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No. 71258-6-I

RECEIVED
COURT OF APPEALS
DIVISION ONE
APR 24 2014

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SWEDISH HEALTH SERVICES,
a Washington nonprofit corporation,

Petitioner,

v.

DEPARTMENT OF HEALTH OF THE STATE OF
WASHINGTON,

Respondent.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 APR 24 PM 2:01

REPLY BRIEF OF SWEDISH HEALTH SERVICES

Brian W. Grimm, WSBA No. 29619
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
(T) 206.359.8000
(F) 206.359.9000

Attorneys for Petitioner,
Swedish Health Services

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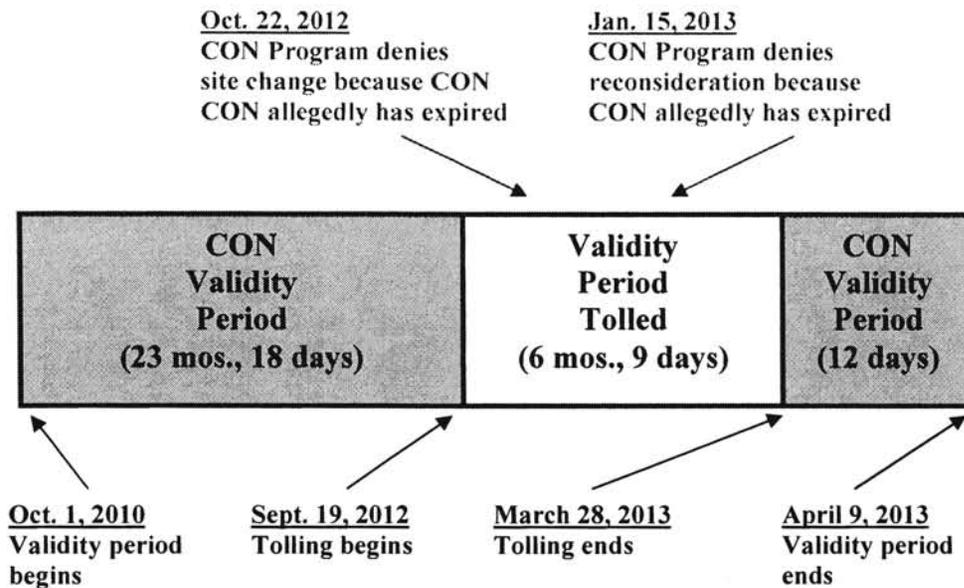
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I. INTRODUCTION

Swedish applied for its proposed change of location more than four months before its CON was scheduled to expire. To allow even more time for the CON Program to evaluate its site-change application, Swedish requested a six-month extension of the CON validity period. When the CON Program denied the six-month extension, and it became clear that the CON Program was not going to evaluate Swedish's site-change application before the CON expired, Swedish commenced the adjudicative proceeding regarding the CON Program's denial of its extension request, and asked the HLJ to toll the CON validity period so that the CON Program would be required to evaluate Swedish's site-change application on its merits and could not deny it on the ground that it had expired. The HLJ issued the tolling order requested by Swedish and denied the CON Program's subsequent motion for reconsideration. In light of the HLJ's tolling order, Swedish asked the CON Program reconsider its denial of Swedish's site-change application, but the CON Program refused to do so, and continued to take the position that the CON had expired.

The following illustration shows the timing of the CON Program's decisions:



The CON Program denied Swedish’s site-change application on October 22, 2012, on the sole ground that Swedish’s CON had expired. The CON Program denied Swedish’s reconsideration request on January 15, 2013, on the same sole ground.

Rather than determine, in the subsequent adjudicative proceeding, whether Swedish’s CON was valid as of the date of the CON Program’s decisions, the HLJ dismissed the adjudicative proceeding as “moot” because the CON expired on April 9, 2013—i.e., because the CON expired during the adjudicative proceeding. This would be analogous to a trial court dismissing a civil lawsuit on the ground that the statute of limitations had expired, and the appellate court declining to review whether the statute of limitations had expired when the complaint was

filed and instead dismissing the appeal as moot because the statute of limitations expired during the appeal.

