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

In the Matter of	)	
Imaging Associates of Providence	)	
(Mat-Su Valley Imaging Facility)	)	OAH No. 08-0447-DHS
	)	

DECISION

I. Introduction

Imaging Associates of Providence (IAP) appealed the Department of Health and Social Services' denial of an application for a certificate of need for IAP's Mat-Su Valley facility. The proceedings were bifurcated so that, before reaching the merits of the denial decision, a final decision can be issued on whether the department is precluded under the doctrine of equitable estoppel from denying IAP's application for a certificate.[1] IAP, the department's certificate of need staff, and *amicus* Mat-Su Regional Medical Center briefed the estoppel issues and presented oral argument.[2]

The briefing and argument established that the extent of IAP's reliance on a position asserted by the department in two letters was limited, and that the amount of resulting prejudice to IAP was relatively small, but that IAP met its burden by proving reasonable reliance on the letters. The estoppel decision, therefore, turns on whether issuing, rather than denying, IAP a certificate of need for the Mat-Su Valley facility serves the interests of justice. Because the potential consequences of shutting down an operating health care facility outweigh the potential effects of continued competition for imaging services in the Mat-Su Valley, IAP should be issued a certificate of need with a condition imposed to restrict expansion of the IAP facility, and thereby mitigate impacts from competition that arguably would be delayed or avoided if IAP were forbidden to operate without demonstrating need for its services.[3]

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[1] September 24, 2008 Case Planning Order, point 2; *also* September 17, 2008 Recording of Case Planning Conference.

[2] Diagnostic Health Anchorage, the appellant in a related case (OAH No. 08-0446-DHS) concerning IAP's Abbott Road, Anchorage, facility for which the department issued a certificate of need, participated as an *amicus* in the estoppel phase of this case but did so without separately briefing or arguing the estoppel issues.

[3] This decision on estoppel assumes, without deciding, that the department's determination that IAP has failed to demonstrate need for the Mat-Su Valley facility is correct. If that determination were incorrect, or if the November 29, 2007 Decision on Summary Adjudication (2007 Decision) that IAP's facility requires a certificate of need were reversed, other Mat-Su Valley imaging services providers would have no reason to expect the certificate of need laws to restrict competition from IAP. Thus, it is arguable, but not certain, impacts from competition that otherwise might not occur for years, if at all, will continue to be felt by competitors in the area as a result of this decision and that such impacts could be mitigated to some extent by restricting IAP's expansion.

II. Facts and Legal History[4]

IAP is a limited liability company (LLC), organized in November 2005, whose purpose is "[t]o provide medical imaging services …."[5] IAP began building its Mat-Su Valley facility in December 2005.[6] The facility was completed and began operating in June 2006.[7] IAP is a joint venture between several radiologists doing business as an LLC and Providence Alaska Medical Center, a hospital.[8] 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.[9]

About a year and half before IAP organized and began developing the facility, legislation added to the health care facilities for which certificates of need are required the category "independent diagnostic testing facility" (IDTF).[10] The legislation did not define the term or otherwise set out criteria for determining whether an operation will be an IDTF. The department addressed this shortcoming by adopting a regulation defining the term.[11] The regulation took effect January 11, 2006, the month after IAP began construction of the facility.

The statute amended to add IDTFs to the facilities requiring certificates of need had long since exempted offices of private physicians from the requirement but did not then (and does not

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[4] The record for the consolidated appeals culminating in the 2007 Decision constitutes part of the record in this matter. *See* September 24, 2008 Case Planning Order, point 3; August 22, 2008 Case Referral Notice (explaining that "[t]his matter is related to OAH case #06-0743 DHS and 06-0764 DHS and the record on appeal in that consolidated case is part of this record …"). The facts in this estoppel decision are based on that record, including fact findings from the 2007 Decision, as supplemented by the parties' filings in connection with the estoppel briefing and the 466-page agency record underlying the department's denial of IAP's application.

Mat-Su Regional's December 12, 2008 proffer of additional documents (marked 000467-000552) that it maintains are part of the agency record has not been accepted for this phase of the appeal. The documents are merely lodged with the Office of Administrative Hearings and thus are not part of the record for the estoppel decision except to the extent they duplicate documents elsewhere in the record.

[5] November 28, 2005 Articles of Incorporation (Exhibit A, p. 10 to February 14, 2007 Motion for Summary Judgment & Exhibit 2 to December 12, 2008 Staff's Brief); *also* 2007 Decision at 2.

[6] February 14, 2007 Motion for Summary Judgment at 2, and exhibits cited therein; *also* 2007 Decision at 2; November 12, 2008 Affidavit of Chakri Inampudi, M.D. (Inampudi Aff.), ¶5. Whenever in this decision the briefs of the parties are cited as the source for undisputed facts, the citation incorporates without further reference any exhibits relied on by the parties in their briefs.

[7] February 14, 2007 Motion for Summary Judgment at 6; 2007 Decision at 2; November 13, 2008 Affidavit of David Pfeifer (Pfeifer Aff.), ¶ 3; November 12, 2008 Affidavit of Christopher Kottra, M.D. (Kottra Aff.), ¶ 7 (stating that "IAP Mat-Su opened its doors in June 2006 …").

[8] Inampudi Aff., ¶2; 2007 Decision at 2; February 14, 2007 Motion for Summary Judgment 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.

[9] February 14, 2007 Motion for Summary Judgment at 2; *also* Pfeifer, ¶ 2; 2007 Decision at 2.

[10] 2004 Sess. Laws of Alaska, ch. 48 (adding IDTFs to the AS 18.07.111(8) definition of "health care facility").

