BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES

In the Consolidated Matters of	)	
Imaging Associates of Providence	)	OAH No. 06-0743-DHS &
	)	06-0764-DHS

NOTICE REGARDING PROPOSED DECISION

Attached is the administrative law judge's proposed decision on summary adjudication. Under AS 44.64.060, the parties (Imaging Associates of Providence and the Department of Health and Social Services' certificate of need staff) have the right to file a proposal for action requesting that the final decisionmaker do one of the following:

1. adopt the proposed decision as the final agency decision;
2. return the case to the administrative law judge to take additional evidence or make additional findings or for other specific proceedings;
3. revise the proposed enforcement action, determination of best interests, order, award, remedy, sanction, penalty, or other disposition of the case;
4. reject, modify, or amend a factual finding;
5. reject, modify, or amend an interpretation or application of a statute or regulation.

If you wish to file a proposal for action, the deadline is **November 22, 2007**. Submit your proposal for action document to the Office of Administrative Hearings. It will be forwarded to Commissioner Jackson with the file. You must give the reasons for the action you propose. If you request action 4 above, you should identify which evidence in the record (for example, documents or testimony given to the administrative law judge) supports your request to change the factual finding(s).

You do not have to file a proposal for action. If no party in this case requests a proposal for action other than adoption of the decision (item 1 above), the proposed decision will become final when the commissioner adopts it or 45 days after the date below, whichever comes first.

DATED this 30th day of October, 2007.

By: Neil Roberts

Office of Administrative Hearings
P.O. Box 110231
Juneau, AK 99811-0231

The undersigned certifies that on October 30, 2007, this notice and the accompanying proposed decision were distributed by **email and U.S. mail** to the following parties: Peter Gruenstein and Peter Maassen, counsel for Imaging Associates of Providence; Stacie Kraly, Assistant Attorney General. Courtesy copies also were distributed by **email and U.S. mail** to Christine Williams and Barat LaPorte, counsel for amicus Mat-Su Regional Medical Center; by **email** to Commissioner Karleen Jackson and Elmer Lindstrom, Office of the Commissioner, Department of Health and Social Services; and by **Interdepartmental Mail** to the Office of the Lt. Governor.

Neil Roberts

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DECISION ON SUMMARY ADJUDICATION

I. Introduction

Imaging Associates of Providence (IAP) has moved for summary adjudication, asserting that as a matter of law the Department of Health and Social Services cannot require IAP to apply for certificates of need for IAP's Abbott Road and Mat-Su Valley facilities. The department's certificate of need staff opposed the motion and cross-moved for summary adjudication in its own favor. Mat-Su Regional Medical Center, as an amicus, separately opposed IAP's motion.

When IAP constructed its facilities, a statute made physicians' offices exempt from the certificate of need requirements and a regulation made imaging facilities not falling within a particular federal billing designation exempt as well. Both the statute and the regulation appeared to apply to the IAP facilities. A subsequent superior court ruling in another case purported to invalidate the regulation. IAP argues that the department cannot apply the superior court ruling to IAP. Alternatively, IAP argues that the department should be estopped from requiring IAP to obtain certificates of need for the two facilities because IAP relied on the regulation and the department's determination that IAP's facilities were physicians' offices and not independent diagnostic testing facilities (IDTFs).

The department is not required to perpetuate errors. Unless and until the superior court's ruling is reversed, the department is free to respect the court's ruling invalidating the regulation. The department's previous determinations that the IAP facilities are not IDTFs did not have the effect of giving IAP permission to operate those facilities free from regulation by the department in the event a change in the law, or its interpretation, subjected the facilities to regulation. This is not to say that no consideration need be given to IAP's reliance on the previous determinations and the regulation.

It would be premature, however, to adjudicate the reasonableness of IAP's reliance and the prejudice to IAP from enforcement of the certificate of need requirements at this point, when IAP has not yet applied for certificates and the department therefore has not had the opportunity to decide whether to issue IAP certificates and, if so, what conditions to include. By requiring certain types of facilities to obtain certificates of need, the law establishes that the public interest

in regulating such facilities outweighs the costs to the regulated community of applying for certificates. IAP, therefore, cannot make the showing necessary to bar the department under the doctrine of equitable estoppel from requiring IAP *to apply* for the certificates. If equitable estoppel or some other limitation plays a role with respect to these facilities, it does so only at a later stage, when the department decides how to rule on the applications.

IAP's motion, therefore, is denied and summary adjudication is entered in favor of the department's certificate of need staff. IAP must apply for certificates of need for the Abbott Road and Mat-Su Valley facilities if it wishes to continue operating them. Whether the doctrine of equitable estoppel will dictate that the facilities be allowed to continue operating, irrespective of need, remains to be seen as part of, or following, the department's decisions in response to the applications.

II. Facts

IAP is a limited liability company (LLC) whose purpose is "[t]o provide medical imaging services ...."[1] IAP began building facilities on Abbott Road in Anchorage and in the Mat-Su Valley in December 2005.[2] The facilities were completed and began operating in June 2006.[3] IAP is a joint venture between six radiologist doing business as an LLC and Providence Alaska Medical Center, a hospital.[4] The radiologists own equal interests in their LLC, which in turn owns 50 percent of the joint venture LLC; Providence owns the other 50 percent.[5]

A few months after IAP began construction, in response to an inquiry by a third party concerning the Mat-Su Valley facility, the department sought information from IAP so that it could determine whether IAP was required to obtain a certificate of need.[6] IAP asserted that the facility fell within the statutory exclusion from certificate of need requirements for the offices of

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1 November 28, 2005 Articles of Incorporation (Exhibit A, p. 10 to February 14, 2007 Motion for Summary Judgment).

