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GARVEY SCHUBERT BARER

May 3, 2012

VIA FACSIMILE (907) 465-3068 AND U.S. MAIL

William J. Streur
Commissioner
Department of Health & Social Services
P.O. Box 110601
Juneau, AK 99811-0601

Re: Kahtnu Ventures, LLC
Appeal of Denial of Certificate of Need

Dear Commissioner Streur:

I represent Kahtnu Ventures, LLC ("Kahtnu"). Pursuant to 7 AAC 07.080 and the instructions in your letter to Kahtnu dated April 4, 2012, Kahtnu hereby requests a hearing to appeal the decision issued April 4, 2012, denying Kahtnu's CON Application.

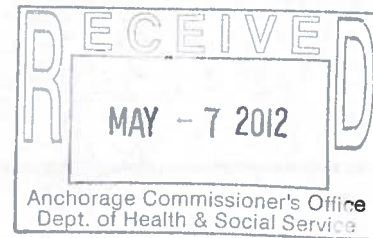
The basis for the hearing is that the CON Staff ("Staff") appears to have purposefully distorted much of the information to be considered in order to arrive at an outcome-determined result. Kahtnu will do its best to decipher the Staff Review of issues to identify the specific challenges to the Staff's analysis, but reserves the right to amend its appeal to identify additional issues once clarification of the Staff's analysis is provided.

The Staff Recommendation at page 11 summarizes its claimed justification for recommending against a CON being issued to Kahtnu:

1. Kahtnu did not clearly outline the cost and size of the project;
2. Kahtnu did not define the service area; and
3. Kahtnu failed to show need for additional surgical capacity through the general surgery standards and methodology.

Kahtnu disputes and appeals each of the above findings as made by Staff and stated on page 11 of the Staff Review. As detailed more fully below, Kahtnu met each of the standards identified by the Staff:

Please reply to STEPHEN D. ROSE
srose@gsblaw.com TEL EXT 1375



DHSS

MAY 07 2012

Commissioner's Office



1. Kahtnu clearly stated the cost and size of the project and the CON Staff's "confusion" on this issue is contrived. Any "discrepancies" in costs were explained in the CON Application;¹
2. The service area for this project is defined by Chapter 16 of the Kenai Peninsula Borough, Alaska, Code of Ordinances. In particular, Title 16, Chapter 16.08, defines the service area applicable to the Kahtnu CON Application; and
3. When one uses the correct service area and correct input data, the need for additional surgical capacity is established through the general surgery standards and methodology. In the alternative, if need is not established, a waiver should be given allowing the construction of the 1-surgery suite ASC. Staff's "analysis" was also incomplete because it failed to even address Kahtnu's request for a waiver should the Staff conclude that their "need" calculation did not demonstrate a "need."

BACKGROUND

Kahtnu Ventures is a relatively new corporation established on or about August 31, 2011.

The CON Application reviewed by Staff is dated November 18, 2011 and was declared complete by Staff on December 21, 2011.

During an initial review of the Application by Staff, Staff noted that sections of the Application dealing with projections of facility income and other financial data and estimates of equipment costs were duplicates of the information submitted for a 2-surgery suite ASC in a prior year. Staff notified Kahtnu that the data submitted was identical to a prior application.

In response, Kahtnu explained why the data used presented valid projections for the Kahtnu project and why the data presented valid estimates. At no time did Staff indicate that it believed these estimates were not valid estimates.²

¹ When Staff first reviewed the Kahtnu CON Application and posted it on the CON web page, Staff described the Kahtnu project accurately as follows: "Kahtnu Ventures, LLC, proposes to construct a single story freestanding ambulatory surgical center in Kenai, Alaska. The facility will be 8,365 square feet with a projected cost of \$9,076,834. The projected completion date is Spring 2013." Comparing Staff's very clear understanding and description of the cost, size, and location of the project as articulated on the web page description with the final "analysis" Staff presented to the Commissioner underscores the fact that the Staff "analysis" was outcome-determined.