[11] *See* 7 AAC 07.012(b).

now) define "offices of private physicians."[12] The regulatory definition for IDTF did not overtly address how to distinguish between IDTFs requiring certificates and the private offices of radiologists. It created a two-part test, the first relating to the equipment used and the second providing that the facility "is, or would be, required to enroll as an [IDTF] for Medicare and Medicaid reimbursement purposes …" under a federal regulation.[13] The federal regulation does not prescribe requirements for enrollment as an IDTF, but rather authorizes payment under the physician fee schedule for diagnostic procedures performed by IDTFs, as well as physicians and certain other medical service providers.[14] In describing what kind of facility qualifies as an IDTF for purposes of being able to secure physician fee schedule reimbursement, the federal regulation explains that an IDTF "is independent of a physician's office or hospital" but requires that the facility have one or more supervising physicians.[15]

Thus, when IAP formed and began constructing the Mat-Su Valley facility, Alaska's statutes dictated that an IDTF obtain a certificate of need but the department had yet to formally and finally speak to what constitutes an IDTF or to formally interpret "offices of private physicians" as that phrase is used in the statutory definition of "health care facility." Up to and including the point at which IAP began construction in December 2005, more likely than not it acted on its own interpretation of the statutory definition of "health care facility." Some of IAP's principals acknowledged as much when they attested to facts showing the care with which they organized their venture in a manner they thought consistent with being offices of private physicians rather than an IDTF.[16]

A few months after IAP began construction, in response to an inquiry by Mat-Su Regional, the department sought information from IAP so that it could determine whether IAP was required to obtain a certificate of need.[17] IAP asserted that the facility fell within the statutory exclusion from certificate of need requirements for the offices of private physicians in

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[12] *See* AS 18.07.111(8)(B) (providing that "the term ['health care facility'] excludes … the offices of private physicians or dentists whether in individual or group practice").

[13] 7 AAC 07.012(b)(2) (referencing 42 C.F.R. 410.33 as the federal regulation governing whether a facility must enroll as an IDTF for Medicare and Medicaid purposes).

[14] 42 C.F.R. § 410.33(a).

[15] 42 C.F.R. § 410.33(a)&(b).

[16] Inampudi Aff., ¶¶ 2-4 & 6-7; December 2, 2008 Affidavit of Leonard Sisk, M.D. (Sisk Aff.), ¶¶ 4 & 6; November 12, 2008 Affidavit of Denise Farleigh, M.D. (Farleigh Aff.), ¶ 5; Kottra Aff., ¶ 3; December 2, 2008 Affidavit of Erik J. Mauer, M.D., M.S. (Mauer Aff.), ¶ 8.

[17] February 14, 2007 Motion for Summary Judgment at 2-3 (describing correspondence beginning in March 2006 between the third party and the department, and the department and IAP).

group practice.[18] 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.[19]

The initial determination letter was dated May 4, 2006—the month before IAP first opened the facility for business. 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."[20] 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 …."[21]

Later, after IAP had begun operating the Mat-Su Valley facility, the department reversed its position as a result of a ruling in superior court litigation concerning a Fairbanks imaging facility (Alaska Open Imaging Center). This is referred to as the *Banner Health* case.[22] The superior court ruling in that case purported to invalidate 7 AAC 07.012, the regulation defining IDTF.[23] The court declared that "7 AAC 07.012 is inconsistent with AS 18.07.111[,]"[24] concluding that the department had the authority to promulgate regulations defining an IDTF 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.[25]

The commissioner, in effect, rescinded the department's previous determination regarding IAP's facility, concluding that the facility is substantially similar to the one found by

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[18] April 25, 2006 Letter from Dr. Inampudi to Commissioner Jackson at 1 (Exhibit F to February 14, 2007 Motion for Summary Judgment).

[19] May 4, 2006 Letter from Commissioner Jackson to Stephens; June 14, 2006 Letter from Commissioner Jackson to Stephens (respectively Exhibits G and J to February 14, 2007 Motion for Summary Judgment).

[20] May 4, 2006 Letter from Commissioner Jackson to Stephens at 1 (Exhibit G to February 14, 2007 Motion for Summary Judgment).

[21] June 14, 2006 Letter from Commissioner Jackson to Stephens at 2 (Exhibit J to February 14, 2007 Motion for Summary Judgment).

[22] Banner Health, which operates Fairbanks Memorial Hospital, was the plaintiff in this lawsuit against the department concerning operation of Alaska Open Imaging Center.

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

[24] September 7, 2006 (Corrected) Preliminary and Permanent Conditional Injunction and Declaratory Judgment at ¶ 2 (Steinkruger, J.); Transcript from August 8, 2006 Findings of Fact and Conclusions of Law at 7-12 (Steinkruger, J.).

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

the superior court to be an IDTF in *Banner Health* and that a certificate of need, therefore, is required.[26] IAP administratively appealed that determination.

That administrative appeal culminated in a decision adopted as final by the commissioner on November 29, 2007, in *Consolidated Matters of Imaging Associates of Providence*, OAH Nos. 06-0743-DHS and 06-0764-DHS. That decision concluded, in pertinent part, as follows:

> 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 [a] certificate[] of need for the … Mat-Su Valley facilit[y], and it is hereby ordered to do so within 60 days after the effective date of this decision.
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> The doctrine of equitable estoppel does not provide IAP with a defense against the requirement to apply for [a] certificate[] of need. Whether that or another doctrine might compel the department to "grandfather" the IAP facilit[y] 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 [a] certificate[] of need and the department acts on IAP's application[].
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> 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 [an] application[] for [a] certificate[] of need for the IAP facilit[y].[27]

The rationale for this ultimate conclusion rested in part on two conclusions of law:

- 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.

- 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

[26] 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); October 10, 2006 Letter from Dr. Inampudi to Commissioner Jackson (regarding both IAP facilities, and requesting a hearing on the Mat-Su facility decision) (Exhibit R to February 14, 2007 Motion for Summary Judgment).

[27] 2007 Decision at 15-16.

> can act accordingly [to require IAP to obtain a certificate of need], even while 7 AAC 07.012 remains on the books.[28]

The decision was mailed to the parties on December 3, 2007. The transmittal notice described this as the commissioner's final decision in the matter, explained that it would become effective 30 days after mailing, and gave notice of the right to seek reconsideration, if filed within 15 days, and of the right to appeal the decision to the superior court within 30 days.[29] IAP did not file a request for reconsideration or appeal to the superior court but rather applied to the department for a certificate of need in January 2008.[30]

The department conducted a public hearing on the application in March 2008 and received written comments as well.[31] The comments came from proponents and opponents of issuing a certificate of need to IAP. Some were principals or employees of IAP or Mat-Su Regional but most of those submitting written comments appeared from the experiences they recounted to be consumers of medical services, many of whom told of specific experiences with imaging services provided by IAP and Mat-Su Regional. Opponents focused on the potential impacts to the hospital from competition by IAP. Proponents spoke of competition being good for consumers in terms of keeping costs down and providing a choice of providers in the area. Some expressed concern that if the IAP facility closes they will have to travel to Anchorage to obtain services from providers in whom they have more confidence, who have superior equipment, or who are accepted as preferred providers for insurance purposes.[32]

The certificate of need staff considered the comments, as well as the data submitted in IAP's application, which it measured against the standards applicable to determining need for imaging services.[33] The staff recommended approval for IAP's Anchorage facility, covered by the same application and review document. As to the Mat-Su Valley facility, however, the staff

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[28] 2007 Decision at 10 & 12.

