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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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SWEDISH HEALTH SERVICES,
a Washington nonprofit corporation,

Petitioner,

v.

DEPARTMENT OF HEALTH OF THE STATE OF WASHINGTON,

Respondent.

OPENING BRIEF OF SWEDISH HEALTH SERVICES

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I. INTRODUCTION

Swedish Health Services ("Swedish") obtained a Certificate of Need ("CON") from the Washington State Department of Health (the "Department") to establish a new ambulatory surgical facility. The Department determined that the existing capacity of operating rooms in the relevant geographic planning area was insufficient to handle the number of outpatient surgeries projected to be required by planning-area residents, and approved Swedish's proposed facility to help meet this need for additional capacity. Swedish subsequently applied for a change of location to build the facility in Redmond instead of at the original proposed site in Issaquah. Rather than evaluate Swedish's site-change application on its merits, the Department delayed its decision until after the validity period for Swedish's CON expired, and then denied Swedish's application on the sole ground that the CON had expired. The presiding officer in the resulting adjudicative proceeding affirmed the Department's decision.

As a matter of law, however, Swedish's CON had <u>not</u> expired, because in a corollary adjudicative proceeding relating to the Department's denial of Swedish's request for an extension of the CON validity period, the presiding officer tolled the remainder of the validity period existing when that adjudicative proceeding was commenced until

the conclusion of that adjudicative proceeding. The Department accordingly erred in denying Swedish's site-change application on the ground that the CON had expired. Because the purported expiration of the CON was the only ground on which Swedish's site-change application was denied, the presiding officer should have granted Swedish's motion for summary judgment approving the site-change application. Alternatively, the presiding officer should have conducted a hearing on the merits of the site-change application.

II. ASSIGNMENTS OF ERROR

1. The Department erred by not approving Swedish's application to change the location of its facility.

2. The Department erred by not evaluating Swedish's application to change the location of its facility on its merits.

3. The Department erred by denying Swedish's corollary request for an extension of the CON validity period.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the presiding officer's tolling order had the legal effect of tolling the remainder of the CON validity period which existed as of September 19, 2012, from that date until March 28, 2013, at which point the remainder of the validity period again began to run, causing it to expire on April 9, 2013. (Assignments of Error nos. 1 and 2.)

2. Whether as a result of the presiding officer's tolling order Swedish's CON remained valid as of October 22, 2012, the date the Department denied Swedish's site-change application on the ground that the CON purportedly had expired. (Assignments of Error nos. 1 and 2.)

3. Whether as a result of the presiding officer's tolling order Swedish's CON remained valid as of January 15, 2013, the date the Department denied Swedish's reconsideration request on the ground that the CON purportedly had expired. (Assignments of Error nos. 1 and 2.)

4. Whether as a result of the presiding officer's tolling order Swedish's CON remained valid as of March 14, 2013, the date by which the presiding officer was required to decide Swedish's motion for summary judgment approving its site-change application. (Assignments of Error nos. 1 and 2.)

5. Whether the presiding officer erred by not granting Swedish's summary judgment motion, because the CON's purported expiration was the only ground for denial of Swedish's site-change application yet as a matter of law Swedish's CON remained valid as of the date the Department denied Swedish's site-change application, the date the Department denied Swedish's reconsideration request, and/or the date the presiding officer was required to decide Swedish's summary judgment motion. (Assignment of Error no. 1.)

6. Alternatively, whether the presiding officer erred by not deciding Swedish's site-change application on its merits, because as a matter of law Swedish's CON remained valid as of the date the Department denied Swedish's site-change application and/or the date the Department denied Swedish's reconsideration request. (Assignment of Error no. 2.)

7. Alternatively, whether the presiding officer erred by granting the Department's motion for summary judgment regarding Swedish's extension request, because viewing the facts in the light most favorable to the non-moving party, Swedish, a reasonable person could conclude that Swedish's actions satisfied the regulatory standard to obtain an extension. (Assignment of Error no. 3.)

8. Whether the Court should stay the presiding officer's lifting of the tolling order, until receipt by Swedish of the amended CON, if approved, so that Swedish is not denied the benefit of a successful appeal. (Assignments of Error nos. 1, 2, and 3.)

IV. ADMINISTRATIVE RECORD

The Administrative Record in this consolidated judicial review proceeding is in two, separately-numbered parts. Swedish will refer to the 966-page Administrative Record filed in King County Superior Court Case No. 13-2-15721-7 SEA as "AR-I" and to the 1,077-page

Administrative Record filed in King County Superior Court Case No. 13-2-26269-0 SEA as "AR-II."

V. STATEMENT OF THE CASE

A. Swedish must obtain a CON to establish a new ambulatory surgical facility.

In Washington, healthcare providers must obtain CON approval before establishing certain types of healthcare facilities or providing certain types of healthcare services. *See* RCW 70.38.105(4); WAC 246-310-020(1). Among the types of healthcare facilities requiring CON approval are ambulatory surgical facilities, where surgical procedures not requiring hospitalization may be provided. *See* RCW 70.38.105(4)(a); RCW 70.38.025(6); WAC 246-310-020(1)(a); WAC 246-310-010(26); WAC 246-310-010(5). The Department generally will issue a CON only if it determines that the proposed facility or service is needed by the population to be served and satisfies certain cost and other criteria. *See* RCW 70.38.115(2); WAC 246-310-200.

