STATE OF ALASKA

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August 28, 2007

The Honorable Sean R. Parnell
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: Review of Initiative Application on Certificate of Need for Long Term Nursing Home and Residential Psychiatric Treatment Centers (07CHA3)
Our File No: 663-08-0003

Dear Lieutenant Governor Parnell:

You have asked us to review an application for an initiative petition entitled "An Act amending the certificate of need requirement to apply only to facilities providing long-term nursing home beds and residential psychiatric treatment centers." The proposed bill submitted with this application is identical to the bill submitted with the initiative application that we reviewed in 2006 Inf. Op. Att'y Gen. (Jan. 12; 663-06-0076). We have completed our review of the current application and find that the application complies with the constitutional and statutory provisions governing the use of the initiative. Under these circumstances we recommend that you certify the application.

I. SUMMARY OF THE PROPOSED BILL AND ANALYSIS

A. SUMMARY

Current law requires that expenditure of more than $1 million for the construction of a health care facility, alteration of the bed capacity of a health care facility, or expanding a health care facility to provide a new category of health services must be preceded by the issuance of a certificate of need from the Department of Health and Social Services. *See* AS 18.07.031(a). In addition, this law requires a certificate of need from the Department before a building can be converted to a licensed nursing home.

AS 18.07.031(b). For a discussion of the background of the certificate of need program, please *see* 2005 Inf. Op. Att'y Gen. 2 (Oct. 12; 663-06-0049). Under the bill proposed by this initiative application, hospitals, facilities for independent diagnostic testing, kidney disease treatment, intermediate care, and ambulatory surgery would no longer be subject to the certificate of need requirement.

This bill would eliminate certificate of need requirements for all facilities except "a long-term nursing home or a facility providing nursing home beds or a residential psychiatric treatment facility."[1] We note that the title of the bill uses somewhat different terms than the text of the proposed bill. The title refers to "residential psychiatric treatment centers," while the text of the bill amending AS 18.07.111(8) refers to "a residential psychiatric treatment facility." Similarly, the title of the bill refers to "facilities providing long-term nursing home beds," while the bill's text in the proposed amendment to AS 18.07.111(8) refers to "a long-term nursing home or a facility providing nursing home beds." The Department of Health and Social Services indicates that it is extremely careful in defining the term "nursing home facility" because these facilities are subject to specific requirements in order to receive Medicaid reimbursement.

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[1] The terms "long term nursing home," and "facility providing nursing home beds" are undefined in AS 18.07.021—AS 18.07.111, and in the bill proposed by this initiative application. However, "nursing home bed" is defined in AS 18.07.111(9) as "a bed not used for acute care in which nursing care and related medical services are provided over a period of 24 hours a day to individuals admitted to the health care facility because of illness, disease, or physical infirmity. "Residential psychiatric treatment center" is defined in AS 18.07.111(10) as

> a secure or semi-secure psychiatric facility or inpatient program in a psychiatric facility that is licensed by the Department of Health and Social Services and that provides therapeutically appropriate and medically necessary diagnostic, evaluation, and treatment services
> (A) 24 hours a day for children with severe emotional or behavioral disorders;
> (B) Under the direction of a physician; and
> (C) Under a professionally developed and supervised individual plan of care designed to achieve the recipient's discharge from inpatient status at the earliest possible time that is intensively and collaboratively delivered by an interdisciplinary team involving medical, mental health, education, and social service components.

The proposed bill's imprecision in drafting may raise issues regarding implementation of the bill if it is enacted. However, imprecision in drafting is not a ground for rejection of an initiative application. *See* 1991 Inf. Op. Att'y Gen. at 5 (Jan. 1; 663-90-0141).

The proposed bill is identical to the bill proposed by an initiative application submitted in late 2005 addressing the certificate of need program. Our office reviewed the earlier initiative application in 2006 Inf. Op. Att'y Gen. (Jan. 12; 663-06-0076). In our earlier opinion we recommended that you certify the application. The earlier initiative petition has lapsed because the sponsors of the earlier petition did not file that petition within the statutory one-year period set out in AS 15.45.140.

The bill proposed in the current application contains a number of introductory clauses indicating that the certificate of need requirement limits medical choices and prevents competitive, lower prices for health care costs. The last of these "whereas" clauses indicates that a majority of states either have no certificate of need regulations or limit regulation to long-term nursing home beds to help control government costs. The bill then sets out a very brief description of proposed revisions to the certificate of need statutes, repealing AS 18.07.041, revising the definition of "health care facility" set out in AS 18.07.111, and directing that conforming amendments be made to Title 18, Chapter 7, to reflect the changes in the definition of health care facility. The new definition for "health care facility" set out in proposed AS 18.07.111(8), is "a long-term nursing home or a facility providing nursing home beds or a residential psychiatric treatment facility."