[29] December 3, 2007 Notice Transmitting Final Decision.

[30] January 2008 Application for Permit Imaging Associates of Providence LLC (Agency Rec. 41-177).

[31] *See* Transcripts from March 11 & 12, 2008 Public Hearings (Agency Rec. 178-283); Assorted Letters and Emails (Agency Rec. 284-337, 347-368, 381-403 & 437).

[32] One commenter, a physician, spoke of elderly patients who historically had delayed getting frequently needed scans because they did not want to drive to Anchorage in bad weather now being able to keep to the recommended schedule because of the IAP option. *See* March 11, 2008 Letter from Marilyn B. Sandford, M.D. (Agency Rec. 308).

[33] *See generally* June 26, 2008 Review of a Certificate of Need Application to Develop Imaging Facilities in the Mat-Su Valley and Anchorage Submitted by Imaging Associates of Providence (Review Document) (Agency Rec. 438-463).

> recommended that the Mat-Su Valley IAP facility's request for a waiver and approval of a Certificate of Need be denied because the facility also does not meet the minimum standards for utilization, and there are no unreasonable barriers that should be met for access or availability. Unlike Anchorage, by 2011, the Mat-Su Valley service area will not on average be equal to or above the minimum standard utilization of 3,000 scans required for both CT and MRI scanners for approval of additional scanners. Therefore, there are no unreasonable barriers that would indicate that an exception to the standard be granted for the Mat-Su IAP facility. A self-imposed limit on where contract physicians can practice is not considered an unreasonable barrier for the purposes of the Certificate of Need program.[34]

The commissioner accepted that recommendation, concluding that "[t]he Palmer independent diagnostic testing facility operating by Alaska Imaging Associates of Providence has not met the applicable standards for approval of a Certificate of Need."[35]

This appeal followed. It was bifurcated into estoppel and merits phases. With the briefing for the estoppel phase, IAP submitted copies of ten letters/emails from the public comments in the agency record and a series of affidavits.[36] Collectively, these support the following findings:

1. Some Mat-Su Valley consumers of imaging services prefer IAP's facility because they perceive the services (including equipment and physical environment, as well as cost, billing practices and staff efficiencies) to be better suited to their needs or desires.[37]
2. Some Mat-Su Valley consumers of imaging services like having IAP as a local option, to save them from making trips to Anchorage or being forced to use a provider they would prefer not to use.[38]
3. Some physicians and other medical specialists consider the quality and variety of equipment and services available at IAP's facility to be superior.[39]

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34 *Id*. at 15 (Agency Rec. 453).

35 July 22, 2008 Letter from Hogan to Sisk (Agency Rec. 465).

36 Exhibits 2A-J and 3-13 to November 14, 2008 Imaging Associates of Providence's Memorandum Re Equitable Estoppel.

37 Exhibit 2A (Bonkoski email); Exhibit 2D (McLaughlin-Sisk letter); Exhibit 2G (Riley email); Exhibit 2H (Soper email); November 7, 2008 Affidavit of Dimitrios Blanas, ¶¶ 3-8 (attesting to his size and claustrophobia being accommodated in IAP'a MRI when a competitor's equipment could not).

38 Exhibit 2D (Perdew email); Exhibit 2G at 3 (Riley email); Exhibit 2H (Soper email); Exhibit 2I (Stouff letter).

39 Exhibit 2C (Lemangie letter, discussing digital mammography at IAP and describing scheduling/wait time problems with imaging services at the hospital and communication/paperwork lapses by the hospital); Exhibit 2F (Ramirez letter, discussing turn around times on reports from images in acute injury cases); Exhibit 2J (Weimer

4. Equipment at the IAP facility is used not just for diagnostic testing but also for treatment of patients' medical conditions.[40]

From these findings it is reasonable to infer that if IAP's Mat-Su Valley facility were to close, some imaging services consumers would delay needed procedures or be forced to choose between convenience, on the one hand, and more appropriate or higher quality services, on the other.

The estoppel issues were fully briefed and oral argument was scheduled when, on December 19, 2008, the Alaska Supreme Court issued an opinion in the *Banner Health* case.[41] The superior court's ruling had been appealed to the Supreme Court by the imaging facility party, not by the department. The court addressed intervention and a constitutional issue concerning the statutory addition of IDTFs to the health care facilities requiring certificates of need, vacated an injunction, and remanded the case to the superior court "because there appears to be an unresolved genuine issue of material fact about whether [the] facility satisfies AS 18.07.111(8)(B)'s exclusion for 'offices of private physicians'."[42] The opinion did not address the validity of the regulatory definition of "independent diagnostic testing facility."

The Supreme Court apparently decided it need not reach the validity-of-the-regulation issue because a change in the entity owning the imaging equipment refocused the inquiry on whether this new owner qualified for the physician's office exclusion.[43] The closest the court

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letter, discussing good services received by patients, as well as reasonableness of fees charged); November 7, 2008 Affidavit of Kellie Evenden (Evenden Aff.), ¶¶ 4-5 & 7-8 (comparing billing practices and describing convenient scheduling and quick report turn around times); Farleigh Aff., ¶¶ 8-12; Inampudi Aff., ¶¶ 8 & 10 (indicating that IAP acquired state-of-the-art imaging equipment and discussing the benefits to patients of scheduling procedures in outpatient settings); Kottra Aff., ¶¶ 9 & 10 (comparing quality of imaging studies and discussing quality of care from advanced equipment); November 12, 2008 Affidavit of Dion Roberts, M.D., ¶¶ 2-5 (discussing importance of imaging studies in treatment of pediatric patients with pulmonary problems and explaining that "IAP-Mat-Su is a preferred imaging facility because its imaging studies are available for [him] to review on-line" in any of several locations and "at meetings with other health care providers who are on the patient's medical management team"); November 7, 2008 Affidavit of Janice Brooks, M.D. (Brooks Aff.), ¶¶ 2 & 6-7 (describing quick reporting times, accommodation of large or claustrophobic patients in open bore MRI, and the first digital mammography equipment in the Valley); *accord* Sisk Aff., ¶ 8a&b.