² In one of its paragraphs Staff alludes to the Kahtnu CON Application containing "inconsistencies and errors." It is not clear whether Staff is trying to imply that the projections and estimates being used by Kahtnu, that were also used for a prior facility, are claimed to be "inconsistencies and errors." Clearly, the Application calls for projections and estimates, so any attack regarding the accuracy of these



PROJECT DESCRIPTION

Staff's Intentional Distortions of Kahtnu's Cost Estimates and Cost Projections

Prior to completing its Review, Staff created the following "Project Description" for the Kahtnu project:

Kahtnu Ventures, LLC, proposes to construct a single story freestanding ambulatory surgical center in Kenai, Alaska. The facility will be 8,365 square feet with a projected cost of \$9,076,834. The projected completion date is Spring 2013.

Attachment A.

The Staff-created description of the Kahtnu project is accurate.

It should also be noted that the Office of Rate Review had no difficulty reading and understanding that the Kahtnu Application sought "to construct a single story Ambulatory Surgical Center (ASC) . . . with approximately 8,365 square feet that will have one surgical suite and a procedure room primarily designed for pre-procedure blocks." Appendix C to Staff Review. The Office of Rate Review was also able to determine that "[t]he facility is to be constructed in Kenai" and "[t]he total costs of the project is projected to be \$9,076,834." Appendix C to Staff Review.

However, for purposes of the completed Staff Review, Staff claims that it is unable to determine the square footage of the project or the projected cost of the project. A careful review of the Kahtnu Application shows that Staff's original description of this project is correct. The Kahtnu project proposes to construct a one-story, one-surgery suite ASC that will be 8,365 square feet with a projected cost of \$9,076,834.

Staff attempts to manufacture a claim that Kahtnu used 3 different projected cost figures and intermingled these cost figures throughout its Application. It is surprising that Staff would so mislead the Commissioner as this is simply not an accurate statement by Staff.

Staff's description of the project as detailed on its web page is accurate; a one-story, one-surgery suite ASC of 8,365 square feet with a projected cost of \$9,076,834.

In its Application at page 5, Kahtnu uses the exact same numbers showing a total cost of \$9,076,834, and Staff admits as much on page 1 of its Review.

projections and estimates by Staff is, at most, Staff indicating a difference of opinion regarding future events and outcomes as opposed to Staff being able to prove this data is in error.



Staff identifies the Certified Cost Estimate from Pfeiffer Development as stating a cost estimate of \$9,176,834 and claims that this is one of the “three separate figures given throughout the application” which cause so much confusion that Staff “is unable to determine” the total construction and equipment cost for the project.

It is true that there is a \$100,000 difference between the \$9,076,834 number used by Kahtnu and the \$9,176,834 number given as the Cost Estimate by Pfeiffer Development. However, Kahtnu identifies and explains this \$100,000 difference. At page 5 of its Application, Kahtnu states that Pfeiffer Development rounded up its estimate for equipment costs from \$1,900,000 to \$2,000,000 which resulted in their Cost Estimate being \$100,000 higher than the cost estimate being used by Kahtnu and that Kahtnu would continue to use the \$1,900,000 figure because they had an equipment bid in that amount:

Please note that the Certified Cost Estimate from the developer rounded the equipment cost up to \$2,000,000, but the equipment bid remains at \$1,900,000.

Kahtnu CON Application at p. 5.

Thus, the so-called “inconsistency” between the Kahtnu figure and the Certified Cost Estimate was fully explained. Also fully explained was the fact that Kahtnu would continue to use the \$9,076,834 total cost figure even though it disagreed with the Certified Cost Estimate by \$100,000.³

It was deceptive and misleading for the Staff to represent to the Commissioner that the \$100,000 difference between these two numbers made it impossible for Staff to determine the actual projected total construction cost for this project. It was unfair to the Commissioner to present these numbers as though both were being promoted by Kahtnu as accurate final numbers without explaining to the Commissioner that the \$100,000 difference was fully explained and accounted for in the Kahtnu CON Application.

At page 1 of the Staff Review the Staff also claims that Kahtnu used a total construction cost figure of \$8,020,000 and claims that this number can be found at page 42 of the Application. A more thorough and careful review of page 42 of the Kahtnu Application reveals that no such number exists on page 42. In fact, as far as Kahtnu can tell, the Staff figure of \$8,020,000 does not ever appear in the Kahtnu Application as a total cost of construction figure.

Page 42 of the Application is titled: “**Section VIII B. Financial Data—Construction Only.**” A copy of page 42 of the Kahtnu Application is attached to this letter and marked as Attachment B.

