



THE STATE  
of **ALASKA**  
GOVERNOR BILL WALKER

Department of  
Health and Social Services

Certificate of Need Program

3601 C Street, Suite 978  
Anchorage, Alaska 99503  
Main: 907.334.2464  
Fax: 907.334-2220

January 9, 2018

Mr. Peter Diemer, Attorney at Law  
Clayton & Diemer, LLC  
500 L Street, Suite 200  
Anchorage, AK 99501

RE: Request for Determination dated December 18, 2017

Dear Mr. Diemer,

Thank you for your letter dated December 18, 2017 in which you request a determination as to whether a proposed business reorganization and relocation by Muldoon ASC, LLC (Muldoon), ASC North, LLC (North), and South Anchorage Surgery Center, LLC (SASC) requires a certificate of need (CON).

Muldoon, North and SASC are all 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. Muldoon, North and SASC desire to engage in a business reorganization and upon completion of the business reorganization the new business entity desires to relocate all of the existing facilities to a single consolidated site within Anchorage. The single facility will be comprised of two operating rooms and will perform the same categories of health services as currently provided.

Per your request, you expect the cost of the new business entity's relocation to exceed the regulatory CON monetary threshold of \$1.5 million. You also state you will not be adding any new categories of health services, or increasing bed capacity and expect to add as yet an undetermined amount of procedure rooms.

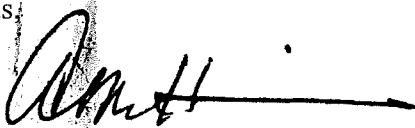
The department requires additional information to process your request for determination whether a CON is necessary for your project. Even if this project is determined to meet the exception to the Certificate of Need requirement in AS 18.07.031(c), a certified cost estimate is still required.

Pursuant to 7 AAC 07.031(b)(2), every request for determination must include "a certified estimate of the total cost of each proposed component of the activity listed in 7 AAC 07.010(a), as applicable, for the entire activity." Recently, the Department did not require a certified cost estimate for a project that the Department found fell under AS 18.07.031(c). This interpretation was challenged, and the Superior Court found that a certified cost estimate is required for every request for determination regardless of the nature of the request. *Mat-Su Valley Medical Center*,

Muldoon, North and SASC, LLC  
Page 2

*LLC vs. State, DHSS and Alaska Spine Center, LLC* (attached). Accordingly, please submit your certified cost estimate for this project pursuant to 7 AAC 07.010(a) within thirty days from the date of this letter.

Regards,

A handwritten signature in black ink, appearing to read 'Alex Hicks', followed by a horizontal line extending to the right.

Alexandria Hicks, CON Coordinator

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

MAT-SU VALLEY MEDICAL )  
CENTER, LLC, an Alaska limited )  
liability company d/b/a Mat-Su )  
Regional Medical Center, )

Plaintiff, )

SURGERY CENTER OF )  
WASILLA, LLC, )

Plaintiff-in-Intervention, )

vs. )

STATE OF ALASKA, DEPARTMENT )  
OF HEALTH AND SOCIAL )  
SERVICES; VALERIE DAVIDSON, )  
in her official capacity as Commissioner )  
of the Department of Health and Social )  
Services; and ALASKA SPINE )  
CENTER LLC, an Alaska limited )  
liability company, )

Defendants. )

Case No. 3AN-16-10186 CI

DECISION AND ORDER

I. INTRODUCTION

This is a case of first impression involving the question of whether the relocation of an ambulatory surgical facility from Anchorage to Wasilla is a move within “the same community” such that the relocating facility is exempt, pursuant

the operator of another ambulatory surgical facility in the Mat-Su Valley, to intervene in the case as a plaintiff.

Before the court are two motions. The first is ASC's Motion for Summary Judgment filed on May 1, 2017. DHSS concurred with this motion by filing a Notice of Non-Opposition on July 3, 2017. The second motion is MVMC's Cross-Motion for Summary Judgment filed on July 3, 2017. The two motions ask the court to decide whether the proposed relocation of ASC from Anchorage to Wasilla is a relocation within the "same community" under AS 18.07.031(c). SCW joined in the positions taken by MVMC. The court heard oral argument on the pending motions on October 16, 2017. The court denies ASC's Motion for Summary Judgment and grants MVMC's Cross-Motion for Summary Judgment.