[40] Farleigh Aff., ¶ 5; Inampudi Aff., ¶¶ 3 & 8 (stating that "we perform therapeutic procedures" and that IAP's "radiologists perform interventional procedures including paracentesis, thoracentesis, endovenous varicose vein ablation, sclerotherapy and various ultrasound-guided procedures …"); Kottra Aff., ¶ 3; Mauer Aff., ¶ 2-7 (discussing interventional radiology which includes "targeted treatments performed using imaging guidance").

[41] *Bridges v. Banner Health* (Slip Op. 6329 Dec. 19, 2008).

[42] *Id*. at 2, 10-15 (intervention) & 16-20 (constitutional issues).

[43] The physician who had been the founder and part owner of the original entity organized a new LLC, which he owned solely, and inquired whether the new, 100% physician-owner entity would have to obtain a certificate of need to purchase the imaging equipment from the original entity. *Id*. at 6 & 12.

came to opining about the validity of the regulation was in its discussion of whether the original entity qualified for the physician's office exclusion. In examining the superior court's reasoning for concluding that the entity was an IDTF because the legislature intended to extend the certificate of need requirements to that specific entity and similar ones, the Supreme Court wrote:

> [G]iven that "independent diagnostic testing facility" is a term of art that was coined by the Center for Medicare and Medicaid Services and that appears to have no general usage outside the Medicare classification context,[] it is logical to conclude that the legislature intended the term to have the same meaning given it by ***the agency***."[44]

The court did not make clear whether by "the agency" it meant the department, and hence was referring obliquely to the Alaska regulation defining an IDTF, or the federal agency—Center for Medicare and Medicaid Services—that coined the term IDTF. The court did not cite the Alaska regulation or otherwise explicitly rule on its validity. The quoted text suggests that the Supreme Court does not view incorporation of federal reimbursement-related regulations in the department's regulatory definition of IDTF as inconsistent with legislative intent, even if the result might be to exclude from regulation a specific facility the members of the legislature had in mind when amending the statutory definition of "health care facility" to include IDTFs. This yields less than clear direction on what constitutes an IDTF for Alaska certificate of need purposes.

Similarly, the Supreme Court opinion provides less than clear direction on how to differentiate between an IDTF and an excluded private physician's office. The court wrote:

> The manual for the federal Medicare program enumerates the standards the Center for Medicare and Medicaid Services uses to decide whether an entity is an independent diagnostic testing facility. [Footnote to the Center's manual.] We accordingly remand to the superior court with instructions to use standards ***such as these*** to determine whether [the facility] satisfies the private physician's office exclusion.
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> No party has argued that we should allow the commissioner to either interpret the controlling statute or make additional fact findings, but given the basis for our remand, we do not mean to foreclose the superior court from considering whether a remand to the commissioner would be appropriate.[45]

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44 *Id*. at 21 (footnote omitted; emphasis added).

45 *Id*. at 22 (emphasis added.).

The court's footnote lists four factors from the Center's manual, following the court's lead-in "that an entity generally should not be considered independent from a physician's office if" the factors are present. Because the court's direction was merely to apply factors "such as" the ones under which an entity "generally should not be considered independent" and left open the option for the superior court to remand the matter to the commissioner, possibly for interpretation of the controlling statute, the opinion stopped short of directing how the phase "offices of private physicians" is to be interpreted for purposes of determining whether an imaging business is excluded from or subject to the requirement to obtain a certificate of need.

After the Supreme Court's *Banner Health* opinion was issued and shortly before oral argument was due to take place, IAP filed two documents triggered by the court's opinion. The first was a notice which characterized the opinion as making the proceedings in this appeal moot.[46] The second was a motion seeking reconsideration of the long-final 2007 Decision.[47] The motion was denied due to a lack of authority to reopen the final 2007 Decision in the context of this appeal.[48] The filings were discussed in a status conference and during oral argument. The administrative law judge informed IAP that it is free to voluntarily dismiss its appeal of the department's denial of the certificate of need, whether because it believes the *Banner Health* opinion moots the appeal or for other reasons.[49] IAP elected to proceed with this appeal.

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[46] December 19, 2008 Notice of Controlling New Authority that Motts this Proceeding.

[47] December 22, 2008 Motion for Reconsideration of Decision on Summary Adjudication.

[48] *See* December 22, 2008 Recording of Status Conference; *also* December 31, 2008 Order Denying Motion for Reconsideration at 2, concluding that

> the administrative law judge has no authority to make recommendations to the commissioner about how the department should exercise its regulatory and enforcement powers regarding the long-final 2007 decision in light of the *Banner Health* opinion or any other new developments. To make such recommendations would be an improper usurpation of the role of the Attorney General as the legal advisor to state officials. Nothing in this order, however, precludes the parties from exercising any options they may have outside the context of the present appeal to address the effect of the *Banner Health* opinion on the 2007 decision. If the parties are able to reach an agreement on that subject that moots the present appeal, they can stipulate to dismissal. Indeed, at this point, IAP is still free to voluntarily dismiss the present appeal without the consent of the department.

(Footnotes omitted.)

[49] *See* December 22, 2008 Recording of Status Conference; December 31, 2008 Order Denying Motion for Reconsideration at 2; January 6, 2009 Recording of Oral Argument.

III. Discussion

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.[50] An IDTF is a "health care facility" but a physician's office is not.[51] IAP began making expenditures to construct the Mat-Su Valley facility before 7 AAC 07.012, which defines an IDTF, was ruled invalid by the superior court. In the 2007 Decision, the commissioner determined that IAP must obtain a certificate of need to continue operating the facility, ruling (among other things) that IAP was not exempt under the physician's office exception from the requirement to obtain a certificate of need but reserving the question whether the doctrine of equitable estoppel might "compel the department to 'grandfather' the IAP facility into the program[,]" which would be ripe for decision only after IAP applied for a certificate and the department acted on IAP's application.[52]

The main issue in this phase of the present appeal, therefore, is whether the department should be estopped from denying IAP a certificate of need under the doctrine of equitable estoppel, irrespective of need for additional imaging services in the Mat-Su Valley. To resolve that issue, the four-factor test for estoppel against the government will be applied in subpart B below. First, however, it is necessary to address whether IAP's appeal should be dismissed without reaching estoppel or the merits.

A. IAP'S APPEAL OF THE DENIAL DECISION IS NOT DISMISSED.

The parties and *amicus* Mat-Su Regional Medical Center raised two threshold questions in their briefing and oral arguments: should the appeal be dismissed (1) under a waiver theory or (2) as moot in light of the *Banner Health* opinion by the Supreme Court? The nature of the decision challenged and the scope of the appeal flowing from that decision dictate the answers.