³ Reviewing the numbers Staff lists under each of these two cost estimates in its Review one can readily see that the Kahtnu explanation for the \$100,000 difference is replicated in the Staff’s numbers recited in their Review at page 1. The Kahtnu estimate at page 5 of its Application of \$9,076,834 is based on equipment costs of \$1,900,000 and the Certified Cost Estimate of \$9,176,834 is based on “furniture, fixtures, and equipment” costs of \$2,000,000.



What does appear on page 42 of the Application are the following pertinent entries:

2. Construction Cost (New Activity)	(omit cents)
a. Site acquisition (Section VIII A.2.f)	\$ 339,500
b. Estimated general construction	\$6,576,834
e. Major movable equipment	\$1,900,000
f. Other cost:	
(6) Land development and landscaping	\$ 260,500
g. Total project cost	\$9,076,834
h. Amount to be financed	\$9,076,834

Contrary to the Staff's assertions, the financial information presented by Kahtnu on page 42 of its Application (Attachment B, hereto) matches, **exactly**, the information presented by Kahtnu on page 5 of its Application.

Staff's Intentional Distortions of Kahtnu's Square Footage Estimate

Beginning at page 2 of the Staff Review the Staff continues its distortions of the information provided by Kahtnu. In this section the Staff includes some of Kahtnu's responses in the Application without providing any context for the response, such as identifying the question or issue identified in the Application that Kahtnu is responding to.

As with the information posted on its web page, Staff first notes correctly that page 5 of the Application also states that the proposed project is to construct a single story, freestanding ASC that will be approximately 8,365 square feet.

Staff next presents disjointed information purposefully selected from page 11 of the Application. In order to give this information some context, something Staff fails to do, below are listed both the topics preset in the Application along with the responses given by Kahtnu:



Section III. Description of Facilities and Capacity Indicators

F. Describe the structural framing, floor system, and number of floors (including the basement).

The facility will be a one-story structure on a concrete slab, steel structure frame, metal roof deck with rigid insulation and EPDM type roof membrane.

G. Total square footage of proposed facility/project.

N/A. This is a new facility.

H. Total square footage of proposed facility/project.

8365 square feet.

I. Area per bed, service unit, or surgery suite (if applicable).

4183 SF per operating room and procedure room.

J. Percentage of total floor area used for direct service (non-bed activity).

5,027.36 SF patient area 60.1%.

Kahtnu Application at p. 11.

Once the series of issues are presented in context it becomes easy to see that Staff cherry-picked the responses in order to take them out of context to concoct an argument that the total square footage was a moving target, when it was not. Staff left out any mention of issue H which asks that the total square footage be listed. As it did consistently throughout the Application, Kahtnu stated that the project was to build an ASC of 8,365 square feet.

The next issue, issue I, is created because the issue statement in the Application is ambiguous. In fact, issue I, as stated, is not even a complete coherent sentence. Kahtnu believed this issue to be asking it to apportion all of the square footage for the project to the two rooms it contemplated building—the one surgery suite and the one procedure room. Thus, Kahtnu listed 4,183 square feet to be allocated to the surgery suite and 4,183 square feet to be allocated to the procedure room. When one multiplies 4,183 times, two the result is 8,366 square feet, which accounts for 100% of the square footage of the total square footage for the ASC.⁴

⁴ Kahtnu concedes that there is a discrepancy of one square foot between the 8,366 figure calculated when these two numbers are added together and the 4,365 square foot number used throughout the rest of the Application.



Rather than seeking any clarification of this answer, Staff manipulates these numbers and pretends that Kahtnu is representing that each room is 4,183 square feet—something Kahtnu is clearly not doing. Staff then states that if each room is 4,183 square feet and if the drawing provided with the Application is to scale “the facility is larger than 8,365 square feet.” Rather than going through this intellectual sophistry to reach the absurd conclusion sought, all Staff had to do was add the numbers together and they would have been able to conclude that 4,183 square feet plus 4,183 square feet results in more square footage than 8,365 square feet.