## II. FACTS

The State of Alaska enacted its statutory CON program in 1976. In 1977, the regulations, which interpret the program, were adopted. 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. 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. The CON requirement reads:

The RFD is not a required part of the CON program. If an individual chooses to submit an RFD, he must comply with the statutory requirements for submission of an RFD.

In 2000, the Alaska legislature amended the CON statutes to allow for an exemption to the CON requirement.<sup>4</sup> The exemption took the form of AS 18.07.031(c) and provides that:

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.<sup>5</sup>

The legislature did not provide for a definition of the term “the same community” as used in the amended statute.

In 2013, DHSS reviewed concurrent certificate of need applications from Surgical Care Affiliates and Providence Health and Services Alaska to construct separate two-suite ambulatory surgical centers located in Wasilla. DHSS rejected the proposals.<sup>6</sup> Using only statistical data for the Matanuska Susitna Borough,

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<sup>4</sup> See *Beal v. McGuire*, 216 P.3d 1154, 1160-61 (Alaska 2009), for an explanation of the statutory amendment process.

<sup>5</sup> AS 18.07.031(c).

<sup>6</sup> Jennifer Coughlin Aff. dated June 30, 2017, Ex. D.

In response to DHHS's determination, MVMC filed suit against DHSS and ASC. MVMC contends that DHSS's conclusion that Anchorage and Wasilla are in the same "service area," which DHSS also found to be synonymous with the word "community" as used in AS 18.07.031(c), was erroneous. Additionally, MVMC argues that ASC's RFD was insufficient in that it lacked the certified estimate of costs required by 7 AAC 07.031(b).

ASC filed a Motion for Summary Judgment. In its motion, ASC states that, as an administrative agency, DHSS has the authority to make decisions regarding the CON program and the decision made regarding the relocation of ASC was based on agency expertise.<sup>10</sup> DHSS agreed that its decision was a reasonable interpretation of the statute and was based on agency expertise. MVMC filed its own Cross-Motion for Summary Judgment maintaining its arguments that DHSS

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seven mile radius of the intersection of South Seward Meridian Parkway and the George Parks Highway located in Wasilla, Alaska. *Id.*, Ex. C. In its October 20, 2016, determination letter, DHSS referred to the project location as Wasilla, Alaska. *Id.*, Ex. D. In the briefing before the court, the parties have consistently referred to the project location as Wasilla.

<sup>10</sup> Alexandria Hicks, the CON Coordinator who made the agency decision in this case, had no particular agency expertise. She had worked in her position for about three and one-half years at the time of the decision. Stephen Rose July 17, 2017, Aff., Ex. G, June 21, 2017, Alexandria Hicks Dep. at 4. She had previously worked for ten years as the State's director of the tobacco program. *Id.* There is no indication that Ms. Hicks has any medical background. In her time as CON coordinator, Ms. Hicks had worked on maybe five CON applications. *Id.* at 7.

determination of the meaning of the statute involved and need not follow the agency's construction even if it is one of several reasonable readings."<sup>15</sup>

ASC and DHSS urge the court to apply the reasonable basis standard, citing *Matanuska-Susitna Borough v. Hammond* ("*Mat-Su v. Hammond*") for support. In *Mat-Su v. Hammond*, the statute at issue directed the department to compute an equalization entitlement based on population and other factors of a taxing unit.<sup>16</sup> The statutes explicitly directed the department to "determine" population and gave the department discretion to choose the data it would use in making its determination.<sup>17</sup> In that case, as defendants have quoted, "the legislature deliberately left 'population' and 'residents' undefined, to allow the department to utilize its expertise" to decide which population groups to count.<sup>18</sup> The Court applied the reasonable basis standard of review not because the legislature failed to define a term and the department was best suited to define that term but rather

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<sup>15</sup> *Nat'l Bank of Alaska v. State, Dep't of Revenue*, 642 P.2d 811 (Alaska 1982).