1. IAP has not waived its appeal of the denial decision.

Department staff argued that IAP waive its appeal rights by applying for a certificate of need, rather than appealing the 2007 Decision, because that decision is final.[53] The consolidated matters that led to the 2007 Decision were subject to the Administrative Procedure Act (APA)

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50 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).

51 AS 18.07.111(8).

52 2007 Decision at 16.

53 December 12, 2008 Staff's Brief at 6-8.

adjudication provisions.[54] As such, the 2007 Decision became final more than a year ago, when 30 days had elapsed after it was mailed to the parties.[55] The staff's position, therefore, is correct to the extent IAP's present appeal seeks to revisit issues decided by the 2007 Decision.

The 2007 Decision, however, did not decide whether IAP would receive a certificate of need, or what conditions would be placed on such a certificate. Indeed, until IAP applied for a certificate, and the department acted on that application, no decision on issuance or non-issuance of a certificate existed to be appealed. The department's regulation authorizing an applicant aggrieved by a denial to appeal the decision (7 AAC 07.080(a)[56]) entitles IAP to appeal the July 22, 2008 denial decision, without regard to the fact that IAP was, in effect, ordered to file an application following an administrative appeal of a prior decision. IAP has not waived its right to appeal the denial decision because that decision did not even exist when the 2007 Decision was made and thus was not resolved by the earlier appeal.

Similarly, IAP has not waived its right to assert that the department is estopped to deny IAP a certificate of need. That issue also was not resolved by the 2007 Decision. Insofar as IAP's request for relief in the present appeal is vague,[57] and thus creates the impression that IAP seeks a ruling that the department is estopped to require IAP to *get* a certificate of need, the staff's waiver argument is understandable. The 2007 Decision, however, made it quite clear that IAP would be free to raise estoppel in the event the department denied IAP's application or imposed onerous conditions on approval.[58] The focus of the estoppel inquiry in this appeal is necessarily narrowed by the limited scope of the appeal—the propriety of denying IAP's application—but IAP has not waived the right to invoke estoppel in this appeal of the denial decision.

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[54] 7 AAC 07.080(b) (providing that certificate of need hearings will be conducted "in accordance with AS 44.62.330 – 44.62.640" which are the adjudication provisions of the APA).

[55] AS 44.62.520(a).

[56] Subsection (a) states: An applicant or a person substantially affected by activities authorized by a certificate of need, who is dissatisfied with a decision of the department to require a certificate of need or a decision of the commissioner to grant, deny, or modify a certificate of need, is entitled to a hearing if the request for a hearing is made in writing and received by the department no later than 30 days after the applicant receives the decision.

[57] *See* November 14, 2008 Imaging Associates of Providence's Memorandum Re Equitable Estoppel at 49 (asserting that "the principal of equitable estoppel should be applied in this matter" but leaving vague precisely what result IAP seeks).

[58] 2007 Decision at 16 (concluding that the grant of summary adjudication in favor of the department's certificate of need staff was without prejudice to IAP's right to raise an estoppel defense after the department has acted on the application); *also id*. at 15 (leaving open the possibility that the department might be estopped from imposing onerous conditions or denying IAP a certificate after the application had been made).

2. IAP's appeal of the denial decision is not moot.

IAP maintains that the Supreme Court's opinion in *Banner Health* makes the appeal moot, but it has declined to voluntarily dismiss this appeal and leave the matter of continued operation of the Mat-Su Valley facility to the department's enforcement discretion and, if necessary, the courts. In effect, IAP seeks a ruling in this limited-scope appeal that the Supreme Court's opinion makes the 2007 Decision wrong.

The Supreme Court's *Banner Health* opinion does not squarely address the issues resolved by the 2007 Decision. Apart from the fact that the 2007 Decision itself was not before the court, the opinion does not explicitly rule that 7 AAC 07.012 is valid, or provide clear, mandatory guidance on how to distinguish an IDTF from a physician's office. By instructing the superior court to consider factors "such as" four from a federal billing manual and suggesting the superior court could remand the matter to the commissioner to "interpret the controlling statute[,]" the opinion appears to leave open the possibility that the interpretation the commissioner already gave to the statutory phrase "offices of private physicians in group practice" in the 2007 Decision might ultimately be applied to the Fairbanks facility at issue in *Banner Health* as well as to other facilities.

Even if the Supreme Court's opinion provided clear, unequivocal direction indisputably establishing that IAP's Mat-Su Valley facility does not require a certificate of need, this appeal still would not be the proper context for that determination. As explained in the order denying IAP's December 22, 2008 reconsideration request, the 2007 Decision is final, the scope of this appeal is limited to the denial decision, and the administrative law judge, therefore, has no authority in this limited-scope appeal to make recommendations to the commissioner (or his delegee) about the enforceability of the 2007 Decision in light of the *Banner Health* opinion.

For the forgoing reasons, IAP's appeal of the denial decision will not be dismissed as moot without IAP's express consent to voluntary dismissal and will not be dismissed under a waiver theory. Accordingly, the estoppel question is ripe for decision.

B. THE DEPARTMENT IS ESTOPPED TO DENY IAP A CERTIFICATE OF NEED FOR THE MAT-SU VALLEY FACILITY.

The doctrine of equitable estoppel applies against a government agency under some circumstances.[59] 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.[60]

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.

1. IAP reasonably relied on the department's position asserted in the letter and suffered a relatively small but tangible amount of prejudice as a result.

The first three elements of the test are inextricably linked. Prejudice must flow from reliance; reliance must be reasonable; reliance must be on the government's asserted position, not on something else. Reliance on the person's own understanding of the law, however reasonable, is not reliance on the government entity's asserted position. Something more in the form of words or conduct by the government entity is required.

In *Municipality of Anchorage v. Schneider*, for instance, the municipality had entered into a settlement agreement pursuant to which it issued a building permit, and the Schneiders had taken actions in reliance on the agreement beyond actions previously taken in reliance on a misunderstanding of the original zoning requirements.[61] The Schneiders had constructed two detached dwellings on a lot in an area originally zone for multiple dwellings but with apparent misunderstanding about the need for multiple dwellings to be connected to comply with the code.[62] In settlement of a code enforcement action for constructing detached units, the parties reached an agreement that included issuance of a permit for the Schneiders to connect the

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59 *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).

60 *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).

61 685 P.2d 94, 96-98 (Alaska 1984).