Once issued, a CON is valid for two years, during which time the CON holder must commence the project or lose the CON. *See* RCW 70.38.125; WAC 246-310-580. For a new healthcare facility, project commencement effectively means the beginning of construction. *See* WAC 246-310-010(13). However, a 6-month extension of the validity period may be obtained if the CON holder has made substantial and

continuing progress towards commencement of the project. *See* RCW 70.38.125(1); WAC 246-310-580(1).

If the CON holder wishes to make certain types of modifications to the project after the CON is issued, the CON holder must apply for and obtain an amendment to the CON. *See* RCW 70.38.115(11); WAC 246-310-570(1). The types of modifications requiring a CON amendment include a change of the approved location. *See* WAC 246-310-570(1)(f).

The Department's initial decisions on CON-related requests are made by the Department's CON Program. If a request is denied, the unsuccessful applicant may obtain review of the decision in an adjudicative proceeding, in which a Health Law Judge ("HLJ"), an administrative law judge employed by the Department, serves as the presiding officer. *See* RCW 70.38.115(10)(a); WAC 246-310-610(1).[1]

B. The Department issues a CON to Swedish.

Swedish is one of Washington's leading healthcare providers. Swedish operates three hospitals in Seattle (First Hill, Cherry Hill, and Ballard), a hospital in Edmonds, a hospital in Issaquah, and other

[1] At the time of the Department's decisions at issue here, the HLJs were the Department's final decision-makers in CON matters. *See DaVita, Inc. v. Wash. State Dep't of Health*, 137 Wn. App. 174, 181, 151 P.3d 1095 (2007) ("HLJ is the Secretary's designee with the authority to make final decisions and issue a final order for CON applications."). A third level of agency review has since been created which applies to CON decisions. However, it did not exist at the time of the Department's decisions at issue here. *See* Engrossed Substitute House Bill 1381, 63rd Leg., Reg. Sess. (Wash. 2013) (effective July 28, 2013).

healthcare facilities in the region. AR-II at 759-60. On May 7, 2008, the Department issued CON #1330R to Swedish to establish a new ambulatory surgical facility in the "East King" planning area. AR-II at 79. The Department evaluates need for ambulatory surgical facilities within defined geographic areas, and divides King County into five planning areas for this purpose (North, East, Central, Southwest, and Southeast). *See* WAC 246-310-270(3). At the time of its application, Swedish operated an outpatient services medical campus in Issaquah. Swedish proposed to establish the new ambulatory surgical facility at that location, and thereby add outpatient surgery to the array of services provided there. The Department approved this location. AR-II at 79.

C. Swedish's CON was scheduled to expire on October 1, 2012.

The Department's issuance of the CON to Swedish was challenged by a competing healthcare provider in the East King planning area, which commenced an adjudicative proceeding. Swedish requested that the 2-year validity period for the CON be tolled during the legal challenges, so that Swedish would not have to bear the risk of building the facility, at a cost of $7.6 million, only to have the CON taken away if the competitor's challenge were successful. The HLJ granted Swedish's request and ordered that Swedish would have "until two years after all administrative

and judicial appeals of the Department's decision granting Swedish's CN are exhausted" to commence its project. AR-II at 80-81.

Swedish's CON survived the competitor's challenge. In the HLJ's final order dismissing the adjudicative proceeding, issued on October 1, 2010, the HLJ referenced his earlier tolling decision and ordered that "the project commencement deadline for CON #1330R shall be two years after entry of this dismissal order." AR-II at 84. Therefore the two-year validity period for CON #1330R began to run on October 1, 2010, and was scheduled to expire on October 1, 2012.[2]

D. Swedish identifies a preferred new location for the facility.

During the legal challenges to Swedish's CON, there were two significant changes in the East King planning area:

First, when Swedish applied to establish this facility, there were no hospitals or CON-approved ambulatory surgical facilities in Issaquah. Therefore, Swedish proposed to establish the facility in Issaquah. Since that time, however, the Department has authorized Swedish to build a new hospital in Issaquah, which opened in 2011, and also has authorized

[2] The competitor's legal challenge was defeated as a result of the Washington Supreme Court's decision in *Overlake Hospital Association v. Department of Health*, 170 Wn.2d 43, 239 P.3d 1095 (2010), in which the Supreme Court resolved an issue of regulatory interpretation relating to how need for new ambulatory surgical facilities should be determined. Recognizing that "the overriding purpose of the CN program," i.e., the legislative intent, is to ensure access to healthcare facilities and services, the Supreme Court adopted the proposed interpretation of the regulation which allowed for approval of more ambulatory surgical facilities (including, indirectly, Swedish's proposed facility at issue in this case). *See Overlake Hosp. Ass'n*, 170 Wn.2d at 55.

several other ambulatory surgical facilities in Issaquah. In contrast, there were no hospitals or CON-approved ambulatory surgical facilities in Redmond. Therefore, Swedish determined that planning-area residents would be better served if Swedish were to establish the facility in Redmond rather than Issaquah. AR-II at 765.