As a matter of law, Swedish's CON was valid as of the date the CON Program denied Swedish's site-change application and as of the date the CON Program denied Swedish's reconsideration request. Because the Department has not identified any other ground on which Swedish's site-change application should be denied, the Court should order the Department to issue the amended CON requested by Swedish. Alternatively, the Court should remand this matter to the Department to evaluate Swedish's site-change application on its merits.¹

II. ARGUMENT

A. The relevant issue is whether Swedish's CON was valid when the CON Program denied Swedish's site-change application, not whether it expired during Swedish's appeal of the CON Program's decision.

Under the Department's regulations, an unsuccessful CON applicant has the right to an adjudicative proceeding regarding a "contested department decision." WAC 246-310-610(2)(b)(iii). Here, the contested Department decisions included the CON Program's denial of Swedish's site-change application and the CON Program's denial of Swedish's reconsideration request. AR-II at 8 (¶¶ 22.a & 22.b).

¹ In this reply brief, Swedish will use the same defined terms as were identified in its opening brief.

If the CON Program had evaluated and denied Swedish's application on its merits, and Swedish had commenced an adjudicative proceeding, the HLJ's role would have been to review that decision and determine whether Swedish's application should have been approved or denied on its merits. But because the CON Program instead denied Swedish's application on the sole ground that the CON had expired as of October 22, 2012 (decision date) and January 15, 2013 (reconsideration decision date), the HLJ's role was to review those decisions and determine whether Swedish's CON had expired as of those dates.

Instead of doing so, the HLJ dismissed the adjudicative proceeding as "moot" because Swedish's CON expired during the adjudicative proceeding. AR-II at 623 (dismissal order); *see also* AR-II at 749-55 (reconsideration order, addressing Swedish's alternate argument that validity period should have been extended pursuant to RCW 43.70.280(2)). As a result, the HLJ never decided the issue actually before him: Whether the CON Program's decisions denying Swedish's site-change application on the ground that Swedish's CON had expired were erroneous because the CON had not expired as of the dates of those decisions.

B. As a matter of law, Swedish's CON was valid when the Department denied Swedish's site-change application on the ground that the CON had expired.

Prior to the scheduled expiration of the CON on October 1, Swedish asked the HLJ to toll the CON validity period so that the CON Program would not be able to deny Swedish's site-change application on the ground that it had expired, and would instead have to evaluate it on its merits.

Swedish, the CON Program, and the HLJ all recognized that this was the purpose of Swedish's motion and would be the result if Swedish's motion were granted. In its motion, Swedish explained that the HLJ should grant the motion because a tolling order "will prevent Swedish's change-of-location application from being denied as moot." AR-I at 74 (Swedish's motion, filed September 28, 2012). In its opposition, the CON Program argued that the HLJ should deny the motion for the same reason, i.e., because "if 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 (Department's response, filed October 5, 2012) (emphasis original).

On October 22, 2012, the CON Program took precisely the action which the tolling order would prohibit: It denied Swedish's site-change application on the ground that the CON had expired. AR-II at 1007-14.

However, on November 7, 2012, the HLJ granted Swedish's motion for a tolling order, and made the order retroactive to the filing of the adjudicative proceeding as Swedish had requested, ordering that "[t]he 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).

On November 14, 2012, following the issuance of the HLJ's tolling order, Swedish asked the CON Program to reconsider its denial of Swedish's site-change application. AR-II at 265-66. Under the Department's regulations, the CON Program will reconsider its denial of an application if the applicant makes a written request within twenty-eight days of the CON Program's decision showing "good cause" for reconsideration. WAC 246-310-560. "[S]ignificant changes in factors or circumstances relied upon by the department in making its findings and decision" are deemed to constitute "good cause" for this purpose. WAC 246-310-560(2)(b)(ii). Since the HLJ's tolling order invalidated the sole

basis for the CON Program's decision—i.e., the expiration of the CON—it constituted good cause for reconsideration, as Swedish explained in its reconsideration request. AR-II at 265-66.