62 *Id.* at 95-96.

detached dwellings by constructing three additional units.[63] In the meantime, unknown to the negotiating parties, zoning for the area had been changed to reduce the number of dwellings allowed per lot to two.[64] The Schneiders expended $24,000 in reliance on the agreement and permit before the municipality discovered the error, sought to revoke the permit and was estopped from doing so.[65]

The Schneiders did not get the benefit of estoppel based on their understanding of the code requirements and original zoning, and the actions they took in reliance on that understanding (building the detached structures) were not in response to assertion of a position by the municipality. Thus, their reliance and the amount of prejudice they suffered were evaluated and measured from the municipality's assertion, in the settlement agreement and permit, that the Schneiders could construct three more units.

Similarly, IAP's own understanding of AS 18.07.111(8) and 7 AAC 07.012 is not the take off point for evaluating reliance and measuring prejudice. The earliest point at which the department asserted a position through words or conduct about certificate of need requirements for IAP's Mat-Su Valley facility was May 4, 2006, in the first of the commissioner's two letters concluding that IAP did not need a certificate. Though the letters constitute neither an agreement nor a permit, they are analogous to the Schneiders' agreement and permit insofar as they satisfy the first element of the test for estoppel. The challenge lies in determine what actions IAP took in reliance on the letters.

By the time the commissioner issued the May 4, 2006 letter, IAP's Mat-Su Valley facility had been under construction approximately five months (since the prior December) of a six-to-seven month construction project. Pre-construction expenditures, such as to form the LLC, acquire the property and permits, contract with the construction contractor, purchase construction materials, and likely even to start acquiring the imaging equipment, would have been made long before the letter was issued. Thus, it is implausible that most or even much of the estimated ten million dollar investment in the project[66] was in reliance on the May letter's asserted position.

The facility opened for business sometime during the month following issuance of the May letter, the same month in which the June 14, 2006 letter reassured IAP that a certificate of

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63 *Id*.
64 *Id*. at 96.
65 *Id*.
66 Inampudi Aff., ¶ 9.

need was not required. No doubt some actions to complete the facility and get it open for business remained to be taken after the May letter, and possibly some after the June letter. The difficulty is in isolating activities taken in reliance on the letters—activities that could have been avoided if the May letter instead had asserted the position that IAP must get a certificate before making further expenditures or operating the facility.

Dr. Inampudi attested to having shown the letters to some prospective employees "[w]hen recruiting technologists and other staff" for the facility.[67] Technologist Kellie Evenden began working for IAP in May 2006 after interviewing for the position that same month.[68] More likely than not, therefore, some hiring of technologists or staff, as well as whatever construction wrap up, furnishing and equipping of the facility took place in the last month or so before opening for business, could have been avoided and thus was in reliance on the assurance provided by the letters.

IAP's reliance on the letters to go forward to complete the facility and begin operating it was reasonable because the May and June letters appeared to be consistent with the applicable law. The regulation defining IDTFs, in part by reference to federal reimbursement standards, had not yet been found invalid by the superior court. That happened three months later, in August 2006. The department had not yet interpreted the statutory phrase "offices of private physician in group practice" as excluding joint ventures between physicians and hospitals. That happened more than a year later, in the 2007 Decision. In the interim, it was not unreasonable to accept the conclusions of the May and June letters, especially when the federal manual meant to help sort out reimbursement rates for IDTFs does not view ownership as a critical factor and the state regulation defining IDTF depends in part on the federal reimbursement scheme.

The department's certificate of need staff and Mat-Su Regional argue that IAP's reliance was not reasonable for essentially three reasons: (1) IAP's involvement in the legislative process adding IDTFs to the facilities requiring certificates and its assumed familiarity with the resulting *Banner Health* litigation; (2) IAP's self-classification as offices of private physicians; and (3) IAP's failure to request a determination from the department on whether a certificate was required.[69] They suggest that it would be inequitable to find IAP's reliance reasonable when a

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[67] Inampudi Aff., ¶ 7.

[68] Evenden Aff., ¶¶ 2 & 10.

[69] *See* 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

competitor, not IAP, prompted the commissioner's inquiry leading to issuance of the letters and when IAP advocated for a finding that its facility is the offices of private physicians, possibly knowing that the legislature's intent about which facilities to regulate as IDTFs was in dispute.

IAP certainly could have asked for a determination under 7 AAC 07.031(a)(4) on whether the planned Mat-Su Valley imaging facility would constitute a health care facility, but it was not required to do so to invoke an independently applicable equitable doctrine. Nothing in the regulation suggests otherwise. The doctrine of equitable estoppel does not require that government entity's assertion of a position result from the action of the party invoking estoppel. No evidence was presented to show that IAP misled the commissioner to reach the conclusions in the letters. In the correspondence from IAP responding to the commissioner's inquiry, the part ownership role of the hospital was disclosed.[70] Self-identification as a physician's office and advocacy for such a determination does not constitute inequitable conduct when no misconduct (*e.g.*, deceiving, misleading) has been shown. Such advocacy was not misconduct simply because IAP may have understood from its owners' involvement in the legislative process and assumed familiarity with the *Banner Health* litigation that reasonable people may differ on whether a particular imaging operation is an IDTF or physician's office. Even if IAP's owners in fact knew there was some risk 7 AAC 07.012 would be found invalid, the affidavit evidence shows they believed they would qualify for the physician's office exemption. Until the 2007 Decision made clear that the hospital's part ownership removed the facility from the exclusion, it was reasonable for IAP to rely on the May 4, 2006 letter.

Quantifying the prejudice resulting from IAP's reliance on the letters is impossible on the existing record. How much of the approximately ten-million-dollar investment reflects expenditures occurring in the last month or so before opening for business was not established. How much of that subset of expenditures could have been avoided after May 4, 2006, also was not established. The extent to which IAP became bound by employment or other contracts in the three months between the May letter and the August *Banner Health* ruling was not established. More likely than not, IAP incurred some liabilities and expended some funds it could have

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before it constructed the facilities and invoking clean hands doctrine based on role of IAP owners in legislative process); *see* December 12, 2008 Equitable Estoppel Briefing Submitted by Mat-Su Regional Medical Center at 15-16; January 6, 2009 Recording of Oral Argument.