Second, after opening its new hospital in Issaquah in 2011, all of the services previously provided at Swedish's outpatient medical campus in Issaquah migrated to the new hospital campus. However, Swedish also operates an outpatient medical campus in Redmond, where related services such as imaging, laboratory, rehabilitation, and physician offices are located. Therefore, Swedish determined that it would be better to build the approved ambulatory surgical facility at the Redmond location, where these complementary services still are provided, rather than at the Issaquah location, where these complementary services no longer are provided. AR-II at 765-66.

E. Swedish applies for a change of location.

On May 29, 2012, Swedish applied for an amendment of CON #1330R, to change the approved location from Swedish's former Issaquah outpatient campus to Swedish's existing Redmond outpatient campus. AR-II at 756-97. In response to a request from the CON Program, Swedish provided supplemental information in support of its application.

AR-II at 803-921 (supplemental information); *see also* AR-II at 925-33 (additional supplemental information).

F. Swedish requests an extension of the CON validity period.

Swedish also requested, on May 29, 2012, a 6-month extension of the validity period for CON #1330R. AR-I at 882-900. An extension of the CON expiration date, from October 1, 2012, to April 1, 2013, would allow additional time for Swedish to commence the project at the proposed Redmond site, assuming the change of location were approved. In response to a request from the CON Program, Swedish provided supplemental information in support of its request. AR-I at 902-04 (supplemental information). In its extension request and supplemental materials provided in support of its extension request, Swedish described the substantial and continuing progress it had made towards commencement of the project.[3]

[3] This work included, without limitation: preparation of the floor plan for the approved location; preparation of the functional program for the approved location; an agreement with the architect to finalize the design for the approved location; meeting with the Department's Construction Review Services ("CRS") regarding the approved location; further communications with CRS regarding the approved location; discussions with the surgeons who would practice at the facility; continuing evaluation of the location of the approved facility, leading to Swedish's ultimate decision to request a change of location from Issaquah to Redmond; communication with the landlord at the proposed new location; analysis of the proposed new location to ensure it meets all specifications and requirements; and the application to change the location from Issaquah to Redmond. AR-I at 882-84 & 902-04.

G. The CON Program denies Swedish's request for an extension of the CON validity period.

On August 30, 2012, the CON Program denied Swedish's request for an extension of the CON validity period. AR-I at 961-63. The stated basis for the denial was that, in the CON Program's view, Swedish had not made substantial and continuing progress towards commencement of its project. AR-I at 961-63.[4]

H. Swedish seeks administrative review of the CON Program's denial of Swedish's extension request.

On September 19, 2012, Swedish commenced an adjudicative proceeding regarding the CON Program's denial of its extension request (the "Extension Request Adjudicative Proceeding"). AR-I at 1-36. HLJ John F. Kuntz was designated by the Secretary of Health to conduct the adjudicative proceeding and make the agency's final decision on Swedish's request. AR-I at 110.

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[4] Notwithstanding its denial of Swedish's request for a 6-month extension, the Department alternatively could have granted a short extension of the CON validity period, to allow time for the amendment application to be evaluated, and for Swedish to commence the project at the new site, without the CON expiring in the meantime. The Department did so for another hospital which had a CON amendment application pending at approximately the same time as Swedish's CON amendment application. AR-II at 480 (October 1, 2012, approval of Kennewick General Hospital's CON amendment application) ("During the review of this amendment application, the department recognized that CN #1418E would expire before the amendment review could be completed. As a result, Secretary Selecky granted a 30-day extension to the validity of CN #1418E, resulting in an expiration date of October 11, 2012."). In other words, the Department extended the validity period for Kennewick General's CON, so that Kennewick General's amendment application could be evaluated without the CON expiring in the meantime, but the Department did not extend the validity period for Swedish's CON, so that Swedish's amendment application could be evaluated without the CON expiring in the meantime.

I. The CON Program fails to evaluate Swedish's proposed change of location before expiration of the CON.

Notwithstanding its denial of Swedish's extension request on August 30, 2012, the CON Program still could have approved Swedish's application to change the approved location from Issaquah to Redmond, and Swedish could have commenced the project at the new location before the CON validity period was scheduled to expire on October 1.

