities. Therefore, the determination that the AOIC facilities are not "health care facilities" when opened to the public would continue to apply with respect to these specific facilities.<sup>2</sup>

Buyer believes that since it is purchasing assets of an existing business and merely intends to continue operating that business in the same manner providing the same services which have been provided over the years, the purchase of the assets of the AOIC facilities should not require Buyer to go through the CON process.

#### A Certificate of Need Is Not Required for the Purchase of the Used Fairbanks MRI

AOIC owns an MRI currently located in Fairbanks, Alaska. Buyer intends to purchase this MRI for \$750,000 provided that an independent third party appraiser certifies the fair market value of the MRI to be \$750,000 or less. Once purchased, Buyer intends to transport the MRI from Fairbanks to Wasilla and install the MRI in the Wasilla facility. The total cost of purchasing, shipping and installing the MRI in the Wasilla facility, as well as any remodeling of the Wasilla facility that might be required for the used MRI, will be less than \$1,200,000.

Buyer believes that since the total cost of purchasing, transporting, and installing the MRI (including any costs associated with remodeling the existing Wasilla facility) is less

---

<sup>2</sup> The proposed purchase of the assets located at the AOIC facilities is easily distinguishable from the issues addressed in *In the Consolidated Matters of Imaging Associates of Providence*, Case Nos. 06-0743 DHS and 06-0764 DHS, hereinafter referred to as *IAP*. In the *IAP* case, the issues concerned the amended definition of a "health care facility" which specifically *includes* IDTFs within the definition. Buyer believes that the AOIC facilities are *not* IDTFs. Even if one were to argue that the AOIC facilities might be considered IDTFs, all of the facilities were built and placed in operation *prior to* the definition of "health care facility" being amended to include IDTFs. Therefore, the amended definition does not apply in any event. The AOIC facilities are not IDTFs and even if they were, it would be improper under Alaska law to apply the amended definition of a "health care facility" (which includes IDTFs) retroactively to the AOIC facilities. *Alaska Department of Health & Social Services v. Valley Hospital Association*, 116 P.3d 580, 584 (Alaska 2005).


than the current statutory threshold of \$1,200,000, a CON is not needed to purchase and move the MRI from Fairbanks to Wasilla and then operate that MRI in Wasilla.

Based on the foregoing, Buyer respectfully requests your determination that (i) a CON review is not necessary in order for Buyer to purchase, own, and operate the assets of the three AOIC facilities identified, and (ii) no CON is required for the purchase, transport, installation and operation of the used Fairbanks MRI in the Wasilla facility.

Thank you for your consideration of this matter.

Very truly yours,

ALASKA REGIONAL HOSPITAL

By   
Paul Morris, CFO

SDR:sdr

Enclosure

cc: Stacie Kraly, Esq. (Attorney General's Office by fax (907) 465-2539)  
Maureen Joyce, Esq. (HCA, Inc.)  
Paul Morris, CFO, Alaska Regional Hospital  
Stephen D. Rose, Esq.



1981 WL 38756 (Alaska A.G.)

Office of the Attorney General

State of Alaska  
File No. J-66-136-82  
September 9, 1981

**Certificate of Need—Purchase 7 AAC 07.010**

\*1 Frederick P. McGinnis  
Deputy Commissioner  
Department of Health and Social Services

You have asked this office if that portion of 7 AAC 07.010 which requires a certificate of need before any person makes a capital expenditure in excess of \$150,000 to purchase a health care facility is ineffective as the requirement is beyond the scope of authority conferred by statute.

A review of the statutory authority for 7 AAC 07.010, as well as the legislative history<sup>1</sup> surrounding the certificate of need program leads us to the conclusion that the certificate of need 'purchase' requirement is ineffective as it is beyond the scope of authority conferred by law.<sup>2</sup>

DISCUSSION 7 AAC 07.101 provides in part that:

a certificate of need is required before any person undertakes any of the following activities:

(1) any capital expenditure in excess of \$150,000 for the excavation, erection, building, alteration, extension, reconstruction, improvement, repair, purchase, or other development of a health care facility, including lease or purchase of equipment, (emphasis added)

The authority for this regulation is found in AS 18.07.101 and AS 18.07.031.