<sup>16</sup> *Matanuska-Susitna Borough v. Hammond*, 726 P.2d 166, 168-69 (Alaska 1986).

<sup>17</sup> *Id.* at 169.

<sup>18</sup> *Id.* at 175-76.

care demand and resources, and that the department has specialized knowledge and expertise about the health care system in the State of Alaska.<sup>22</sup> These considerations do not warrant application of the reasonable basis test. The policy arguments made by defendants do not implicate the type of specialized agency judgments that would cause the court to apply the reasonable basis test. Defendants “do not suggest any detriment to the over-all [CON program] or interference with the functioning of the [d]epartment which might result if its interpretation were not upheld.”<sup>23</sup> Because no agency expertise or determinations of fundamental policies are involved and the question in this case is one of statutory interpretation, the court concludes that the independent judgment standard of review is appropriate.<sup>24</sup> With the independent judgment standard for guidance, the court now turns to an examination of the statute and the language at issue.

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<sup>22</sup> Alaska Spine Center’s Reply to Mat-Su Opp’n to Mot. for Summ. J. and Opp’n to Cross-Mot. for Summ. J. at 6.

<sup>23</sup> *Union Oil Co. of California v. Dep’t of Revenue*, 560 P.2d 21, 24 (Alaska 1977).

<sup>24</sup> Even if the reasonable basis standard of review were applicable, the court would come to the same result.



program allows DHSS to issue certificates which authorize certain activity and put limitations on the construction and alteration of health care facilities to regulate the amount of health care services offered and the number of health care facilities in operation.<sup>26</sup>

ASC contends that Anchorage and the Mat-Su Valley are the “same community” because both have been included in the same statistical areas and economic regions by divisions of DHSS in the past.<sup>27</sup> DHSS supports this argument by stating that the CON program has consistently and transparently considered the Mat-Su Valley and Anchorage to be a single service area.<sup>28</sup> While MVMC counters by arguing that “same community” and “same service area” are distinct and separate terms not to be misconstrued as synonyms.<sup>29</sup> This court agrees with MVMC’s interpretation of the term “same community” and finds that the defendants’ substitution of “service area” into the statute changes the meaning of the relocation exemption entirely.

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<sup>26</sup> See generally AS 18.07.031.

<sup>27</sup> Alaska Spine Center Mot. for Summ. J. at 14.

<sup>28</sup> SOA’s Mot. of Non-Opp’n of Def.’s Mot. for Summ. J. at 9.

<sup>29</sup> Pl.’s Memo in Opp’n to Summ. J. and in Supp. of Cross-Mot. at 10.

Simply read, community is not synonymous with service area. If the legislature wanted to allow an exemption for an ambulatory surgical facility to relocate within a service area and be exempt from the CON process, it would have worded the statute accordingly. Instead, the legislature used specific language of within "the same community" to limit the exemption from the CON process to a smaller area, a "community." A reading of the statute to allow an exemption for relocation within a "service area" would change the meaning of the statute entirely by broadening the geographical parameters of an allowable relocation.<sup>33</sup>

The court interprets the statute plainly so that "community" is narrower than "service area." Anchorage is a community. Those individuals living in Anchorage consider themselves part of the Anchorage "community," and not a part of Wasilla. Wasilla is a community, separate from Anchorage. Those

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<sup>33</sup> For example, at oral argument, DHSS admitted that its substitution of "service area" for "community" in AS 18.07.031(c) and its interpretation that Anchorage and the Mat-Su Valley are in the same service area mean that an ambulatory surgical facility located in Anchorage could relocate to Talkeetna without obtaining a CON. Applying this same logic and DHSS's view that Fairbanks and the northern half of Alaska are in the same service area means that the ambulatory surgical facility at Fairbanks Memorial Hospital could relocate to Utqiagvik without obtaining a CON. These examples show that DHSS's interpretation of "community" is not reasonable. Realistically, who would equate Anchorage and Talkeetna or Fairbanks and Utqiagvik as part of the same community? The answer is no one other than DHSS and ASC.