If the CON Program had not requested supplemental information, the CON Program would have been required, under the applicable regulations, to issue its decision on Swedish's site-change application by August 15, well before the CON was scheduled to expire on October 1.[5]

Even taking into account the CON Program's request for supplemental information, the CON Program still could have issued a decision on Swedish's site-change application before the expiration of the CON validity period. If the CON Program had simply declared Swedish's application complete immediately upon receipt of Swedish's supplemental

[5] The CON Program is required to make a determination whether an application is complete within fifteen working days, which in this case would have been by June 19. *See* WAC 246-310-090(2)(a). The CON Program is required to begin review within five working days of determining that the application is complete, which in this case would have been by June 26. *See* WAC 246-310-170(2)(a)(ii). Swedish's application was subject to the Department's expedited review process. AR-II at 923. Under this process, public comment must be completed within thirty days, which in this case would have been by July 26. *See* WAC 246-310-150(1)(a); *see also* WAC 246-310-010(17) ("'Days' means calendar days."). The CON Program's decision is due within twenty days of the completion of the end of the public-comment period, which in this case would have been by August 15. *See* WAC 246-310-150(1)(b).

information, begun the public comment period immediately, and complied with its regulations regarding the length of the public comment period, the CON Program's decision would have been due by September 25. This would have given Swedish a window of time, albeit a short one, to commence its project before the October 1 expiration date.[6]

Instead of declaring Swedish's application to be complete upon receipt of Swedish's application, or immediately upon receipt of Swedish's supplemental information, however, the CON Program delayed its decision. First, the CON Program took three weeks to review Swedish's supplemental information and declare it complete. AR-II at 923. This was the longest the CON Program was permitted to wait under the Department's rules. *See* WAC 246-310-090(2)(a). Then the CON Program scheduled a 35-day public comment period on Swedish's application. AR-II at 923. This violated the Department's rules, which restrict the public comment period to thirty days. *See* WAC 246-310-150(1)(a) ("The public comment period shall be limited to thirty days."); WAC 246-310-010(17) ("'Days' means calendar days."). This extended

[6] Swedish's supplemental information was provided on Friday, August 3, 2012. AR-II at 803. If the CON Program had begun review on Monday, August 6, the public comment process would have been completed by September 5. *See* WAC 246-310-150(1)(a) (public comment limited to 30 days). The CON Program's decision would have then been due by September 25. *See* WAC 246-310-150(1)(b) (decision due within 20 days); *see also* WAC 246-310-010(17) ("'Days' means calendar days.").

the public comment period until October 2, one day after the CON was scheduled to expire. AR-II at 923.

J. The CON Program denies Swedish's proposed change of location.

On October 22, 2012, the CON Program denied Swedish's site-change application. AR-II at 1007-14. The only reason for the denial was that, according to the CON Program, the CON had expired on October 1. AR-II at 1007-14.

K. The HLJ tolls the CON validity period.

On September 28, 2012, Swedish requested a tolling order from the HLJ in the pending Extension Request Adjudicative Proceeding. Specifically, Swedish requested that the remainder of the validity period existing on the date Swedish commenced the Extension Request Adjudicative Proceeding be tolled until the conclusion of the adjudicative proceeding. AR-I at 69-89. This would preserve the status quo and ensure that Swedish would not be denied the benefit of a successful appeal. It also would require the CON Program to evaluate Swedish's site-change application on its merits, as the CON would remain valid and the CON Program therefore could not deny the site-change application on the ground that the CON had expired.

The CON Program opposed Swedish's motion, and argued that the HLJ should deny the motion for the very reason that the effect would be

that the Department could not deny Swedish's site-change application on the ground that the CON had expired:

> [I]f the October 1 validity period is tolled beyond October 22, and the Program is required to make an amendment decision on October 22, then the amendment will be approvable because the validity period will not have expired on October 22.

AR-I at 97 (Program's opposition to motion) (emphasis original).

Over the CON Program's objection, the HLJ granted Swedish's motion and tolled the validity period for Swedish's CON. AR-I at 112-17. The HLJ ordered as follows:

> The remainder of the validity period for CN #1330R existing on September 19, 2012, the date Swedish filed its Application for Adjudicative Proceeding in this matter, is tolled from that date until the conclusion of this adjudicative proceeding, at which point the remainder of the validity period shall again begin to run.

AR-I at 117 (emphasis added).

L. The HLJ denies the CON Program's motion to reconsider the tolling order.

The CON Program moved for reconsideration of the tolling order, again asserting that the HLJ should not grant this relief because the effect would be to maintain the validity of Swedish's CON, and prevent the CON Program from denying the site-change application on the ground that the CON had expired:

> By the tolling [of] the two-year validity period effective September 19, the Program no longer may deny the site-change amendment for [the] reason that the CN expired on October 1. The HLJ's tolling order itself extends the validity period past October 1[.]

AR-I at 120 (Program's reconsideration motion) (emphasis added); *see also* AR-I at 276 (Program's reconsideration reply) (recognizing that tolling order "render[s] moot the Program's position that the amendment could not be granted because the validity period had expired").

The HLJ denied the CON Program's motion for reconsideration. AR-I at 354-61. The HLJ ordered as follows:

> The Program's Motion for Reconsideration is DENIED, to the extent that it requests that Prehearing Order No. 1 be reconsidered to deny Swedish's request for the tolling of the remainder of the validity period for CN #1330R on September 19, 2012, pending the conclusion of the adjudicative proceeding.

AR I at 360.

As a result of the HLJ's tolling order, if Swedish's extension request were approved in the adjudicative proceeding, Swedish would have the remainder of the original validity period plus the six-month extension in which to commence its project, and if Swedish's extension request were denied in the adjudicative proceeding, Swedish would at least have the remainder of the original validity period (twelve days) to

commence its project. AR-I at 359-60 (HLJ's order denying Program's motion for reconsideration, recognizing that tolling order would preserve remainder of validity period irrespective of ruling on extension request).