[70] *E.g.*, April 25, 2006 Letter from Inampudi to Jackson (Exhibit F, p. 2 to February 14, 2007 Motion for Summary Judgment (explaining that the "radiology practice is equally owned by the Radiology group and Providence Alaska Medical Center).

avoided incurring and expending if it halted the project in May and did not open for business in June. In *Schneider* expenditure of $24,000 was prejudice enough to warrant estopping the government from, in effect, shutting down the Schneiders' construction project. For IAP, an expenditure of $24,000 would be less than a quarter of one percent of the overall investment. More likely than not, IAP made expenditures or committed to liabilities similar to or greater than the Schneiders' in the final month or so of the six to seven month construction project.

For the foregoing reasons, IAP has met its burden of proving that it suffered some prejudice resulting from reasonable reliance on the May and June 2006 letters. The amount of prejudice resulting from actions taken by IAP after the May letter may be small, perhaps even trivial in monetary terms relative to the overall investment in the project. Nevertheless, it is sufficient to trigger the interest of justice inquiry on which this decision ultimately depends.

2. Issuance of a certificate of need to IAP for the Mat-Su Valley facility, with conditions imposed on expansion, will serve the interests of justice so as to limit public injury.

For estoppel against the government, the fourth element is different from the corresponding one in the test for estoppel between private parties. Both share the 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[.]"[71] When a private party seeks to estop the government, however, the "interest of justice" element precludes application of the estoppel doctrine altogether when the private party cannot or does not show that applying the doctrine would "limit public injury." The competing private interests of IAP and Mat-Su Regional, therefore, are not the focus of the interest of justice inquiry.

The potential for public injury from either allowing IAP to continue operating, by granting it a certificate of need, or enforcing the denial decision dictates whether the interest of justice will be serve by applying estoppel. Large scale job loss results in public injury in any sector, but loss of one or two jobs in the health care sector likely would not, unless the loss compounded adverse effects on patient care.[72] Similarly, the private financial interests of others,

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

[72] IAP's affidavit evidence established that one technologist and possibly one radiologist would lose their jobs if the Mat-Su Valley facility closed. Evenden Aff., ¶ 10; Brooks Aff., ¶ 12; Farleigh Aff., ¶ 9 (explaining that "Dr. Brooks would likely be out of a job" if IAP's Mat-Su Valley facility had to close); Inampudi Aff., ¶ 13 (indicating that Dr. Brooks likely would be terminated if the facility closed, "as would other [unidentified] IAP-Mat-Su employees…").

such as the physician-owners of half an interest in the IAP LLC, are not the proper focus of the public injury inquiry, unless the diminishment of those interests would in turn lead to adverse effects on patient care or increased health care costs.

In the context of certificates of need for health care facilities, the public injury to be limited is reduction in the availability, quality and accessibility of health care services.[73] "[M]aintaining the good health of the citizens of Alaska" is the core value to be achieved by regulating investment in health care facilities through the certificate of need program.[74] Alaska has retained its certificate of need program (despite the disappearance of federal incentives) "as a planning tool [meant] to ensure that providers of health care services build adequate capacity, but not excess capacity, to supply the *medical* needs of a community."[75] Certificate of need programs "are now viewed as a way of protecting the cross-subsidies that currently support unprofitable parts of the health care system," allowing revenue-producing services to "offset money-losing services [such as hospital] emergency room operations."[76] In the health care sector, the usual rule that market forces will create a disincentive to building excess capacity does not apply.[77]

In short, excess capacity in the form of too many health care facilities competing to supply a limited demand for services in a particular area, instead of forcing providers to be more efficient and cut costs so they can lure consumers to their facilities, may actually drive up costs at facilities such as community hospitals that necessarily must provide a variety of services and cannot relocated to a higher-demand area without leaving the community's medical needs unmet. Accordingly, it is reasonable to proceed from the premise that too much imaging services capacity in the Mat-Su Valley might injure the public over time, to some degree, depending on how that excess capacity affects the cost and quality of services at Mat-Su Regional and how

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73 Under AS 18.07.041, the department must issue a certificate of need

> [i]f the availability and quality of existing health care resources or the accessibility to those resources is less than the current or projected requirements for health services required to maintain the good health of citizens of [Alaska].

74 *Id*.

75 Decision and Order, *Consolidated Matters of Alaska Medical Development-Fairbanks LLC, Kobuk Ventures LLC, and Fairbanks Memorial Hospital*, OAH Nos. 06-0744, 06-0745 & 06-0746 at 2 (April 18, 2007) (emphasis original) (Comm'r of Health and Social Services, adopted in relevant part October. 9, 2007).

76 *Id*. (footnote omitted).

77 *Id*. (explaining that "the health care market is widely regarded as imperfect: price sensitivity among consumers is poor, there are strong informational disparities between consumers and suppliers, and those controlling supply can also affect demand by recommending more or different procedures, or changing the location where procedures are done, as capacity expands").

long the excess capacity persists. Thus, one faced with the decision whether to authorize expenditures to construct a new imaging facility in the area quite reasonably could plan conservatively, using the applicable regulatory standards and projections the staff used in reaching its recommendation to deny IAP's application.

When, as here, the question is whether through estoppel to "grandfather" an existing facility into the certificate of need program, however, the approach must be different. If the decisionmaker is to limit public injury while also ameliorating prejudice from reasonable reliance on a position asserted by the agency, the planning approach applicable to new facilities must be set aside in favor of considering the circumstances that already exist and the future ability of the market to absorb the excess capacity.

Faced with an existing facility, which opened for business partly in reliance on assurances from the agency and thereafter created an established patient demand for its services in the current location, the decisionmaker should consider two questions: (1) how would shutting down the facility affect current and future patients; (2) how soon is the local health care services market likely to absorb excess capacity? With those questions answered, it will be possibly to determine whether potential public injury in the form of impacts to Mat-Su Regional's patients can be mitigated such that the interest of justice favors issuing IAP a certificate-by-estoppel.

Effects on IAP Patients. IAP has shown that closure of its Mat-Su Valley facility would adversely affect an unidentified and unquantifiable group of patients needing or desiring use of equipment not available elsewhere in the Mat-Su Valley, some of whom may delay medically advisable imaging appointments rather than travel to Anchorage. Specifically, the public hearing and affidavit evidence established that some elderly patients who are hesitant to travel to Anchorage in bad weather conditions might depart from the recommended schedule for imaging appointments, that large/claustrophobic patients might not have ready access to appropriate equipment, that physicians of pediatric patients with pulmonary problems get quicker and more versatile access to imaging data if the patients use IAP, and that some images taken at other Mat-Su Valley facilities necessarily will be of lower quality due to equipment strength or resolution limits.[78]

[78] *See supra* notes 32, 37 & 39; *also* November 12, 2008 Affidavit of George Barker, M.S. (Barker Aff.) at ¶¶ 17-22 (comparing the age, qualities and strengths of MRI and CT scanners available at the Mat-Su Valley facilities providing imaging services).