2 February 14, 2007 Motion for Summary Judgment at 2, and exhibits cited therein. Whenever in this decision the briefs of the parties are cited as the source for the undisputed facts, the citation incorporates without further reference any exhibits relied on by the parties in their briefs.

3 *Id.* at 6.

4 *Id.* at 2, stating that

> IAP is a joint venture between a group of physicians doing business as Interventional and Diagnostic Radiology Consultants, LLC ("IDRC"), and Providence Health System-Washington, d/b/a Providence Alaska Medical Center ("PACM"), a non-profit community hospital.

5 *Id.*

6 *Id.* at 2-3 (describing correspondence beginning in March 2006 between the third party and the department, and the department and IAP).

private physicians in group practice.[7] In letters signed by the commissioner, the department determined (initially and on reconsideration) that IAP's Mat-Su Valley facility is not a "health care facility" for which a certificate of need is required.[8] The department's initial determination observed that the Mat-Su Valley facility would "be constituted as an office of private physicians in group practice ..." and thus would be excluded under AS 18.07.111(8) from the definition of "health care facility."[9] In response to a request for reconsideration by the third party, the department again determined that the Mat-Su Valley facility is not a "health care facility," relying on 7 AAC 07.012 and reasoning that the facility is not an IDTF "based upon the fact that [it is] not characterized as such for the purpose of billing ...."[10]

Meanwhile, litigation concerning a Fairbanks imaging facility (Alaska Open Imaging Center) was ongoing in superior court. This is referred to as the *Banner Health* case.[11] About two months after IAP's facilities began operating, the superior court issued an oral ruling purporting to invalidate 7 AAC 07.012.[12] In subsection (b), that regulation defines "independent diagnostic testing facility" (IDTF) using a test that relies on federal billing designations. Under the definition, if a facility performs diagnostic testing using certain types of equipment and also would be required to enroll as an IDTF for federal reimbursement purposes, it is an IDTF for Alaska certificate of need purposes.[13] By negative implication, the regulation suggests that if a

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7 April 25, 2006 Letter from Dr. Inampudi to Commissioner Jackson at 1.

8 May 4, 2006 Letter from Commissioner Jackson to Stephens (regarding the Mat-Su facility); June 14, 2006 Letter from Commissioner Jackson to Stephens (regarding the Mat-Su facility in response to a request for reconsideration).

9 May 4, 2006 Letter from Commissioner Jackson to Stephens at 1.

10 June 14, 2006 Letter from Commissioner Jackson to Stephens at 2.

11 Banner Health, which operates Fairbanks Memorial Hospital, was the plaintiff in this law suit against the department concerning operation of Alaska Open Imaging Center.

12 *See generally* Transcript from August 8, 2006 Findings of Fact and Conclusions of Law (Steinkruger, J.).

13 7 AAC 07.012(b), which provides

> (b) For purposes of AS 18.07.111 and this section, "independent diagnostic testing facility" means a fixed-location facility or mobile facility that
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> (1) performs diagnostic testing using major diagnostic testing equipment; for purposes of this paragraph, "major diagnostic testing equipment" means
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> (A) magnetic resonance imaging (MRI) equipment;
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> (B) a cardiac catheterization laboratory and related imaging equipment;
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> (C) ultrasound imaging equipment;
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> (D) a positron emission tomography (PET) scanner;
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> (E) a computed tomography (CT) scanner; or
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> (F) a positron emission tomography/computed tomography (PET/CT) scanner; and
>
> (2) is, or would be, required to enroll as an independent diagnostic testing facility for purposes of Medicare or Medicaid reimbursement under 42 C.F.R. 410.33.

facility is not required to enroll as an IDTF under the federal billing regulations, then it is not an IDTF—and hence not a "health care facility"—under AS 18.07.111(8).

The superior court declared that "7 AAC 07.012 is inconsistent with AS 18.07.111 ...."[14] The court found that the department had the authority to promulgate regulations, including authority to define "independent diagnostic testing facility" (which the legislature had not done), but that use of the federal billing designation to determine whether a facility required a certificate of need was not consistent with the legislature's intent to regulate facilities like Alaska Open Imaging Center.[15] The superior court's ruling has been appealed to the Alaska Supreme Court, by the imaging facility party, not by the department.

Shortly after the superior court's ruling, a third party who had been following developments in the case and in the matter concerning IAP's Mat-Su Valley facility wrote to the commissioner, asking for a determination concerning IAP's Abbott Road operation.[16] A series of letters went back and forth between IAP and the department in August, September and October 2006. Through that correspondence the commissioner, in effect, rescinded the department's previous determinations and concluded that the IAP facilities are substantially similar to the facility found to be an IDTF in *Banner Health* and that IAP, therefore, is required to apply for certificates of need.[17] IAP's administrative appeals followed and were consolidated into this single matter.