M. The CON Program denies Swedish's request for reconsideration regarding Swedish's proposed change of location.

On November 14, 2012, Swedish requested that the CON Program reconsider its denial of Swedish's site-change application, in light of the HLJ's tolling order. Swedish explained that, pursuant to the HLJ's tolling order, Swedish's CON remained valid and the CON Program therefore could not deny Swedish's site-change application on the ground that the CON had expired, which was the only ground on which the CON Program asserted it should be denied. AR-II at 265-66. On January 15, 2013, the CON Program denied Swedish's reconsideration request. The CON Program continued to take the position, inexplicably following the HLJ's tolling order, that the CON had expired. AR-II at 63-64.[7]

[7] The CON Program asserts that the HLJ granted the CON Program's motion for reconsideration regarding the tolling order. AR-II at 63-64. However, the HLJ only granted the reconsideration motion to the extent that he corrected a factual misstatement. Specifically, the HLJ had referred to October 22, 2012, as the deadline by which the CON Program expected to issue its decision on the extension request, when he meant to refer to this date as the deadline by which the CON Program expected to issue its decision on the amendment application. AR-I at 359. The HLJ plainly denied the remainder of the reconsideration motion, including with respect to the substantive issue, i.e., the tolling of the validity period. AR-I at 360.

N. Swedish seeks administrative review of the CON Program's denial of Swedish's proposed change of location.

On February 11, 2013, Swedish commenced an adjudicative proceeding regarding the CON Program's denial of its site-change application (the "Site Change Adjudicative Proceeding"). AR-II at 2-38. HLJ Kuntz was designated by the Secretary of Health to conduct the adjudicative proceeding and make the agency's final decision on Swedish's request. AR-II at 551.

O. The HLJ de facto denies Swedish's motion for summary judgment in the Site Change Adjudicative Proceeding.

On February 12, 2013, Swedish moved for summary judgment in the Site Change Adjudicative Proceeding. AR-II at 40-350. Swedish argued that as a result of the tolling order, the CON had not expired, and the CON Program's denial of Swedish's change of location on the ground that the CON had expired therefore was erroneous as a matter of law. AR-II at 46-49; *see also* AR-II at 466-68 (reply brief). Swedish further argued that because there was no ground for denial of Swedish's change of location, other than the alleged expiration of the CON, the HLJ should grant summary judgment approving the change of location. AR-II at 49-50; *see also* AR-II at 469 (reply brief). The CON Program cross-moved for summary judgment. AR-II at 456-61; *see also* AR-II at 505-15 (reply brief). Although the HLJ did not address Swedish's motion directly, the

HLJ denied it de facto when he dismissed the adjudicative proceeding. AR-II at 623 (discussed below in § V.Q).

P. The HLJ grants the CON Program's motion for summary judgment in the Extension Request Adjudicative Proceeding.

On March 1, 2013, the CON Program moved for summary judgment in the Extension Request Adjudicative Proceeding. AR-I at 449-54. Swedish opposed the CON Program's motion. AR-I at 493-688. In a decision served on March 28, 2013, the HLJ granted the CON Program's motion. AR-I at 696-705. The basis for the HLJ's decision was his finding that Swedish had not made substantial and continuing progress towards commencement of the project. AR-I at 703.

The HLJ's summary judgment order was the final order in the Extension Request Adjudicative Proceeding, meaning that the 12-day remainder of the validity period began to run when it was served on March 28. AR-I at 117. Therefore, the validity period for CON #1330R was scheduled to expire on April 9.

Q. The HLJ dismisses the Site Change Adjudicative Proceeding.

In a decision served on April 19, 2013, the HLJ dismissed the Site Change Adjudicative Proceeding. AR-II at 623. The basis for the HLJ's order was that because the CON validity period expired during the adjudicative proceeding, on April 9, Swedish's application to amend the CON to change the approved site was moot. AR-II at 623.

R. The HLJ denies Swedish's motion for reconsideration regarding dismissal of the Site Change Adjudicative Proceeding.

Swedish sought reconsideration of the HLJ's dismissal order in the Site Change Adjudicative Proceeding. AR-II at 626-31; *see also* AR-II at 710-19 (reply brief). In an order served on July 3, 2013, the HLJ denied Swedish's reconsideration request. AR-II at 748-55.

S. The Superior Court affirms the agency's actions.

On April 5, 2013, Swedish commenced a judicial review proceeding regarding the Department's March 28 denial of its request for an extension of the CON validity period in the Extension Request Adjudicative Proceeding. CP 1-23. On July 16, 2013, Swedish commenced a judicial review proceeding regarding the Department's July 3 denial of its CON amendment application to change the approved location in the Site Change Adjudicative Proceeding. CP 51-95. On August 2, 2013, the two superior court proceedings were consolidated. CP 24-26. On November 12, 2013, the Honorable Theresa B. Doyle affirmed the agency's actions. CP 27-30. Swedish timely sought judicial review by this Court. CP 43-50.