The primary dictionary definition of community also supports the court's conclusion that Anchorage and Wasilla are not the same community. The primary dictionary definition of community is "a group of people residing in the same locality and under the same government."<sup>34</sup> Anchorage and Wasilla are almost 50 miles apart. They do not have the same local government. They are not the same community.

While ASC and DHSS point to other dictionary definitions of community such as different social, religious, or political groups, those distinctions make no sense in the context of the statute in question. If one were to parse the statutory term "the same community" based on such distinctions, there would be obvious constitutional problems. For example, when the Valley Hospital Association, the predecessor to MVMC, attempted to distinguish itself as an anti-abortion hospital, the Alaska Supreme Court struck down the hospital's rules and regulations as violations of the Alaska constitutional right to privacy.<sup>35</sup>

## **2. The legislative history of the statute.**

The court "decides questions of statutory interpretation on a sliding scale: The plainer the language of the statute, the more convincing any contrary

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<sup>34</sup> Webster's II New College Dictionary 227 (1995).

<sup>35</sup> *Valley Hosp. Ass'n v. Mat-Su Coalition*, 948 P.2d 963 (Alaska 1997).

location within a community without obtaining a new CON because the move does not increase services in that community.<sup>39</sup>

In the legislative committee meeting concerning the potential enactment of AS 18.07.031(c), there was a discussion specific to the word “community” and what that word would mean in the new statute. A DHSS representative noted that over time all terms used in the proposed statute would be subject to interpretation and discussion, for example words like “community,” “capacity,” or “greater.”<sup>40</sup> A representative of the Alaska State Hospital and Nursing Home Association indicated that one of the association’s concerns was how “community” would be defined. To clarify how broadly “community” was to be read, she asked whether the term meant that a facility in Anchorage could move from one community council to another community council.<sup>41</sup> The chair of the House State Affairs Committee responded and attempted to clarify the coverage of “community” by stating that community means the service area of the hospital. But the chair then explained that a facility would not be allowed to move from Anchorage to Mat-Su

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<sup>39</sup> Minutes of House State Affairs Standing Committee Meeting, March 16, 2000.

<sup>40</sup> *Id.* (statement of E. Lindstrom, Special Assistant DHSS).

<sup>41</sup> *Id.* (statement of S. Anderson, representative of Alaska State Hospital and Nursing Home Association).

history demonstrates the potential for service area growth; it does not however support the claim that the two distinct communities of Anchorage and Wasilla have merged and become one. The court does not find the legislative history convincing enough to support an interpretation of AS 18.07.031(c) contrary to the court's interpretation of the meaning of the statute.

### 3. The legislative purpose of the statute.

The purpose of AS 18.07.031(c) is detailed in the opening statement of the House Committee meeting. In introducing the amended version of the statute, one of the sponsoring legislators explained that the current version of the bill "is quite different from the original, because after a great deal of discussion we have found a solution to the immediate problem."<sup>43</sup> The immediate problem was an Anchorage ambulatory surgical facility wanting to move several blocks because it needed additional space for parking and doctors' offices. Under existing law, that move would have required the facility to go through a time consuming process to receive a CON even though there was no intent to alter services in any way. AS 18.07.031(c) was drafted to fix this problem.<sup>44</sup>

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<sup>43</sup> Minutes of House State Affairs Standing Committee Meeting, March 16, 2000 (statement of Chair James).

<sup>44</sup> *Id.*

of AS 18.07.031(c) to be an exemption from the CON requirement for relocation within a service area, the legislature would have used that language. Instead, the legislature used the language “same community,” which gives the exemption a narrower purpose than the “service area” language would have signified. The specific language used is important. Reading “community” and “service area” to be synonymous would go against the court’s rule that every word used in a statute has a purpose. This court understands that the purpose of using the word “community” was to provide a narrow exemption to the CON requirement so that a relocation of a facility to a site down the street did not have to go through the time consuming CON process. That purpose does not support an interpretation of the statute which extends the relocation exemption to an entire service area.