B. ANALYSIS.

Under AS 15.45.070, within 60 days after the date the application is received, the lieutenant governor is required to review an application for a proposed initiative and either "certify it or notify the initiative committee of the grounds for denial."[2] The grounds for denial of an application are that (1) the proposed bill is not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors. AS 15.45.080. We discuss these next.

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[2] This initiative application was submitted on or about July 10, 2007. Therefore, the deadline for the lieutenant governor's certification decision is September 10, 2007.

1. The Form of the Proposed Bill

The form of a proposed initiative bill is prescribed by AS 15.45.040, which requires that (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the enacting clause state, "Be it enacted by the People of the State of Alaska"; and (4) the bill not include prohibited subjects. The prohibited subjects—dedication of revenue, appropriations, the creation of courts or the definition of their jurisdiction, rules of court, and local or special legislation—are listed in AS 15.45.010 and in article XI, section 7 of the Alaska Constitution.

The bill is confined to one subject: certificate of need requirements for nursing home and psychiatric facilities. The subject of the bill is expressed in the title. The enacting clause is set forth correctly. The proposed bill does not contain a prohibited subject. Accordingly, the bill is in the required form.

2. The Form of the Application

The form of an initiative application is prescribed in AS 15.45.030, which provides:

> The application must include the
>
> (1) proposed bill;
> (2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached; and
> (3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

The application meets the first and third requirements. With respect to the second requirement, the application does not exactly meet the requirement that "each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached." The statement set out on each signature page of this initiative application provides: "I am a qualified voter in the State of Alaska.

The proposed Consumer's Access to Competitive Heath Care Act is attached to this document." Staff of your office has verified that a copy of the proposed bill was attached to each signature page. AS 15.45.080 does not require exact compliance with form requirements for the initiative application, and requires only that the application be "substantially in the required form." The courts have taken a fairly liberal view on technical deficiencies. *See NWCA v. State,* 145 P.3d 573, 577 (Alaska 2006); *Yute Air Alaska, Inc. v. McAlpine,* 698 P.2d 1173, 1181 (Alaska 1985); *Boucher v. Engstrom,* 528 P.2d 465, 462 (Alaska 1974). We believe that a court would find that the statement on the signature pages is substantially in the required form. Given the court's liberal view on technical deficiencies, the statement here provides sufficient notice that the sponsors are qualified voters who signed the application with the proposed bill attached. Therefore, we do not recommend that you deny certification due to this minor defect in the form of the application. With respect to the fourth requirement, the Division of Elections within your office determines whether the application contains the signatures and addresses of not less than 100 qualified voters.

II. PROPOSED BALLOT AND PETITION SUMMARY

We have prepared the following ballot-ready petition summary and title for your consideration:

Limit Certificate of Need Requirement

> This bill would amend the law that requires a person to obtain a certificate of need from the state before a health care facility can be built. It would exempt certain facilities from the requirement. A certificate of need would no longer be required for new hospitals or facilities for diagnostic testing, treatment of kidney disease and day surgery. A certificate of need would still be required for long-term nursing care and residential psychiatric treatment care facilities.
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> Should this initiative become law?

This summary has a Flesch test score of 41.702, which is lower than the target readability score of 60. However, given the need to use technical and multi-syllable words in the summary, we have made the ballot summary as readable as is possible. Given these circumstances, we believe that the summary meets the readability standards of AS 15.60.005.

III. CONCLUSION

Assuming that the Division of Elections determines that there are a sufficient number of qualified subscribers, we conclude that this bill and application are in the proper form, and that the application complies with the constitutional and statutory provisions governing the use of the initiative. Therefore, we recommend that you certify this initiative application, and so notify the initiative committee. Preparation of the petitions may then commence in accordance with AS 15.45.090.

Please contact me if we can be of further assistance to you on this matter.

Sincerely,

TALIS J. COLBERG
ATTORNEY GENERAL

By: Sarah J. Felix
Sarah J. Felix
Assistant Attorney General

SJF/rca

cc: Whitney Brewster, Director
Division of Elections, Office of Lieutenant Governor

Stacie Kraly, Statewide Section Chief
Human Services Section, Department of Law