Under AS 18.07.101 the commissioner has the authority to adopt regulations to carry out the purposes of the certificate of need program but the commissioner is not free to go beyond the scope of the program as enacted into law.

The basic scope of the certificate of need program is found in AS 18.07.031 which provides that:

No person may undertake the following unless authorized under the terms of a certificate of need issued by the office:

- (1) construction of a health care facility;
- (2) alteration of the bed capacity of a health care facility;
- (3) addition or elimination of a category of health services provided by a health care facility.

'Construction' of a health care facility is defined in AS 18.08.111 as the erection, building, alteration, reconstruction, improvement, extension or modification of a health care facility under this chapter, including lease or purchase of equipment, excavation or other necessary actions.

This definition goes beyond the dictionary meaning of construction. If the Legislature had intended the dictionary meaning of construction, there would have been no need for a definition of that term in the certificate of need statutes. The Legislature however, did define 'construction' specifically to include the lease or purchase of equipment, as well as activities not generally encompassed in the initial construction of a building. The inclusion of these terms gives the impression that the legislature's intent was to go beyond the dictionary definition of construction.<sup>3</sup>

A review of the legislative history as contained in hearings before the House Health, Education and Social Services Committee shows that construction, purchase, and the scope of the certificate of need program were specifically discussed. As a result of that discussion a motion was made that proposed AS 18.07.031 be amended to include language that a certificate of need be required to construct or to acquire a health care facility.<sup>4</sup> The amendment was voted down.<sup>5</sup>

\*2 The inclusion of the 'purchase' requirement in the regulations appears to be the department's decision that acquisition of a health care facility should be included within the coverage of the certificate of need program. To include acquisition, however, a statutory amendment is needed.<sup>6</sup>

As the purchase requirement is ineffective the department need not enforce it. The department should, however, repeal or amend the provision to reflect the scope of authority conferred.<sup>7</sup>

Wilson L. Condon  
Attorney General  
Elizabeth Shaw  
Assistant Attorney General

#### Footnotes

1 See State of Alaska v. City of Haines, 627 P.2d 1047, 1049 n 6.

2 AS 44.62.020 provides in part:

To be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

3 The definition of construction contained in an earlier draft of then proposed certificate of need legislation provided that: 'construction' means the erection, building or substantial acquisition, alteration, reconstruction, improvement, extension, or modification of a medical facility under this chapter, including equipment, inspection and supervision, excavation or other necessary action; construct means and includes any action or construction;

The above language was amended in committee to excluded reference to 'substantial acquisition'.

4 House Health, Education and Social Services Committee, April 5, 1976, HB 665.

5 The vote was clearly the committee's decision to exclude purchase of an existing health care facility FROM THE certificate of need coverage.

The 1974 federal legislation (PL 93-641) which mandated the state's statutes left the question of the requirement of a certificate of need for the purchase of a facility to the discretion of the states. Current federal statutes and regulations require that the certificate of need program cover acquisition of a health care facility. Due to the Budget Reconsideration Act of 1981, Alaska is not currently required to comply with these new requirements.

6 See HB 195 introduced in the first session of the 12th Legislature, February, 19, 1981.

It is arguable that the fact that purchase has been included in the department's regulations since 1977, is evidence of the administrative interpretation which is to be given weight in determining the validity of the regulation. In the current situation, however, there is no history of a request for a certificate of need for purchase nor for a specific administrative interpretation of this requirement.

7 The exclusion of the purchase requirement affects 7 AAC 07.100 which provides that a certificate of need is not transferable in that if the purchase requirement is ineffective then it follows that the original certificate of need is transferred to the new

owner for to disallow such transfer in actuality would be requiring a certificate for purchase. A certificate of need would be required if the purchase were to affect the operation of the health care facility such as the purchase of new equipment or the offering of a new health service. That certificate would not be for the purchase but for the change in services or the addition of new equipment.

1981 WL 38756 (Alaska A.G.)

---

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.