**B. Inconsistency in determinations by DHSS.**

Although DHSS has dealt with relocations under AS 18.07.031(c), ASC’s request for exemption from the CON program presents the first case in which an ambulatory surgical facility is attempting to relocate from one city to another without obtaining a CON. All previous relocations of ambulatory surgical facilities have been within Anchorage or within Wasilla, but not between the two.<sup>47</sup> DHSS contends that “the CON program has consistently and transparently

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<sup>47</sup> SOA’s Revised Resp. to Pl.’s First Disc. Req. at 2.

assumptions about patients needing to travel between Anchorage and Mat-Su for care. SCA also included surgical cases performed in Anchorage as part of its proof of unmet surgical capacity. DHSS noted throughout its denial of SCA's application that no evidence was shown of patients traveling to Anchorage from Mat-Su for treatment and that the methodology used to analyze need for additional ambulatory surgical beds in Wasilla did not allow for the inclusion of the Anchorage data.<sup>51</sup>

The 2013 CON review by DHSS is inconsistent with its current determination that Anchorage and Wasilla are the "same community" for the purposes of AS 18.07.031(c). An explanation for this inconsistency is that Ms. Hicks, the CON coordinator who made the DHSS determination in this case, was aware of but never reviewed the 2013 DHSS CON determination for the proposed addition of ambulatory surgical facilities in Wasilla when she issued the RFD letter to ASC.<sup>52</sup> DHSS's actions were unreasonable in ignoring its own precedent in making its decision in this case.

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which was produced by DHSS a couple of days before oral argument. In the CON application, SCA referred to Anchorage, Wasilla, and Palmer as separate communities.

<sup>51</sup> See Pl.'s Memo in Opp'n to Summ. J. and in Supp. of Cross-Mot., Ex. D.

<sup>52</sup> Stephen Rose July 17, 2017, Aff., Ex. G, June 21, 2017, Alexandria Hicks Dep. at 46.

Anchorage residents would travel to Wasilla for day surgery when there are many day surgery options in Anchorage. This conclusion is buttressed by MVMC's undisputed evidence that only 1.6% of its outpatients have an Anchorage address.<sup>56</sup>

**C. The Request for Determination lacked required information.**

As outlined in 7 AAC 07.031(b), where an individual chooses to submit an RFD, he must include three pieces of information: A description of the proposed activity, a certified estimate of the total cost, and an estimated starting date and completion date.<sup>57</sup> ASC and DHSS misconstrue the language of the regulation. Both ASC and DHSS have stated that "this regulation is clear that the certified cost estimate will be required 'as applicable.'"<sup>58</sup> However, that is not a logical reading of the regulation. It requires an estimate of each proposed component of the activity listed in 7 AAC 07.010(a), as applicable. The language is clear and unambiguous. The regulation lists the expenditures to be included when determining whether a certificate of need is required. Not all of those

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<sup>56</sup> Jared Kosin's June 29, 2017, Aff. at 2.

<sup>57</sup> 7 AAC 07.031(b).

<sup>58</sup> Alaska Spine Center's Reply to Mat-Su Opp'n to Mot. for Summ. J. and Opp'n to Cross-Mot. for Summ. J. at 26.



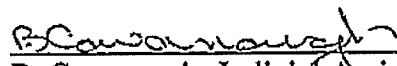
in compliance with AS 18.07. Pursuant to AS 18.07.091(a), the court grants the requests of MVMC and SCW for a permanent injunction prohibiting DHSS from authorizing and ASC from proceeding with ASC's relocation of its Anchorage ambulatory surgical facility from Anchorage to Wasilla without ASC obtaining a CON in compliance with AS 18.07. MVMC and SCW shall provide the court with an appropriate form of judgment within ten days.<sup>60</sup>

Dated this 19th day of October, 2017, at Anchorage, Alaska.

  
FRANK A. PIFFNER  
Superior Court Judge

I certify that on 10-19-17 a copy  
of the above was delivered to:

J. Coughlin  
D. Ryman  
S. Rose  
P. Sandberg  
E. Smith

  
B. Cavanaugh, Judicial Assistant

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<sup>60</sup> There is no contention in this case that MVMC and SCW do not meet the standing requirements for obtaining such an injunction. *See Mat-Su Valley Med. v. Advanced Pain Centers*, 218 P.3d 698 (Alaska 2009).