III. Discussion

In administrative adjudications, the right to a hearing does not require development of facts through an evidentiary hearing when no factual dispute exists.[18] Summary adjudication of an administrative appeal uses the same standard as summary judgment in court: if the material facts are undisputed, they are applied to the relevant law and the resulting legal conclusions

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[14] September 7, 2006 (Corrected) Preliminary and Permanent Conditional Injunction and Declaratory Judgment at ¶ 2 (Steinkruger, J.)

[15] Transcript from August 8, 2006 Findings of Fact and Conclusions of Law at 7-12 (Steinkruger, J.).

[16] August 25, 2006 Letter from Lamb to Commissioner Jackson.

[17] August 17, 2006 Letter from Commissioner Jackson to Dr. Inampudi (informing IAP that it must apply for a certificate of need for the Mat-Su Valley facility because the earlier determination that the facility was excluded from regulation rested on the same legal basis as for the department's Alaska Open Imaging Center decision); September 22, 2006 Letter from Commissioner Jackson to Dr. Inampudi (concluding that the Abbott Road facility is an IDTF); October 10, 2006 Letter from Dr. Inampudi to Commissioner Jackson (regarding both facilities, and requesting a hearing on the Mat-Su facility decision); October 31, 2006 Letter from Commissioner Jackson to Dr. Inampudi (reaffirming Abbott Road facility decision on reconsideration, concluding that it is an IDTF).

[18] *See Smith v. Dep't of Revenue*, 790 P.2d 1352, 1353 (Alaska 1990).

determine the outcome. Only if the parties genuinely dispute a material fact (not legal conclusion) is it necessary to hold an evidentiary hearing.[19]

An evidentiary hearing is not necessary in this matter to determine whether the department can require IAP to apply for certificates of need for the Abbott Road and Mat-Su Valley facilities. A certificate of need from the department is a prerequisite to making expenditures equal to or exceeding a threshold amount for construction of a health care facility.[20] An IDTF is a "health care facility" but a physician's office is not.[21] IAP began making expenditures to construct the two facilities before 7 AAC 07.012 was ruled invalid. The issues in this appeal, therefore, are whether in light of the superior court's *Banner Health* ruling the department can regulate IAP's facilities under the certificate of need program and, if so, whether it should be estopped from doing so by the doctrine of equitable estoppel.

A. THE DEPARTMENT CAN REGULATE IAP'S FACILITIES.

In the five briefs they submitted, the parties and the amicus, Mat-Su Regional Medical Center, disputed the legal effect of the superior court's *Banner Health* ruling on IAP, which was not a party to that case, and on the department's previous determinations that the IAP's Mat-Su Valley facility is not an IDTF. This legal dispute, however, reduces to a single question: can the department correct a court-identified error and, if so, what are the bounds on how the correction can affect regulated persons other than those involved in the court case.

1. The department can correct court-identified errors.

The Alaska Supreme Court recently reaffirmed the long-standing rule that an executive branch agency is not required to perpetuate its errors.[22] The context was a challenge to an agency's permitting decision.[23] The appellant argued that the agency must issue him a permit because it had done so (albeit erroneously) for a similarly situated member of the regulated

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[19] A fact is not "material" unless it would make a difference to the outcome. *Whaley v. State*, 438 P.2d 718, 720 (Alaska 1968).

[20] AS 18.07.031(a)&(d) (requiring a certificate of need for expenditure of $1,000,000 or more, with the base $1,000,000 trigger increasing $50,000 each year, beginning July 1, 2005, until July 1, 2014).

[21] AS 18.07.111(8).

[22] *May v. Alaska Commercial Fisheries Entry Comm'n*, Slip Op. 6173 at 15-16 (Alaska October 12, 2007) (concluding that the commission was not required to perpetuate an error by awarding fishery participation points in the instant case simply because it had done so in an earlier—wrongly decided—permit adjudication).

[23] *Id.* at 1-2 (describing appeal of commission's denial of limited entry permit).

community through an earlier administrative adjudication.[24] The agency refused, and the Supreme Court affirmed the agency's decision because the doctrines on which the appellant had relied (collateral estoppel, *stare decisis*, and due process) "do not require that we perpetuate an erroneous decision in clear contravention of applicable statutes and regulations ...."[25] The same reasoning applies here.

IAP argues that the department must perpetuate what the superior court has found to be an error—namely, exempting IDTFs from the certificate of need requirements under a regulatory definition that is inconsistent with the intent of a statute. Like the recent Supreme Court precedent, IAP's administrative appeals concern agency authorization for regulated activity. Also, they share with the precedent case the common fact that the agency once made a particular determination on how the law applies to the regulated parties and later changed direction—in the precedent case due to self-discovery of the error and here due to a court ruling of error. In the precedent case, the earlier erroneous determination pertained to another member of the regulated community, whereas here the department's earlier erroneous determinations are multiple and pertain to the appellant (IAP) and another member of the regulated community (Alaska Open Imaging Center, the facility involved in the *Banner Health* case). These differences are not material, however, because they affect only when and how the errors were discovered, not the nature of the errors.