Rather than reconsider its decision, however, the CON Program asked the HLJ to reconsider the tolling order. The CON Program conceded in its motion that its denial of Swedish's site-change application on the ground that the CON had expired could not stand. As the CON Program explained in its motion, “[b]y 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.” AR-I at 120 (emphasis added). And, as the CON Program further explained in its reply brief, the tolling order “render[s] moot the Program's position that the amendment could not be granted because the validity period had expired.” AR-I at 276 (emphasis added).

The HLJ denied the CON Program's motion for reconsideration. AR-I at 354-61. The CON Program refused to acknowledge the HLJ's denial of its motion for reconsideration, and continues to take the position that the HLJ effectively granted the CON Program's motion. *See* Department of Health Response Brief, filed March 20, 2014 (“Dept. Br.”) at 13-14.

However, the only aspect of the tolling order that was reconsidered was the correction of a single factual misstatement. In the tolling order, 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 site-change application. The HLJ corrected this misstatement in the reconsideration order. AR-I at 359. With the exception of this correction, the HLJ denied the CON Program's motion. Specifically, the HLJ ordered that "[t]he Program's Motion for Reconsideration is DENIED, to the extent that it requests that [the tolling order] be reconsidered to deny Swedish's request for the tolling of the remainder of the validity period for CN #1330R existing on September 19, 2012, pending the conclusion of the adjudicative proceeding." AR-I at 360.

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 v. City of Medina*, 168 Wn.2d 845, 853, 232 P.3d 558 (2010) (motion for reconsideration tolls deadline for notice of appeal). In this case, the legal effect of the HLJ's tolling order was that the deadline for Swedish to commence its project was extended by the length of the tolling period, until April 9, 2013.

The CON Program's denial of Swedish's site-change application and reconsideration request on October 22, 2012 and January 15, 2013, respectively, therefore constituted legal error. These were the "contested department decisions" under review, and by not reversing them, the HLJ engaged in unlawful procedure or decision-making process, failed to follow a prescribed procedure, erroneously interpreted and applied the law, failed to decide all issues requiring resolution by the agency, and acted arbitrarily and capriciously, each of which constitutes grounds for judicial relief under the APA. *See* RCW 34.05.570(3) (judicial review of agency orders in adjudicative proceedings).²

C. That the tolling order was issued in the Extension Request Adjudicative Proceeding is irrelevant.

As Swedish discussed in its opening brief, the tolling order was issued in the Extension Request Adjudicative Proceeding. This was, in

² The Department also cites to the HLJ's order denying Swedish's motion for reconsideration of the HLJ's dismissal order for the proposition that the HLJ did not toll the CON validity period. *See* Dept. Br. at 14. That order does reference the original CON expiration date of October 1, 2012. AR-II at 751. However, this background reference was within the context of evaluating Swedish's argument that in lieu of extending the CON validity period by six months, as Swedish requested, the Department should have at minimum extended Swedish's CON validity period for a short period of time, pursuant to RCW 43.70.280(2), as the Department had done for Kennewick General Hospital's CON amendment application during the same time period. The referenced order had nothing to do with whether the CON remained valid as of the date of the CON Program's decisions due to the tolling order. AR-II at 623. Moreover, the effect of the tolling order should be determined by looking to the language of the tolling order; surely the language of the actual order at issue cannot be ignored in favor of superficially contradictory language from a different decision issued in a different procedural context with respect to a different legal issue.

fact, the only proceeding in which it could have been issued. Because the CON Program had not yet denied Swedish's site-change application, the Site Change Adjudicative Proceeding had not yet been commenced. Indeed, the purpose of the tolling order, as proposed by Swedish, acknowledged by the CON Program, and given effect by the HLJ, was supposed to be to prevent the CON Program from denying Swedish's site-change application on the ground that the CON had expired (i.e., to prevent the Site Change Adjudicative Proceeding from ever having to be filed).

