

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

In the Matter of )  
Imaging Associates of Providence )  
\_\_\_\_\_ )

OAH No. 06-0743-DHS

**ORDER DENYING INTERVENTION**

Mat-Su Regional Medical Center applied to intervene as a party in the appeal by Imaging Associates of Providence (IAP) of the Department of Health and Social Services' determination that IAP must obtain a certificate of need for its Mat-Su Valley facility. IAP opposed intervention by Mat-Su Regional. The department did not object to Mat-Su Regional's intervention. The parties argued the matter orally during the November 14, 2006 prehearing conference. For the reasons explained during the conference and summarized below, Mat-Su Regional's request to intervene is denied, but Mat-Su Regional will be allowed to participate as an amicus in briefing on any dispositive motions filed and any post-hearing brief allowed.

Under 2 AAC 64.180(a), the administrative law judge may allow a person to intervene if a statute or regulation provides for intervention. The regulation setting out the certificate of need-related standards for bringing an administrative appeal such as this—7 AAC 07.080—extends the right to appeal to a variety of differently-situated parties. For instance, when (as here) the decision challenged is a “decision to require a certificate of need[,]” a person “who is dissatisfied with [that] decision” may appeal it.<sup>1</sup> The regulation, however, does not speak to whether persons interested in the outcome of such an appeal (i.e., an entity that is not dissatisfied with the decision but rather is a proponent of it) can join in as a party to the appeal.

In its briefing and oral argument, Mat-Su Regional acknowledged that no statute or regulation specifically provides for intervention in this type of case but urged that it be allowed to intervene through an exercise of inherent discretion. Under AS 44.64.040(b), the administrative law judge who hears a case such as this on behalf of the commissioner of the Department of Health and Social Services exercises the commissioner's powers authorized by law for the conduct of the case. Without ruling on whether the commissioner has inherent discretion to allow an entity without a right to appeal<sup>2</sup> to intervene in a certificate of need case

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<sup>1</sup> 7 AAC 07.080(a).

<sup>2</sup> Because the decision challenged in this appeal is one to require IAP to obtain a certificate of need and, as the proponent of the inquiry that led to the decision, Mat-Su Regional is not “a person ... who is dissatisfied with [that] decision[,]” Mat-Su would not be entitled to appeal the decision under 7 AAC 07.080(a).

and participate as a full party, I decline to exercise such discretion and am limiting Mat-Su Regional's participation to that of an amicus for the following reasons:

- This case was referred to the Office of Administrative Hearings (OAH) after 2 AAC 64.180 took effect.<sup>3</sup>
- The referral was not contingent upon an agreement to use procedures that excluded OAH's own 2 AAC Chapter 64 regulations. Thus, 2 AAC 64.180 applies.<sup>4</sup>
- OAH's authority to allow intervention under 2 AAC 64.180(a) is limited to those cases in which an applicable statute or regulation provides for intervention.
- One purpose of that limit was to ensure that OAH did not overreach its mandate to develop *procedural* regulations, instead creating substantive rights that neither the legislature nor the agency with regulatory authority over the subject matter saw fit to create.
- If the department had intended to allow participation as a full party by persons who do not otherwise have the ability to appeal a certificate of need-related decision, it could have adopted a regulation providing for intervention, but it did not.
- Under circumstances such as in this appeal, if the administrative law judge were to permit a person to intervene in the absence of clear statutory or regulatory authority to do so, that would effectively make the intervenor a private attorney general, with the ability to pursue in the administrative appeal and through appeal to the courts what is for all practical purposes an enforcement action, and would thereby take the decision about who will represent the public interest in such actions away from lawmakers and regulatory agencies.

In sum, neither the lawmakers who enacted the certificate of need statutes, nor the regulatory agency charged with implementing them, decided that private parties should be able to assume the agency's role in determining whether a particular facility must apply for a certificate of need. Mat-Su Regional can play a role in this appeal, by providing information and making witnesses available to the department's counsel, just as it played the role of concerned citizen-competitor in initiating the inquiry about whether IAP's facility should be required to


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<sup>3</sup> The OAH regulations in 2 AAC Chapter 64 took effect July 2, 2006; the appeal was referred on October 20, 2006.

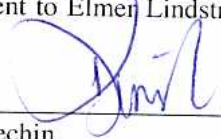
<sup>4</sup> See 2 AAC 64.100(b)(3) (indicating that OAH's regulations apply to voluntary referrals unless a referral agreement between the referring agency and the chief administrative law judge provides otherwise).

obtain a certificate of need. In addition, Mat-Su Regional will be allowed to file amicus briefs as described above. It will not, however, be allowed to intervene as a party.

DATED this 16<sup>th</sup> day of November, 2006.

By:   
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Terry L. Thurbon  
Chief Administrative Law Judge

The undersigned certifies that on November 17, 2006, this order was distributed to the following: Peter Gruenstein, counsel for Imaging Associates of Providence; Stacie Kraly, Assistant Attorney General; Michael Spaan, counsel for Mat-Su Regional Medical Center. A courtesy copy was sent to Elmer Lindstrom, Office of the Commissioner.

  
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Kim Rechin