In the precedent case, the nature of the agency error was in initially overlooking a statutory requirement and relying on the silence of the regulations, and in applying incorrect regulations, all of which led to confusion and disagreement about whether the appellant was eligible for a permit.[26] Here, the nature of the error identified by the superior court in *Banner Health* was in overlooking the intent of a statutory requirement when preparing regulations to implement the statute, which led to confusion and disagreement about whether IAP's facilities

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[24] *Id.* at 1-2 &15 (explaining that the appellant argued that the commission should grant him an entry permit despite his lack of participation points because in an earlier adjudication the commission (erroneously) awarded another fisherman points for fishing in the same area which was not a qualifying area).

[25] *Id.* at 2.

[26] *Id.* at 5. The statutory requirement was that the applicant for a permit must have fished in a particular area to be eligible for an entry permit for the fishery in question. Confusion resulted when, at one point, a hearing officer overlooked the statute and relied on the silence of the regulations in initially concluding the appellant might be eligible for a permit. The appellant, like his predecessor who erroneously received participation points, fished in the Annette Island Reverse, which was not within the particular area. Compounding the confusion created by overlooking the statute was the fact that application of the wrong regulations had previously led to the appellant's predecessor erroneously receiving participation points for the fishery.

(and the Alaska Open Imaging Center facility) are required to have a permit (certificate of need). That the appellant in the precedent case wanted a permit and IAP wants to be free from the requirement to get one makes no difference to the reasoning. In both situations, the agency initially made an error in failing to properly follow a statutory/regulatory requirement, discovered the error, and set about correcting it. In the precedent case, the correction resulted in denial of a desired permit; for IAP it results in a requirement that IAP apply for one.

In either case, the Supreme Court's ruling that neither an agency nor the court itself must perpetuate an error is apt. Having been told by the superior court that its regulation is invalid because its use of the federal billing designation to exempt facilities is inconsistent with the legislature's intent regarding regulation of IDTFs, the department can accept the court's ruling and correct its past erroneous determinations notwithstanding the fact that the superior court's decision is on appeal by another party. Certainly, if the collateral estoppel and *stare decisis* doctrines invoked by the appellant in the precedent case did not compel perpetuation of error in contravention of applicable statutes and regulations, the inapplicability of the doctrines *stare decisis* and *res judicata* to IAP's appeal cannot compel the department to perpetuate an error that contravenes AS 18.07.111's definition of "health care facility."[27]

In short, the department can correct errors identified by a superior court's ruling on the validity of a regulation and the intent of a statute without waiting to see if the Supreme Court will uphold that ruling. If agencies can correct self-identified errors, then surely they can correct court-identified errors. This is not to say that an agency's ability to correct errors knows no bounds, particularly when it leaves an invalid regulation on the books instead of repealing it. The issue, therefore, becomes whether IAP has shown that the department's reversal of its previous determinations exceeded those bounds.

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[27] IAP argued convincingly that the superior court's *Banner Health* decision does not bind it under the doctrine of *res judicata* because it was not a party to that case and does not constitute a precedent under the doctrine of *stare decisis*. February 14, 2007 Motion for Summary Judgment at 15-17. The department's reversal of its previous determinations so as to correct the court-identified error in implementing AS 18.07.111(8)'s changed definition, however, does not purport to bind IAP to the *Banner Health* judgment, nor is it predicated on a supposed *stare decisis* effect of the superior court's decision. The department has accepted the superior court's ruling and is correcting the resulting errors, just as it could if this had been a self-discovered error. That the Supreme Court ultimately might disagree with the superior court's ruling or that the error correction process may have collateral consequences the department will have to address does not render the department powerless to start correcting the error before all appeals have been exhausted.

2. The department is not retroactively applying a changed regulation.

The bounds within which the department must operate include the legal requirements for adopting, amending and repealing regulations. IAP correctly points out that the Administrative Procedures Act (APA) prescribes limits on the retroactive application of regulations.[28] The APA gives only prospective effect to regulations that are primarily legislative and places certain limits on the retroactive effect of primarily interpretative regulations.[29] This might be determinative of IAP's appeal if the department were attempting to apply a new or amended regulation to IAP, or had based its reversal of the earlier determination regarding IAP's facilities on an agency repeal of 7 AAC 07.012. That is not the case.

The department's reversal was dictated by the superior court's ruling that 7 AAC 07.012 is invalid. The APA does not purport to address the effect of a court's determination that a regulation is invalid.[30] The department's decision to act on the superior court's ruling in *Banner Health* is not itself a regulation to which the APA limits on retroactive effect apply because it is not a regulation adopted by an agency under the APA.[31] The decisions that IAP's facilities are IDTFs did not go through the process requirements for an agency's adoption of a regulation under the APA.[32] The decisions were specific to the two IAP facilities and thus do not have the general applicability required to constitute a "regulation" within the meaning of the APA.[33] Those decisions did not, individually or in combination, have the effect of repealing 7 AAC 07.012.[34]

IAP's position appears to be that the department's post-*Banner Health* decisions that IAP's facilities are IDTFs were attempts to retroactively apply a later-to-be-proposed

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28 February 14, 2007 Motion for Summary Judgment at 17-18.

29 AS 44.62.240 (providing, in part, that a primarily interpretative regulation has retroactive effect unless the agency previously adopted an inconsistent regulation or followed a course of conduct that is inconsistent with the new regulation).

30 *See generally* AS 44.62; *also* AS 44.62.300 (establishing right to judicial review of a regulation but without addressing effect of court's decision following from such review).