It is telling that as part of the Staff Review presented to the Commissioner, the Staff leaves out Kahtnu’s specific answer to the one issue, issue H, that asks the applicant to state the total square footage of the project. Rather than presenting this information to the Commissioner and using the square footage number stated, Staff plays make believe that Kahtnu’s answer to issue H does not exist so that it can present its argument that “the size of the facility is also in question.” The size of the facility is **not** in question now and never has been. All Staff need do is to look at Kahtnu’s response to the one issue that asks Kahtnu to state the size of the facility and they would conclude, just as they did for purposes of creating the “project description” for their web page, that the project is to build a 8,365 square foot facility.

REVIEW STANDARDS

General Review Standard #1—Documented Need:

Staff concluded that this General Review Standard was not met. Kahtnu disagrees and appeals this conclusion.

First, per Kenai Peninsula Borough, Alaska, Code of Ordinances and the City of Seward Code of Ordinances, the Kenai Peninsula is divided into three service areas: (1) The Central Kenai Peninsula Hospital Service Area, (2) The South Kenai Peninsula Hospital Service Area, and (3) The City of Seward Public Health Facility Service Area. The area served by the Central Kenai Peninsula Hospital Service Area is defined in Title 16, Chapter 16.08, of the Kenai Peninsula Borough, Alaska, Code of Ordinances. The Kahtnu project targets the service area defined as the Central Kenai Peninsula Hospital Service Area.

Staff claims that the target population and/or service area was not identified by Kahtnu. This is not true. Compare Staff’s claim with what the Application actually states:

Staff’s claim at p. 3: “There is no indication as to the service area this project is targeting, aside for [sic] the use of the Kenai Peninsula Borough population and projections in the surgical methodology.”



Kahtnu's Application at p. 16: "Volume figures document the following utilization at the only facility, Central Peninsula Hospital, performing surgeries in the market area this project proposes to serve."

Kahtnu is at a loss to explain how the Staff could read the above sentence and simultaneously claim that "[t]here is no indication as to the service area this project is targeting."

The Kahtnu Application does identify the service area the Kahtnu project is targeting and does include a documentation of need. This standard is met. Kahtnu appeals the Staff's conclusion that it was not met.

General Review Standard #2—Relationship to Applicable Plans:

Kahtnu agrees with Staff that this standard is waived.

General Review Standard #3—Stakeholder Participation:

Kahtnu agrees with Staff that this standard is met.

General Review Standard #4—Alternatives Considered:

Kahtnu agrees with Staff that this standard is met.

General Review Standard #5—Impact on the Existing System:

Staff concluded that this General Review Standard was not met. Kahtnu disagrees and appeals this conclusion.

Once again, Staff distorts what is stated in the Kahtnu Application in order to reach its outcome-determined result. As noted in the discussion of General Review Standard #5, Kahtnu's Application is unambiguous that the service area for the proposed project is the same service area served by Central Peninsula Hospital:

Volume figures document the following utilization at the only facility, Central Peninsula Hospital, performing surgeries in the market area this project proposes to serve.

Kahtnu Application at p. 16.

Similarly, later in the Application, Kahtnu identifies that their proposed ASC will impact the one hospital in their proposed service area, Central Peninsula Hospital:



17. Having an ASC for the service area will ease the hospital burden. Using the 900 surgeries per year factor for combination suites, Central Peninsula Hospital's general surgery suites already operate above 100% of capacity. . . .

Kahtnu Application at p. 38.

In spite of the above statements in the Kahtnu Application, Staff claims this standard is not met because Kahtnu only addresses the impact of the proposed ASC on the one hospital in the service area it plans on serving and does not address the impact of the proposed ASC on the hospitals in Seward and Homer which are both clearly outside the Central Kenai Peninsula Hospital Service Area.

Further, Staff feigns that it does not know which hospital Kahtnu will seek to have a transfer agreement with. This is another ruse. The ASC will seek a transfer agreement with Central Peninsula Hospital.

This standard is met. Kahtnu appeals the Staff's conclusion that it was not met.

General Review Standard #6—Access:

Staff concluded that this General Review Standard was not met. Kahtnu disagrees for the reasons stated regarding General Review Standards #1 and #5 and appeals this conclusion.