The Department argues that because the tolling order was issued in the Extension Request Adjudicative Proceeding it had no effect with respect to Swedish's site-change application. *See* Dept. Br. at 15. This of course is inconsistent with the CON Program's numerous acknowledgements below that the tolling order would prevent the CON Program from denying Swedish's site-change application on the ground that the CON had expired. *See, e.g.*, AR-I at 97, 120 & 276. It also is inconsistent with the parties' agreement below that the two adjudicative proceedings should have been consolidated because they related to the same underlying issues. AR-II at 351-52 & 445-46. More importantly, however, the HLJ tolled the CON, not a legal proceeding. AR-I at 117 (tolling "[t]he remainder of the validity period for CN #1330R existing on

September 19, 2012 ...”) (emphasis added). Therefore, what was tolled was the deadline for Swedish to commence its ambulatory surgical facility project. It is irrelevant that the tolling order was issued in the Extension Request Adjudicative Proceeding rather than the Site Change Adjudicative Proceeding.³

D. The Health Law Judge’s dismissal of the Site Change Adjudicative Proceeding should be set aside.

As a result of the tolling order, Swedish’s CON was valid as of October 22, 2012, when the CON Program denied Swedish’s site-change application on the ground that the CON had expired. Swedish’s CON remained valid as of January 15, 2013, when the CON Program denied Swedish’s request for reconsideration in light of the tolling order. And, Swedish’s CON remained valid as of March 14, 2013, by which date the HLJ was required under the Department’s regulations to rule on Swedish’s summary judgment motion on this issue.⁴

³ Indeed, the tolling order logically could not have been issued in the Site Change Adjudicative Proceeding, as the Department appears to argue was required. The very basis for the Site Change Adjudicative Proceeding was that the CON Program erred by denying the site-change application because of the tolling order. Thus, the issue raised in the Site Change Adjudicative Proceeding did not exist until after the tolling order was issued.

⁴ As explained in Swedish’s opening brief, the Department’s regulations required the HLJ to rule on Swedish’s motion within 30 days after filing of the motion. WAC 246-10-403(11). Swedish’s summary judgment motion was filed on February 12, 2013, making the HLJ’s order due by March 14, 2013. AR-II at 40-50. Even if this time period were extended in accordance with the extended briefing schedule on Swedish’s motion, the HLJ’s order still would be due while Swedish’s CON remained valid. *See* Opening Brief of Swedish Health Services, filed February 20, 2014, at 24, n.8.

The HLJ erred by not deciding the issue before him, i.e., whether Swedish's CON was valid when the CON Program denied Swedish's site-change application on the ground that the CON had expired at that time, and instead dismissing the adjudicative proceeding as moot because Swedish's CON expired during the adjudicative proceeding. Consistent with the APA judicial review standards, the Court should set aside the HLJ's order because the HLJ engaged in unlawful procedure or decision-making process, the HLJ failed to follow a prescribed procedure, the HLJ erroneously interpreted and applied the law, the HLJ did not decide all issues requiring resolution, and the HLJ's order was arbitrary and capricious. *See* RCW 34.05.570(3).

E. This Court reviews the Department's actions, not the Superior Court's decision.

The Department references the Superior Court's denial of Swedish's motion for a judicial tolling order during the pre-consolidation period when the extension request was being considered by the Superior Court in a judicial review proceeding but the site-change application was still being considered by the HLJ in an adjudicative proceeding. *See* Dept. Br. at 15. It is not apparent what import the Department gives to this Superior Court ruling. However, as a matter of law it is irrelevant. Under the APA, this Court reviews the Department's actions, not the Superior

Court's decisions. *See Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). The Superior Court's denial of Swedish's motion for a judicial tolling order is irrelevant to this Court's review of the Department's denial of Swedish's site-change application.