31 *See* AS 44.62.240 (speaking to the prospective and retroactive effect of "a regulation adopted by an agency under this chapter[,]" *i.e.* under AS 44.62).

32 The APA prescribes an adoption process that consists of many steps meant to give notice of a proposed regulation and to provide for public participation in the regulation adoption process. *See* AS 44.62.180 – AS 44.62.200. It prescribes the minimum procedures for adoption of regulations. AS 44.62.280.

33 AS 44.62.640(3) (defining "regulation," in pertinent part, as a "standard of general application … adopted by a state agency…").

34 The superior court ordered the department to rewrite the problematic regulation. The department has proposed an amendment which includes repeal of the version of 7 AAC 07.012 at issue in *Banner Health*.

amendment to the department's regulations.[35] That position fails to take account of the inapplicability of the APA's limit on retroactivity to things which are not regulations. Indeed, the key case on which IAP relied in its retroactivity argument—*Alaska Dept. of Health and Social Services v. Valley Hospital Ass'n*, 116 P.3d 580 (Alaska 2005)—underscores the point that the APA's limit comes into play only if the agency adopts a regulation. In the Valley Hospital case, the court did discuss the APA's retroactivity limit in a decision regarding a changed deadline for Medicaid rate-related data submission.[36] The change to which Valley Hospital took exception in that case, however, was an actual change to a regulation; the change went through the normal regulation adoption process before its retroactive effect on the hospital's data submittal procedures was challenged.[37]

In short, the APA's limitation on retroactive effect of regulations does not come into play at all with regard to the decisions IAP is challenging in this appeal. It would be premature to address in this appeal whether some future regulation could have retroactive effect on IAP.

3. The IAP facilities are not merely group radiology practices.

Other bounds within which the department must operate when undertaking to correct a court-identified error are the requirements of statutes. By statute, the requirement to obtain a certificate of need to construct, modify or add services applies to health care facilities.[38] Under AS 18.07.111(8)(B), "health care facility"

> means a private, municipal, state, or federal hospital [or] independent diagnostic testing facility [but] excludes ...the offices of private physicians or dentists whether in individual or group practice[.]

The certificate of need statutes do not define "offices of private physicians" or otherwise prescribe criteria for determining whether a particular facility constitutes such offices. The department's regulations do not define "offices of private physicians" either.[39]

Absent a statutory or regulatory definition giving the terms special meaning, AS 18.07.111(8)(B) must be interpreted "according to reason, practicality, and common sense,

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35 February 14, 2007 Motion for Summary Judgment at 19-20 (remarking that "DHSS's attempt to retroactively apply its proposed amendment to the regulation is a little unsettling").

36 116 P.3d at 584.

37 *Id.* at 582-584.

38 AS 18.07.031(a).

39 *See generally* 7 AAC 07.900. The department's July 6, 2007 Notice of Proposed Regulations indicates that the department intends to amend 7 AAC 07.900, but any amendments proposed or ultimately adopted, of course, are not considered in this decision because they are not in effect.

'taking into account the plain meaning and purpose of the law as well as the intent of the drafters.'"[40] IAP has asserted that its Abbott Road and Mat-Su facilities are the offices of private physicians in group practice and are thereby excluded from the statutory definition of "health care facility."[41] Thus, in addition to the phrase "offices of private physicians," the phrase "in group practice" is material to determining whether IAP's facilities are excluded.

Applying reason, practicality and common sense, and taking into account the plain meaning of the combination of words "the offices of private physicians in group practice," the exclusion should be construed as applying to the place where a group of physicians practice medicine together, among themselves and not as part of an enterprise owned, in full or in part, by someone not authorized to practice medicine. To hold otherwise would have the effect of reading the word "practice" out of the AS 18.07.111(8)(B) phase "whether in individual or group practice." That would violate the rule of construction that meaning must be give to every word.[42]

Radiologists affiliated with IAP's Abbott Road and Mat-Su Valley facilities, may or may not be in group practice with one another, but it is undisputed that they are in business with a non-physician for purposes of operating the two facilities. At page two of its February 14, 2007 Motion for Summary Judgment, IAP states:

> IAP is a joint venture between a group of physicians doing business as Interventional and Diagnostic Radiology Consultants, LLC ("IDRC"), and Providence Health System-Washington, d/b/a Providence Alaska Medical Center ("PACM"), a non-profit community hospital.

IAP is a 50-50 joint venture between the six co-equal physician owners of IDRC and the hospital.[43] A hospital is a hospital, not a physician. Accordingly, even if the IAP facilities do, as a practical matter, house offices out of which the six physicians practice, and even if their co-equal ownership of the IDRC constitutes a "group practice" for other purposes, as a matter of law, the two facilities are not the offices of private physicians in group

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[40] *Alaska Department of Commerce, Community and Economic Development v. Progressive Casualty Ins., Co.*, 165 P.3d 624, 628 (Alaska 2007) (citations omitted); *see also* AS 01.10.040(a) (requiring that words and phases be construed "according to their common and approved usage" and that technical words be construed according to their "peculiar and appropriate meaning" if they have acquired such a meaning).

[41] February 14, 2007 Summary Judgment Motion at pp. 3-4 (recounting assertions made in correspondence between an IAP representative and the department).