VI. STANDARD OF REVIEW

The Court reviews the Department's decisions pursuant to the judicial review standards set forth in the Administrative Procedure Act

(the "APA"). The Court reviews the Department's decisions directly, not the Superior Court's order. *See Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). Because the Department's decisions relating to Swedish's facility were agency orders in adjudicative proceedings, the Court reviews them pursuant to RCW 34.05.570(3), which provides that the Court may grant relief on, inter alia, the following grounds:

> - The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
> - The agency has erroneously interpreted or applied the law;
> - The order is not supported by evidence that is substantial when viewed in light of the whole record before the court;
> - The agency has not decided all issues requiring resolution by the agency;
> - The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
> - The order is arbitrary or capricious.

See RCW 34.05.570(3)(c), (d), (e), (f), (h) & (i).

If the Court determines that relief should be granted from the Department's decisions on any of these grounds, the Court may grant the following relief:

- Order the agency to take action required by law;
- Order the agency to exercise discretion required by law;
- Set aside agency action;
- Enjoin or stay the agency action;
- Remand the matter for further proceedings; or
- Enter a declaratory judgment order.

See RCW 34.05.574(1)(b). Additionally, "[i]f the court sets aside or modifies agency action or remands to the agency for further proceedings, the court may make any interlocutory order it finds necessary to preserve the interests of the parties and the public, pending further proceedings or agency action." RCW 34.05.574(4).

VII. RELIEF REQUESTED

Swedish respectfully requests that the Court:

(1) Determine that the HLJ erred by not granting Swedish's motion for summary judgment regarding its site-change application, order the Department to issue the amended CON to Swedish, and stay the lifting of the tolling order until Swedish's receipt of the amended CON; or, alternatively,

(2) Determine that the HLJ erred by not evaluating Swedish's site-change application on its merits, remand to the HLJ to conduct a hearing on Swedish's application, and stay the lifting of the tolling order

until Swedish's receipt of the amended CON, if approved; or, alternatively,

(3) Determine that the HLJ erred by granting the Department's motion for summary judgment regarding Swedish's extension request, remand to the HLJ to conduct a hearing on Swedish's request, and stay the lifting of the tolling order until Swedish's receipt of the amended CON, if approved as a result of the approval of the extension request.

VIII. ARGUMENT

A. The Court should order the Department to amend the CON to reflect Swedish's proposed change of location.

The HLJ's failure to grant Swedish's motion for summary judgment regarding its proposed change of location, and decision to instead dismiss the adjudicative proceeding, constituted legal error. The Court should grant relief from the HLJ's decisions pursuant to RCW 34.05.570(3)(c), (d), (f), and (i). Specifically, the Court should reverse the HLJ's decisions and order the Department to issue an amended CON to Swedish reflecting the proposed change of location, pursuant to the Court's authority under RCW 34.05.574(1)(b).

1. The HLJ's failure to grant Swedish's summary judgment motion constituted legal error.

The Department applies the CR 56 standards to motions for summary judgment in CON adjudicative proceedings. AR-I at 702.

Accordingly, Swedish should have been awarded summary judgment if there was no genuine issue as to any material fact and Swedish was entitled to judgment as a matter of law. *See* CR 56(c).

The CON Program denied Swedish's proposed change of location based solely on its determination that Swedish's CON had expired. The CON Program identified no other ground for denial in its evaluation. AR-II at 1009-14. The CON Program identified no other ground for denial in its reconsideration decision. AR-II at 63-64. The CON Program identified no other ground for denial in its response to Swedish's summary judgment motion. AR-II at 456-61 & 505-09.

As a matter of law the validity period for Swedish's CON had <u>not</u> expired. The validity period was tolled from September 19, 2012 until April 9, 2013. AR-I at 117 (tolling the remaining twelve days of the validity period from September 19, 2012); AR-I at 695 (March 28, 2013, service of final order in adjudicative proceeding, at which point the remaining twelve days of the validity period began to run). It is axiomatic that when the deadline for a party to act is tolled, this extends the time for the party to act by the length of the tolling period. *See Skinner v. Civil Serv. Comm'n of City of Medina*, 168 Wn.2d 845, 853, 232 P.3d 558 (2010) (motion for reconsideration tolls deadline for notice of appeal).

Thus, the HLJ's tolling order extended the time for Swedish to commence its project by the length of the tolling period.

Due to the tolling order, as a matter of law Swedish's CON remained valid on October 22, 2012, the date the Department denied Swedish's site-change application on the sole ground that the CON purportedly had expired. AR-II at 1007-14 (CON Program's decision). The CON Program's denial of Swedish's application therefore constituted error.

For the same reason, Swedish's CON remained valid on January 15, 2013, the date the Department denied Swedish's reconsideration request on the sole ground that the CON purportedly had expired. AR-II at 63-64 (CON Program's reconsideration decision). This decision was made after issuance of the tolling order. The CON Program's denial of Swedish's reconsideration request therefore constituted error.