REVIEW STANDARDS SPECIFIC TO SURGICAL CARE

A. General Surgery Services

Staff concluded that this Review Standard Specific to Surgical Care was not met. Much of Staff's analysis is based on their contrived issue of not knowing that the service area for the proposed ASC is the same service area as serviced by Central Peninsula Hospital. If Staff had conducted the need calculation properly, they would have concluded that there is a demonstrated need. Specifically, Kahtnu agrees that the three general surgery rooms at Central Peninsula Hospital should have been used in the need calculation but disagrees with the inclusion of the 2 surgery rooms from South Peninsula General Hospital, as that hospital is not in the proposed service area. Kahtnu does not challenge the inclusion of three general surgery rooms at Central Peninsula Hospital.

Kahtnu disagrees with the Staff's conclusion and appeals it. Kahtnu believes this Review Standard Specific to Surgical Care was met.



WAIVER

In addition to the above, at pages 36-38 of its Application, Kahtnu specifically requested a waiver of the standards and methodology because the strict use of these standards and methodology could lead to an erroneous result. Kahtnu presented sufficient reasons why a waiver should be granted in the event that the "need" calculation failed to show a need.

Staff failed to provide any analysis of the Kahtnu request for a waiver. Kahtnu appeals the Staff's failure to address Kahtnu's request for a waiver and believes that a waiver should have been recommended to the Commissioner.

FINANCIAL FEASIBILITY AND COST TO MEDICAID

As part of its application and public testimony, Kahtnu presented numerous examples of the financial feasibility of this project and the significant cost savings to the Medicaid program. Further, based on the Office of Rate Review's experience with the other ASCs in the state, the Office of Rate Review should have been able to reach the overall conclusion that Medicaid would experience significant cost savings if the Kahtnu ASC were built.

RECOMMENDATION

Kahtnu disagrees with the Staff Recommendation and appeals it for the reasons stated above. The Staff's Recommendation should be reversed and a CON should be issued to Kahtnu Ventures.

Very truly yours,

GARVEY SCHUBERT BARER

By 

Stephen D. Rose

Enclosures: Denial Letter dated April 4, 2012
Attachments A, B, and C

cc: Kahtnu Ventures, LLC (by email and U.S. Mail; w/enc.)
Lam Nguyen-Bull, Esq. (w/o enc.)
Stacie Kraly, Chief Assistant Attorney General (by email only; w/enc.)

**COMMISSIONER'S
DENIAL LETTER**

April 4, 2012

STATE OF ALASKA

DEPT. OF HEALTH AND SOCIAL SERVICES
OFFICE OF THE COMMISSIONER

SARAH PALIN, GOVERNOR

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

April 4, 2012

Certified, Return Receipt Requested

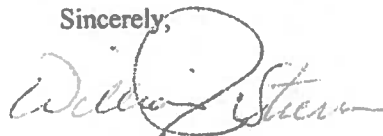
Kahtnu Ventures, LLC
c/o Sharon Anderson
340 West Tudor
Suite 102
Anchorage, Alaska 99503

Dear Ms. Anderson:

The review of the Kahtnu Ventures, LLC Certificate of Need (CON) application for a one-suite freestanding ambulatory surgery center in Kenai is complete. I have determined that the application has not met the applicable criteria for approval to the satisfaction of the State of Alaska Department of Health and Social Services.

Under 7 AAC 07.080, if you are dissatisfied with this decision you are entitled to a hearing if the request for a hearing is received in writing by the department no later than 30 days from the date of this letter.

Sincerely,



William J. Streur
Commissioner

Encl: Staff review of CON application

USPS #7007 0710 0000 1695 1688

Denial Letter
Page 1 of 1

ATTACHMENT A

Certificate of Need Web Page

[H&SS](#) > [Office of the Commissioner](#) > [Health Planning & Systems Development](#) > [Certificate of Need](#) > Certificate of Need Activities

Certificate of Need (CON) Activity Details

Project Name: Kenai - Ambulatory Surgery Center

Applicant: Kahtnu Ventures, LLC

Description: Kahtnu Ventures, LLC proposes to construct a single story freestanding ambulatory surgical center in Kenai, Alaska. The facility will be 8,365 square feet with a projected cost of \$9,076,834. The projected completion date is Spring 2013.

Notes: The application was declared complete on 12/22/2011. After staff review the Commissioner denied the application on 4/4/2012.