[42] *Alaska Railroad Corp. v. Native Village of Eklutna*, 43 P.3d 588, 593 (Alaska 2002).

[43] February 14, 2007 Motion for Summary Judgment at 2 and Exhibit A thereto at 1. The motion identifies six persons as physicians (each listed with "M.D." following his or her name) and states that each of the six has an equal interest in the IDRC.

practice for purposes of the AS 18.07.111(8)(B) exclusion from the definition of "health care facility."

4. IAP's facilities cannot be exempted by an invalid 7 AAC 07.012.

Before the superior court ruling in *Banner Health*, 7 AAC 07.012 defined "independent diagnostic testing facility" so as to effectively exempt from certificate of need requirements facilities the legislature (according to the superior court) intended be regulated. The parties do not dispute that under 7 AAC 07.012, the department's previous determinations that IAP's Mat-Su Valley facility is exempt were correct. The disputed legal issue concerns the effect of the *Banner Health* ruling on the validity of the regulation. IAP asserts that the regulation remains valid, at least as to IAP; the department's certificate of need staff and Mat-Su Regional assert that it is "invalid" or "void."[44]

The superior court's written order uses the word "void" but modifies it by including the qualifier language:

> to the extent it negates the legislature's intent to include [Alaska Open Imaging Center] and other like independent diagnostic testing facilities within the definition of "health care facility," and thus subject [them] to the requirements of the certificate of need program.[45]

The transcript from the judge's oral ruling, which she purposefully added to the form of order prepared by one of the parties,[46] shows that she considered the regulation to be invalid under the APA standard that renders a regulation invalid and ineffective if inconsistent with the applicable statute.[47]

Taken together, the written and oral orders communicate the superior court judge's ruling that 7 AAC 07.012 is invalid as a whole, not just to some limited extent that leaves the health care community or the department free to declare exemptions based on a remnant of the regulation.[48] The phrase "to the extent it negates the legislature's intent" after "void" in the

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[44] February 28, 2007 Opposition (department staff) at 5-6; February 28, 2007 Mat-Su Regional Opposition at 9-13.

[45] September 7, 2006 (Corrected) Preliminary and Permanent Conditional Injunction, and Declaratory Judgment at ¶ 2 (Steinkruger, J.).

[46] *Id.* at 2, between ¶ 3 and date line (adding hand-written notation "transcript of ruling attached").

[47] Transcript from August 8, 2006 Findings of Fact and Conclusions of Law at 7-12 (citing at p. 8 AS 44.62.030 and saying that "a regulation is not valid or effective unless consistent with the statute ...).

[48] The IDTF definition in 7 AAC 07.012(b) consists of a two-part, conjunctive (joined by "and") test under which the combination of equipment used and the Medicaid billing designate dictate whether a facility is an IDTF. In addition to the subsection (b) definition, 7 AAC 07.012 contains a subsection (a) covering apportionment of expenditures for freestanding versus co-located facilities. Though subsections (a) and (b) arguably could be

written order initially suggests that what follows will be a limiting factor on when or how the regulation will be considered void. What actually follows is the court's rationale for invalidating the regulation—*i.e.,* that the regulation "negates" (is inconsistent with) the legislature's intent to regulate IDTFs. This comports with the rationale in the oral order to the effect that a regulation inconsistent with the statute it purports to implement, interpret or make specific is not valid.

Without the exemption previously (but erroneously) provided to IAP by a now-invalid regulation, and because the statutory exclusion for physicians' offices does not apply to IAP for the reasons in Part II.A.3, the department can regulate IAP's facilities as IDTFs.[49] Unless and until the Supreme Court rules otherwise, or the legislature changes the law, the department can accept the superior court's ruling that 7 AAC 07.012 is invalid, and can act accordingly, even while 7 AAC 07.012 remains on the books.

Importantly, however, that the regulation has been declared invalid does not necessarily mean that an entity subject to regulation as a health care facility is entirely without defenses to enforcement of the certificate of need requirements. Under proper circumstances, an entity that relied in good faith on 7 AAC 07.012 before, or without reason to know that, it was declared invalid may succeed in proving that grounds exist for the department to forebear from enforcing a particular requirement of the program or to "grandfather" an existing facility into it, possibly using an equitable estoppel theory.[50]

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separated from one another and still leave (a) with some independent meaning, separating subparagraphs (1) and (2) of subsection (b) and retaining only the part that does not depend on the federal Medicaid billing designation would change the meaning. The regulation was adopted as a single regulation. The superior court, at page 1 of its written order, spoke to 7 AAC 07.012 as a whole, not just to subsection (b). The court's order, therefore, appears to have invalidated the whole regulation, though for purposes of IAP's appeal, only subsection (b) is at issue.

[49] IAP is a self-described provider of imaging services. *See, e.g.,* November 28, 2005 Articles of Incorporation (Exhibit A, p. 10 to February 14, 2007 Motion for Summary Judgment). It uses MRI machines and CT scanners, among other equipment. April 25, 2006 Letter from Dr. Inampudi to Commissioner Jackson at 1 (Exhibit F to February 14, 2007 Motion for Summary Judgment). Thus, even if the superior court had not invalidated 7 AAC 07.012 as a whole, but instead had invalidated only subparagraph (b)(2), IAP would be an IDTF under the regulation. In addition, a plain meaning reading of the phrase "independent diagnostic testing facility" as used in AS 18.07.111(8) necessarily encompasses the facility of a self-described provider of imaging services that uses MRIs and CT scans and does not fall under the physician's office exemption.