For the same reason, Swedish's CON remained valid on March 14, 2013, the date by which the HLJ was required to decide Swedish's summary judgment motion. *See* WAC 246-10-403(11). The HLJ's de facto denial of Swedish's summary judgment motion therefore constituted error, because Swedish was entitled to summary judgment. The HLJ's failure to timely rule on Swedish's summary judgment motion, allowing the CON to expire in the meantime, also was itself error, as it constituted

an unlawful procedure or decision-making process, a failure to follow a prescribed procedure, a failure to decide an issue requiring resolution, and arbitrary or capricious decision-making. *See* RCW 34.05.570(3).[8]

The only ground on which the proposed change of location was denied was that the CON had expired, but as a matter of law the CON had not expired. Swedish was entitled to summary judgment on its proposed change of location. The HLJ therefore erred by not granting Swedish's summary judgment motion, and by subsequently dismissing the adjudicative proceeding. The Court should grant relief from the HLJ's order. *See* RCW 34.05.570(3).

2. The Court should order the Department to issue an amended CON to Swedish.

If the Court determines that Swedish was entitled to summary judgment, the appropriate remedy is for the Court to order the Department to issue an amended CON to Swedish which reflects the proposed change of location. *See* RCW 34.05.574(1)(b) (court may "set aside agency action" and "order an agency to take action required by law").

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[8] Under the Department's rules, briefing on Swedish's motion, filed February 12, 2013, would have been completed by March 4. *See* WAC 246-10-403(7) (opposition brief due within 11 days); WAC 246-10-403(8) (reply brief due within 5 days); WAC 246-10-105(4) (calendar days for opposition brief; business days for reply brief). Briefing actually was not completed until three days later. AR-II at 465-72. Even if the March 14 deadline for the HLJ to issue his decision is extended by these three days, however, the HLJ's decision still would be due well before the CON expired on April 9. Indeed, even if the 30-day period for the HLJ to decide the motion is calculated from the filing of Swedish's reply brief, rather than the filing of the motion as the regulation provides, the HLJ's decision still would be due before April 9.

B. Alternatively, the Court should remand to the Department to conduct an adjudicative hearing on Swedish's site-change application.

If the Court does not determine that Swedish was entitled to summary judgment, the Court should remand to the Department to determine, in an adjudicative hearing, whether Swedish's proposed change of location should be approved.

1. The HLJ's dismissal of the adjudicative proceeding constituted legal error.

The HLJ was reviewing the CON Program's October 22, 2012, denial of Swedish's proposed change of location and the CON Program's January 15, 2013, denial of Swedish's reconsideration request. *See* WAC 246-310-610 (unsuccessful CON applicant has right to adjudicative proceeding regarding "contested department decision"); *see also* AR-II at 8 (Swedish's application for adjudicative proceeding, assigning error to CON Program's denial of proposed change of location (¶ 22.a) and CON Program's denial of reconsideration request (¶ 22.b)).

The fact that Swedish's CON expired several months later, during the adjudicative proceeding, is irrelevant to whether the CON Program's decisions were erroneous and should have been reversed by the HLJ. Therefore, the HLJ erred by dismissing the adjudicative proceeding on the ground that the CON expired during the adjudicative proceeding, notwithstanding the fact that the CON was valid when the CON Program

denied Swedish's proposed change of location, which was the decision being reviewed. The Court should grant relief from the HLJ's order. *See* RCW 34.05.570(3).

2. The Court should remand to the Department to conduct a hearing and decide Swedish's site-change application on its merits.

If the Court determines that the HLJ erred by dismissing the adjudicative proceeding, the appropriate remedy is for the Court to remand to the HLJ to conduct a hearing and decide Swedish's site-change application on its merits. *See* RCW 34.05.574(1)(b) (court may "set aside agency action" and "remand the matter for further proceedings").

C. Alternatively, the Court should remand to the Department to conduct an adjudicative hearing on Swedish's extension request.

If the Court orders the Department to issue the amended CON to Swedish or to decide Swedish's site-change application on its merits, and the Court stays the lifting of the tolling order until the Department does so (*see* § VIII.D below), it is unnecessary for the Court to review the Department's denial of Swedish's extension request. Swedish would commence its project at the new location within twelve days (i.e., the remainder of the original validity period) following approval of the change of location. However, if the Court affirms the Department's denial of the site-change application on the ground that the CON expired, it is

necessary for the Court to review the HLJ's decision on Swedish's extension request, because if the HLJ had granted this request the CON would not have expired.

1. The HLJ's summary judgment order constituted legal error.

As discussed above, the Department applies the CR 56 standards to summary judgment motions in adjudicative proceedings. Accordingly, the HLJ could grant the CON Program's summary judgment motion only if there was no genuine issue of material fact and the CON Program was entitled to judgment as a matter of law. *See* CR 56(c). In making this determination, "[a]ll facts and reasonable inferences must be considered in the light most favorable to the nonmoving party, and summary judgment is appropriate only if reasonable minds could reach but one conclusion." *Staples v. Allstate Ins. Co.*, 176 Wn.2d 404, 410, 295 P.3d 201 (2013).