It is impossible to predict how many current and future Mat-Su Valley patients would skip important appointments because of weather and how badly any would be affected by this, or by delays in treatment due to long turnaround times and limited physician access to results, or how many, if any, would miss vital treatments or accurate diagnoses because of lower quality of images. Nevertheless, it is reasonable to conclude that at least some current and future patients might suffer reduced availability, quality or accessibility of health care from these causes if IAP's facility closed. As demand for services grows with the population, the number of patients suffering such effects likely would increase.

Ability to Absorb Excess Capacity. IAP has shown that the potential for increased demand for imaging services in the Mat-Su Valley likely exceeds the certificate of need staff's projections. The staff projected "that the Mat-Su Valley utilization is only expected to grow to an average of 2,599 CT scans per unit and an average of 2,492 MRI scan per unit by 2011."[79] These figures fall short of the 3,000 scans minimum usage standard required to authorize a new facility.[80]

The population in the Mat-Su Valley, however, is growing at a much greater rate than elsewhere in Alaska.[81] Taking into account that population growth rate and other factors affecting consumption of imaging services, it is reasonable to project a higher growth in use of MRI and CT scans for the area over the next few years than the staff projected.[82] One health care economist and planner concludes that

> using the regression analyses [and p]rojecting out three years … from 2009 to 2012 yields projected volumes in the Mat-Su Valley of 8,743 MRI procedures and 14,470 CT scans[;] projecting out five years, to 2014, … the volumes are 10,005 MRI procedures and 16,469 CT scans.[83]

He also concludes that MRI and CT procedures data from IAP for the first ten months of 2008 shows volumes "more than 15 percent above 2007 levels[,]" which he believes makes it reasonable "to use the trends embodied in the regression analyses to project growth over the next

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79 Review Document at 4 (Agency Rec. 442).

80 *Id*. at 4 & 20 (Agency Rec. 442 & 458).

81 *Id*. at 9 (comparing Anchorage's average population increase of five percent over the 2005-2007 period to the Mat-Su's 13 percent increase for the same period); *also* Barker Aff., ¶¶ 15-16 & Table 2 (discussing growth and in-migration to the Mat-Su, and projecting same using data from 1990 forward and projecting more than 40,000 additional residents by 2030).

82 Barker Aff., ¶¶ 9-12 & Table 1.

83 Barker Aff., ¶ 11.

few years."[84] Excluding equipment closed or used only as emergency backup from the inventory of MRI and CT scanners, he predicts that under the standards for authorizing new facility expenditures, need for the IAP scanners would be demonstrated within the planning horizon.[85]

Mitigation. The commissioner (or his delegee) can attach conditions to the issuance of a certificate of need.[86] This power to impose conditions has been used based on evidence introduced and decisions reached through an administrative adjudication to prevent expansion of a facility ahead of demonstrated need for increased services.[87] Inherent in the need to limit public injury when deciding whether estoppel serves the interest of justice is the power to design a remedy that mitigates impacts to competing health care facilities whose patients (like those of Mat-Su Regional) might be injured if persistent excess capacity were to raise the cost or reduce the quality of services at the hospital.

As explained above, there is good reason to believe that excess capacity in imaging services available in the Mat-Su Valley will not persist very far into the future. The potential public injury from closing IAP's facility, though unquantifiable, ranges from patient inconvenience to the possibility that some patients' conditions will go untreated or undiagnosed. The interest of justice, therefore, favors "grandfathering" IAP's facility into the certificate of need program but at the same time restricting its ability to expand in a manner that might extend excess capacity to the point at which injury to Mat-Su Regional's patients results.

Accordingly, to limit public injury, IAP's certificate-by-estoppel should be conditioned to require IAP to obtain department approval for the installation and operation of additional "major diagnostic testing equipment" as defined in 7 AAC 07.012(b)(1). If such a condition is imposed, and thereby prevents IAP from adding equipment without prior approval and consideration of the unused imaging capacity at other Mat-Su Valley facilities, the estoppel will serve the interests of justice.

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84 Barker Aff., ¶ 12.

85 Barker Aff., ¶¶ 11 & 13-21.

86 7 AAC 07.070(b)(8).

87 *Matter of South Anchorage Ambulatory Surgery Center*, OAH No. 06-0152-DHS at 20 (May 24, 2007) (restricting number of surgery suites), *modified on other grounds* Decision and Order (Comm'n of Health and Social Services July 7, 2007); May 24, 2007 decision *affirmed on other grounds* in *South Anchorage Ambulatory Surgery Center v. State of Alaska, Department of Health and Social Services*, 3AN-07-10738-CI (July 2, 2008) (Torrisi, J.).

IV. Conclusion

IAP reasonably relied on the department's position asserted in the May 4, 2006 letter, and to a lesser extent in the June 14, 2006 letter, and suffered prejudice as a result, albeit a relatively small amount. Application of estoppel, to require the department to issue IAP a certificate of need, serves the interest of justice and limits public injury, provided that IAP accepts and adheres to the following condition:

> Notwithstanding any other laws or standards allowing installation or operation of major diagnostic testing equipment, Imaging Associates of Providence shall not install or operate at its health care facility located at 2820 S. Woodward Loop, Palmer, Alaska, any major diagnostic testing equipment as defined in 7 AAC 07.012(b)(1) (as in effect January 11, 2006, and as amended from time to time) not already installed at the facility as of the January 2008 application for a certificate of need and disclosed in that application, without first obtaining approval by the Department of Health and Social Services, which approval will not be given unless the department has considered the then-existing imaging capacity of health care facilities the department determines to be within the applicable service area.

The department's certificate of need staff is hereby directed to prepare a certificate of need incorporating the condition above for execution on the effective date of this decision under AS 44.62.520—that is, 30 days after this decision is mailed to the parties as a final decision following adoption, unless reconsideration or a stay is granted.

DATED this 28th day of January, 2009.

By: *Signed*
Terry L. Thurbon
Chief Administrative Law Judge

Adoption

The undersigned, acting under a delegation from the Commissioner of Health and Social Services, 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 3rd day of March, 2009.

By: *Signed*
Patrick B. Hefley
Deputy Commissioner

[This document has been modified to conform to technical standards for publication.]