[50] Nothing in this conclusion is intended to prejudge the outcome of any other adjudication in which person allegedly relied on 7 AAC 07.012 prior to its repeal, or to predict the outcome of any future decision by or on behalf of the department regarding IAP's alleged reliance on 7 AAC 07.012.

B. THE DEPARTMENT IS NOT ESTOPPED FROM REQUIRING IAP *TO APPLY* FOR CERTIFICATES OF NEED.

The doctrine of equitable estoppel applies against a government agency under some circumstances.[51] The test for estoppel against the government consists of four elements:

> (1) the governmental body asserts a position by conduct or words; (2) the private party acts in reasonable reliance thereon; (3) the private party suffers resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury.[52]

Normally, the inquiry necessary to apply this test is very fact-intensive, especially as to the first three elements.[53] The parties' briefing demonstrates that they dispute the reasonableness of IAP's reliance on the department's previous determinations that certificates of need would not be required for the Mat-Su Valley facility.[54] This suggests that an evidentiary hearing is necessary on the estoppel issue. The uniqueness of the fourth element dictates otherwise, however.

The four-element test for estoppel against the government is conjunctive. Use of the word "and" between the third and fourth elements confirms what would otherwise be intuitive in context—that a party invoking estoppel against the government must prove that all four elements are met. For estoppel against the government, the fourth element is different from the corresponding element in the test for estoppel between private parties. Both share the common feature of being an "interest of justice" element. In cases of estoppel between private parties, the fourth element provides that "the estoppel will be enforced only to the extent that justice requires[.]"[55] Between private parties, justice limits only the extent to which estoppel will be enforced, not whether estoppel will apply at all.

In contrast, when a private party seeks to estop the government, the "interest of justice" element precludes application of the estoppel doctrine altogether when the private party cannot

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[51] *See, e.g., Crum v. Stalnacker*, 936 P.2d 1254, 1256 (Alaska 1997) (applying estoppel against the government in a retirement benefits case to correct an inequity resulting from the agency not providing the retiree with the form needed to secure the benefit sought).

[52] *Crum*, 936 P.2d at 1256; *accord Wassink v.Hawkins*, 763 P.2d 971, 975 (Alaska 1988) (applying the same four-element test in a case asserting an estoppel defense against government enforcement action).

[53] *Cf. Wassink*, 763 P.2d at 975 (reversing trial court's grant of summary judgment because raised genuine issues of material fact regarding, among other theories, estoppel stemming from the government's attempt to enforce an interim permit requirement as a prerequisite to a land sale contract).

[54] *Compare* February 14, 2007 Motion for Summary Judgment at 21-28 & March 14, 2007 IAP's Combined Reply at 25-26 *with* February 28, 2007 Opposition (by department staff) at 7-9 & March 23, 2007 Reply (by department staff) at 5-9 (arguing that IAP was on notice of the possible consequences of the pending *Banner Health* litigation before it constructed the facilities).

[55] *Tufco, Inc., v. Pacific Environmental Corp.*, 113 P.3d 668, 671 (Alaska 2005).

or does not show that applying the doctrine would "limit public injury." Thus, if the private party cannot show that "estoppel serves the interest of justice so as to limit public injury," it is unnecessary reach the other three elements. Accordingly, when the public injury aspect of the fourth element can be determined without regard to any disputed facts—*i.e.,* the public injury inquiry can be answered as a matter of law—summary adjudication is appropriate

The parties and Mat-Su Regional Medical Center briefed estoppel but apparently were not in agreement about the role of the fourth element. IAP acknowledged that the Alaska Supreme Court added a requirements-of-justice (fourth) element to the test in 1984, but IAP did not address the fourth element's limit-public-injury component.[56] The department's certificate of need staff did not address the fourth element at all, but instead focused on the reliance element and invoked the "equitable doctrine of clean hands."[57] Mat-Su Regional observed that the fourth element "traditionally plays a greater role" in estoppel against the government cases and discussed the public interest protected by the certificate of need statutes.[58] The parties looked to the equities of regulating the IAP facilities in the face of the department's previous determination and did not focus on whether the department should be estopped from requiring IAP to ***apply*** for

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[56] February 14, 2007 Motion for Summary Judgment at pp. 22-23 (relying on the supreme court's 1984 decision in *Municipality of Anchorage v. Schneider,* 685 P.2d 94, and quoting the court's reasoning, while failing to acknowledge the full effect of the subsequent decisions by the court articulating the four-element test in the aftermath of *Schneider*); March 14, 2007 IAP's Combined Reply at pp. 21-26 (asserting at p. 26 that "[a]ll elements of the equitable estoppel doctrine are met" but without anywhere addressing the limit-public-injury component of the fourth element).