Documents:

- [Application](#)
- [Request for Information](#)
- [Addendum to Application](#)
- [CON Staff review](#)
- [Commissioners decision](#)

Events:	Date	Event	Event Description
	04/04/2012	CON Denied	CON denied

Notices:	Notice	Noticed On	Expires On
	Public notice of commissioner's decision	04/05/2012	05/05/2012

[State of Alaska](#) | [Alaska Pioneer Homes](#) | [Behavioral Health](#) | [Boards and Councils](#)
[Finance and Management Services](#) | [Health Care Services](#) | [Juvenile Justice](#) | [Office of Children's Services](#)
[Public Assistance](#) | [Public Health](#) | [Seniors and Disabilities Services](#)
[H&SS Public Notices](#) | [Site Search](#) | [Links for staff](#) | [Webmaster](#) | [H&SS Contacts](#)

ATTACHMENT B

Kahtnu
CON Application
Page 42

Section VIII.B. Financial Data – Construction Only

1. Construction Method (Please check)

- a. Conventional bid Contract management Design and build
 b. Phased Single project Fast Track

2. Construction Cost (New Activity)

	(Omit cents)
a. Site acquisition (Section VIII.A.2.f)	\$ 339,500
b. Estimated general construction**	\$ 6,576,834
c. Fixed equipment, not included in a**	\$
d. Total construction costs (sum of items a, b, and c)**	\$6,916,334
e. Major movable equipment**	\$1,900,000
f. Other cost:**	
(1) Administration expense	\$
(2) Site survey, soils investigation, and materials testing	\$
(3) Architects and engineering fees	\$
(4) Other consultation fees (preparation of application included)	\$
(5) Legal fees	\$
(6) Land development and landscaping	\$ 260,500
(7) Building permits and utility assessments (including water, sewer, electrical, phones, etc.)	\$
(8) Additional inspection fees (clerk of the works)	\$
(9) Insurance (required during construction period)	\$
g. Total project cost (sum of items d, e, f)	\$9,076,834
h. Amount to be financed	\$9,076,834
i. Difference between 2.g and 2.h (list, as Schedule 1, available resources to be used, e.g., available cash, investments, grants funds, community contributions, etc.)	\$
j. Anticipated long-term interest rate	_____ %
k. Anticipated interim (construction) interest rate	_____ %
l. Anticipated long-term interest amount	\$
m. Anticipated interim interest amount	\$
n. Total items g, l, and m	\$
o. Estimated annual debt service requirement	\$
p. Construction cost per sq. ft.	\$
q. Construction cost per bed	\$
r. Project cost per sq. ft.	\$
s. Project cost per bed (if applicable)	\$

*Site acquisition should be stated as "book" value, i.e., actual purchase price (or estimate of value if donated) plus costs of development. If desired, the applicant may elect to state as "fair market value" (in which case, so indicate). A form for use in calculating fair market value is included on page 31 of this packet. Include your calculations as part of this section of your application.

** Items must be certified estimates from an architect or other professional. Major medical equipment may be documented by bid quotes from suppliers.

ATTACHMENT C

Kahtnu
CON Application
Page 11

D. Provide in the following table information regarding equipment to be replaced or retired.
 N/A This is a new facility

Equipment to be Replaced or Retired				
Equipment Description	Make	Model	Date Placed Into Service	Reason for Replacement or Retirement

E. Describe replacement or upgrading of utilities including the electrical, heating, ventilation, and air conditioning systems.

N/A This is a new facility

F. Describe the structural framing, floor system, and number of floors (including the basement).

The facility will be a one-story structure on a concrete slab, steel structure frame, metal roof deck with rigid insulation and EPDM type roof membrane.

G. Total square footage in current facility/project.

N/A This is a new facility

H. Total square footage of proposed facility/project.

8365 square feet

I. Area per bed, service unit, or surgery suite (if applicable).

4183 SF per operating room and procedure room

J. Percentage of total floor area used for direct service (non-bed activity).

5,027.36 SF patient area 60.1%.

K. Additional volume of service (non-bed activity) expected.

N/A. This is a Freestanding Ambulatory Surgical Center.

L. Provide a brief history of expansion and construction for the past five years, including new equipment purchases, additional beds, and new services. Describe how this project fits into the facility's long-range plans, including potential projects planned for development within the next five years.

This is a new facility.