To obtain the 6-month extension of the CON validity period, Swedish was required to demonstrate that it had "made continuous progress towards commencement of the project." WAC 246-310-580(2)(c). In granting the CON Program's summary judgment motion, the HLJ did not interpret the facts in the light most favorable to Swedish, the non-moving party, as was required under CR 56. *See Staples*, 176 Wn.2d at 410. Instead, the HLJ weighed the evidence relied upon by Swedish

(principally, the materials Swedish submitted at the time of its extension request) against the evidence relied upon by the CON Program (principally, Swedish's earlier progress reports) and then made a factual determination that Swedish had not made continuous progress towards commencement of its project. AR-I at 696-705.

The progress reports relied upon by the CON Program and the HLJ are simply short forms which healthcare providers must complete quarterly for each of their active CONs. *See, e.g.*, AR-I at 952-54 (progress report for Q1-2012). There is no requirement that these reports demonstrate continuous progress. *See* WAC 246-310-590. Therefore, there is no reason these reports would contain the level of detail contained in Swedish's extension request, which did demonstrate continuous progress. AR-I at 882-900 & 902-04. In light of the contradictory evidence regarding whether or not Swedish made continuous progress towards commencement of its project, summary judgment on this issue was improper. The Court should grant relief from the HLJ's summary judgment order. *See* RCW 34.05.570(3).

2. The Court should remand to the Department to conduct a hearing on Swedish's extension request.

If the Court determines that the HLJ erred by denying Swedish's extension request on summary judgment, the appropriate remedy is for the

Court to remand to the HLJ to conduct a hearing to resolve the parties' factual disputes relating to whether Swedish demonstrated "continuous progress" such that Swedish's request for a 6-month extension of the validity period should be granted. *See* RCW 34.05.574(1)(b) (court may "set aside agency action" and "remand the matter for further proceedings").[9]

D. The Court should stay the lifting of the tolling order.

Under the APA, the Court may "enjoin or stay" agency action. RCW 34.05.574(1)(b). The Court also "may make any interlocutory order it finds necessary to preserve the interests of the parties and the public, pending further proceedings or agency action." RCW 34.05.574(4). Until March 28, 2013, the remainder of the validity period for Swedish's CON (twelve days) was being tolled. In the HLJ's summary judgment order served on that date, the HLJ lifted the tolling order. AR-I at 704. Pursuant to the Court's authority under the APA, the Court should stay the

[9] In the remand proceeding, the Department also should evaluate whether the validity period for Swedish's CON should be extended at least until Swedish's amendment application is decided on its merits, as was the validity period for Kennewick General's CON. *See* note 4. The HLJ did not resolve this issue in his dismissal order. AR-II at 623. In his denial of Swedish's request for reconsideration, the HLJ determined that the Department's failure to extend the validity period for Swedish's CON was not arbitrary or capricious. AR-II at 754-55. This was the wrong standard of review. The HLJ should have conducted a de novo review of the Department's actions and determined, on behalf of the Department, whether it should have evaluated Swedish's amendment application before the expiration of Swedish's CON. *See DaVita*, 137 Wn. App. at 183.

HLJ's lifting of the tolling order so that Swedish is not denied the benefit of a successful appeal.

If the Court determines that Swedish's proposed change of location must be approved, and orders the Department to amend Swedish's CON, the Court should stay the HLJ's lifting of the tolling order until Swedish receives the amended CON, at which point the remaining twelve days of the validity period would begin to run. *See* RCW 34.05.574(1)(b); RCW 34.05.574(4). If the Court remands to the Department to conduct an adjudicative hearing on Swedish's proposed change of location and/or Swedish's extension request, the Court should stay the HLJ's lifting of the tolling order until Swedish receives the amended CON, if approved as a result of the remand proceedings, at which point the remaining twelve days of the validity period would begin to run. *See* RCW 34.05.574(1)(b); RCW 34.05.574(4).

IX. CONCLUSION

Swedish timely requested an amendment of its CON to build the approved facility in Redmond rather than Issaquah. Swedish complied with all of the Department's regulations in seeking this amendment. However, the Department waited until after the CON purportedly expired, and then refused to approve Swedish's application on this ground.

Swedish obtained a tolling order from the presiding officer in an adjudicative proceeding, which preserved the validity of Swedish's CON. As the Department admitted at the time, it "no longer may deny the site-change amendment for [the] reason that the CN expired[.]" Yet this is precisely what the Department did. Even after the tolling order was issued, the Department continued to take the position that Swedish's CON had expired and refused to approve Swedish's application.

For the reasons discussed above, and in the interests of justice, the Court should order the Department to issue an amended CON to Swedish, or, alternatively, to conduct a hearing on Swedish's site-change application and decide it on its merits. If the Court denies Swedish this relief, the Court at minimum should order the Department to conduct a hearing on Swedish's extension request, because the HLJ's summary judgment order regarding that request also constituted legal error. In any of these scenarios, the Court also should stay the lifting of the tolling order, so that Swedish is not denied the benefit of a successful appeal.

Respectfully submitted this 20th day of February 2014.[10]

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[10] Swedish's opening brief originally was filed on February 20, 2014. This corrected opening brief was filed on April 24, 2014. Nothing has been changed except the spacing of the text, the Table of Contents and Table of Authorities, and the addition of this footnote.