[57] February 28, 2007 Opposition and Cross-motion at pp. 7-9. The staff's invocation of the clean-hands doctrine is misplaced. The "unclean hands" case on which the staff relied involved a dispute between a bank and a partnership concerning whether the partnership ratified a loan obligation created by its general manager. *Alaska Continental Bank v. Anchorage Commercial Land Associates*, 781 P.2d 562, 565, n. 6 (cited at page 7, n. 11 of the staff's brief). The court concluded that the lending bank could not invoke estoppel because it had "unclean hands." The partnership's manager was also on the board of the bank's holding company. Apparently, this sort of insider dealing led the trial court to find that the bank's loan review was inadequate, either because it had knowingly overlooked irregularities or negligently failed to seek a legal opinion/consult with the partners.

The staff's argument concerning IAP's actions is quite different. It rests on the notion that IAP does not have "clean hands" because (through affiliates) it testified on and supported the certificate of need legislation regarding IDTFs and was aware of the *Banner Health* litigation, and thus had notice of the possible outcome and potential effect of the legislative changes and litigation, but now is trying to avoid the adverse consequences. February 28, 2007 Opposition and Cross-motion at pp. 7-8; March 23, 2007 Reply at pp. 5-9. To the extent they are pertinent at all, these arguments go to whether IAP's reliance on the department's previous determinations and the regulation was reasonable. If and when the time comes to address the reasonable reliance element of estoppel, facts and arguments going to the state of IAP's knowledge may become material. Arguing that "IAP has 'dirtied' its proverbial hands" (staff's February 28, 2007 opposition brief at p. 7) by participating in the legislative process and knowing about litigation, however, likely will not be availing.

[58] February 28, 2007 Mat-Su Regional Opposition at pp. 13-15.

certificates of need, which at this stage is the proper focus for an estoppel argument because the legislature has already decided to regulate facilities such as IAP's.

Estopping the department from requiring IAP to ***apply*** for certificates of need does not serve "the interests of justice so as to limit public injury." Public injury will not result from requiring IAP to apply for the certificates of need. IAP may incur some inconvenience and expense in preparing the applications, but so do all entities subject to the certificate of need requirements or like requirements to apply for permission from a government agency to undertake a regulated activity. The legislature has, in effect, already grappled with whether requiring entities to apply for (and obtain) certificates of need is in the public interest or causes public injury. By enacting a law that conditions expenditure of fund for certain facilities on the owner/operator first applying for and obtaining a certificate of need from the department, the legislature decided that it is in the public interest to regulate such facilities. That which has already been determined to be in the public interest can hardly be said to cause ***public*** injury at all, let alone one that the interests of justice demand be limited through application of estoppel.

Moreover, even if the burdens or restrictions placed on the private sector through regulation of such facilities arguably could lead to public injury in the form of higher cost for or reduced access to medical care, such injuries would not flow from requiring someone to apply for a certificate. They would flow from ***denying*** applications for certificates, or perhaps from imposing conditions on operation of facilities that would increase costs or deter construction or expansion of needed facilities. Thus, unless and until IAP applies for certificates of need *and* the department denies IAP's applications or issues IAP certificates containing onerous conditions, it would be premature to conduct an evidentiary inquiry into potential public injury.

IAP cannot show that the fourth element of the estoppel against the government test has been met. As a matter of law, therefore, the department cannot be estopped from requiring IAP to ***apply*** for certificates of need, irrespective of whether the department might ultimately be estopped from imposing particular conditions or from denying IAP's applications.

IV. Conclusion

IAP is subject to regulation under the certificate of need program. The regulation under which it was previously determined to be exempt has been declared invalid and the department has accepted the ruling. IAP, therefore, must apply for certificates of need for the Abbott Road

and Mat-Su Valley facilities, and it is hereby ordered to do so within 60 days after the effective date of this decision.

The doctrine of equitable estoppel does not provide IAP with a defense against the requirement to apply for certificates of need. Whether that or another doctrine might compel the department to "grandfather" the IAP facilities into the program, or in some other way to ameliorate the effect of reliance on 7 AAC 07.012 in deciding how to rule on the application once received, is a question that will not be ripe for decision until IAP applies for certificates of need and the department acts on IAP's applications.

For the foregoing reasons, summary adjudication of this matter is granted in favor of the department certificate of need staff but without prejudice to IAP's ability to raise an estoppel defense to enforcement in a future proceeding, after the department has acted on applications for certificates of need for the IAP facilities.

DATED this 29th day of October, 2007.

By: _____
Terry L. Thurbon
Chief Administrative Law Judge

Adoption

The undersigned adopts this Decision under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this _____ day of _____, 2007.

By: _____
Signature

_____
Name

_____
Title

Non-Adoption Options

1. The undersigned, in accordance with AS 44.64.060, declines to adopt this Decision, and instead orders under AS 44.64.060(e)(2) and that the case be returned to the administrative law judge to

take additional evidence about _____;

make additional findings about _____;

conduct the following specific proceedings: _____.

DATED this _____ day of _____, 2007.

By: _____
Signature

_____
Name

_____
Title

2. The undersigned, in accordance with AS 44.64.060 (e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows:

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this _____ day of _____, 2007.

By: _____
Signature

_____
Name

_____
Title

3. The undersigned, in accordance with AS 44.64.060(e)(4), rejects, modifies or amends one or more factual findings as follows, based on the specific evidence in the record described below:

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this _____ day of _____, 2007.

By: _____
Signature

_____
Name

_____
Title

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4. The undersigned, in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this _____ day of _____, 2007.

By: _____
Signature

_____
Name

_____
Title