F. The Court should order the Department to issue the amended CON to Swedish or, in the alternative, remand this matter to the Department for further proceedings.

For the reasons discussed in Swedish's opening brief, if the Court determines that the sole ground for denial of Swedish's site-change application, the alleged expiration of Swedish's CON, was invalid, the Court should order the Department to issue the amended CON to Swedish and stay the lifting of the HLJ's tolling order until Swedish receives the amended CON. In the alternative, the Court should remand this matter to the Department to conduct an adjudicative hearing regarding the merits of Swedish's site-change application. At minimum, the Court should remand this matter to the Department to conduct an adjudicative hearing regarding Swedish's validity-period extension request.⁵

⁵ The intervenors argue that in a remand proceeding the Department should evaluate whether there is "need" for Swedish's proposed ambulatory surgical facility. *See* Intervenor Eastside Endoscopy Center and King County Public Hospital District No. 2 d/b/a EvergreenHealth Response Brief, filed March 24, 2014, at 13-18. However, Swedish's approved location in Issaquah and Swedish's proposed location in Redmond are both within the East King planning area. As a matter of law, need for ambulatory surgical facilities must be determined for a planning area as a whole, not for sub-areas within a planning area. *See* WAC 246-310-270(2). Therefore, as a matter of law the Department's need determination for East King is unaffected by the proposed change of location from Issaquah to Redmond. When evaluating CON amendment applications, the

III. CONCLUSION

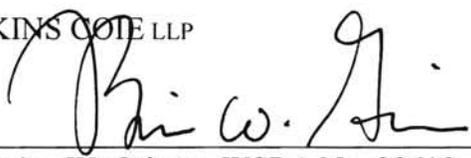
Much of the protracted and complex procedural history of this matter could have been avoided if the CON Program simply had (1) evaluated Swedish's site-change application before the CON expired, (2) extended the validity period to allow more time for Swedish's site-change application to be evaluated, or (3) evaluated Swedish's site-change application on its merits following the HLJ's tolling order, as Swedish asked it to do. But notwithstanding the procedural history resulting from the Department's failure to take any of these actions, the issues now before the Court are narrow: The CON Program erred by denying Swedish's site-change application on the ground that Swedish's CON had expired, and the HLJ erred by dismissing the Site Change Adjudicative Proceeding as moot because the CON expired during the adjudicative proceeding, as opposed to determining whether the CON remained valid when the CON Program denied Swedish's site-change application on the

Department only evaluates the CON criteria which are affected by the proposed amendment. AR-II at 1012 (CON Program's evaluation, stating "The review for an amendment project is limited to only those criteria that would be affected by the amendment, provided that the amendment does not significantly alter the project" and confirming that Swedish's proposed amendment, i.e., a change of location within the planning area, did not result in the project being "significantly altered under CN rules") (emphasis omitted); *see also id.* at 756-77 (Swedish's amendment application, which states that need forecast is unaffected by proposed change of location) & 799-802 (Department's screening questions, which do not request an updated need forecast). The intervenors' proposed approach would be no different than requiring Swedish to file an entirely new CON application, which would defeat the entire purpose of the CON amendment process.

ground that Swedish's CON had expired. Swedish respectfully requests that the Court order the Department to issue the amended CON to Swedish or remand to the Department to evaluate Swedish's site-change application on its merits.

Respectfully submitted this 21st day of April 2014.⁶

PERKINS COIE LLP

By: 

Brian W. Grimm, WSBA No. 29619

1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Petitioner,
Swedish Health Services

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⁶ Swedish's reply brief originally was filed on April 21, 2014. This corrected reply 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.