No. 36919-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

THE CAMPAIGN TO MAKE HEALTH CARE WORK and its members, WASHINGTON COMMUNITY ACTION NETWORK (WASHINGTON CAN!); SERVICE EMPLOYEES INTERNATIONAL UNION 1199 NORTHWEST; SOCIETY OF PROFESSIONAL ENGINEERING EMPLOYEES IN AEROSPACE, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS LOCAL 2001; and UNITED FOOD AND COMMERCIAL WORKERS LOCAL 21,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH, and PROVIDENCE EVERETT MEDICAL CENTER

Respondents.

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PROVIDENCE EVERETT MEDICAL CENTER'S BRIEF OF RESPONDENT

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I. INTRODUCTION

Providence Everett Medical Center is racing against time to modernize and expand its hospital to meet the growing health care needs of its region. Providence Everett has over the last decade grown from a community hospital into a regional medical center, taxing its ability to treat the sick and injured in cramped and aging facilities, some of which date back to the 1920s. Because the number of sick and injured has grown rapidly over the last few years, patients must often wait hours to be seen in the emergency room or admitted to the hospital. Increasingly, Providence Everett's hospital beds are full, resulting in the need to transfer patients to other hospitals, exacerbating a growing shortage of hospital beds in the region.

The Campaign to Make Healthcare Work, a group of labor organizations that brought this challenge, acknowledges Providence Everett must "renovate," "modernize" and "appropriately expand" its hospital to keep pace with the growing number of sick and injured. The new hospital tower will include an expanded emergency department, state-of-the-art surgical suites, and replacement beds primarily in modern single-occupancy rooms. The Department of Health may only review the cost of implementing the 106 new hospital beds, which represent just 13 percent of total project costs. The Campaign challenges the decision to

grant Providence Everett a Certificate of Need increasing its licensed capacity, claiming the Department of Health should have adopted new cost-containment procedures prior to approving the application. Because the reviewable and non-reviewable parts of the project are tied together, the Campaign's claims could delay an urgently needed hospital project and increase its price tag by several million dollars due to construction cost inflation.

The Campaign's claim is not based on the premise that the Department of Health failed to follow existing procedures, or that the new hospital beds are not needed. Instead, it seeks to have the Department of Health adopt new cost-containment procedures in response to a policy audit by the Joint Legislative Audit and Review Committee.

In finding the Campaign does not have standing to bring this challenge, the Superior Court concluded courts may not hear generalized grievances with agency programs. In addition, the Campaign has not met the burden to show that its members are directly injured by the Department of Health's failure to adopt new cost-containment procedures and that any such injury could be remedied by this lawsuit. The Campaign has not demonstrated that hospital charges would be lower if the Department of Health developed new cost-containment procedures and applied them to Providence Everett's Certificate of Need application.

While the Campaign argues that the Department of Health could regulate or cap Providence Everett's rates, the Department of Health does not have rate regulation authority.

The Department of Health applied its established Certificate of Need standards in approving Providence Everett's application. The Campaign has not met its burden to show that the Department's failure to adopt new cost-containment procedures has injured its members. Providence Everett respectfully requests the court to affirm Judge Hirsch's decision and dismiss this challenge.

II. ISSUES RELATED TO APPELLANT'S ASSIGNMENTS OF ERROR

Issue 1: Whether the Campaign's demand that the Department of Health adopt new cost-containment procedures is a generalized grievance that should be addressed by the legislative and executive branches, not the courts?

Issue 2: Whether the Campaign has standing to challenge the Department of Health's failure to adopt new cost-containment procedures when it claims injuries caused by Providence Everett's expansion, not the Department of Health's inaction?

Issue 3: Whether the Campaign has shown a direct injury when its members' health care costs are determined by the complexities of the

health care market, not whether the Department of Health has adopted new cost-containment procedures for a Certificate of Need application?

Issue 4: Whether the Campaign's alleged injury can be remedied by this lawsuit when the Department of Health does not have authority to impose the rate regulation proposed by the Campaign and available cost-containment measures have already been implemented?

III. STATEMENT OF THE CASE

A. Providence Everett Must Modernize and Expand Its Facilities To Meet The Region's Increasing Health Care Needs.

Providence Everett Medical Center is a non-profit hospital that serves as the principal referral center for tertiary care – complex procedures like heart surgery – in Snohomish, Island and Skagit Counties. Declaration of David T. Brooks ("Brooks Dec.") at 2.[1] The hospital's mission is to "provide compassionate care to all people in need," including "those who are poor and vulnerable." CP 173. It provides excellent care, and is rated among the top 100 hospitals in the country. CP 133 at 60:22-25.

It is increasingly difficult for Providence Everett to maintain this high level of care in antiquated and overcrowded facilities. Brooks Dec. at

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[1] The Brooks Dec. is Sub No. 17 in the Thurston County Superior Court docket, and is included in Providence Everett's March 25, 2008 Supplemental Designation of Clerk's Papers. All documents included in that supplemental designation are referred to in this brief by their name and docket Sub number. Providence Everett will file an amended brief to update these references when the Clerk's Papers numbers become available.

2; CP 119 at 4:8-16. On many days, the hospital is full and must send patients to other hospitals, sometimes as far away as Seattle. Declaration of Jack Robinson at 2 ("Robinson Dec.").[2] An emergency department built to accommodate 60,000 visits is serving more than 100,000 patients each year, making it the second busiest in the state. Brooks Dec. at 2; Declaration of Enrique Enguidanos at 1-2 ("Enguidanos Dec.");[3] CP 126 at 32:6-34:5.

Incoming patients often wait hours to be seen, and frequently must be treated in hallway beds set up behind temporary curtains. Enguidanos Dec. at 2. Patients coming out of surgery sometimes must wait hours in the recovery room while nurses shift other patients among double occupancy hospital rooms to find a suitable roommate based on gender and diagnosis. Declaration of Kim Williams ("Williams Dec.") at 2;[4] CP 120 at 9:5 – CP 121 at 11:9. Because they are in old buildings, many of Providence Everett's existing patient rooms do not meet current building or health codes or the requirements of the Americans with

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[2] The Robinson Dec. is Thurston County Superior Court Docket Sub No. 12; *see also* Sharon Salyer, *Hospitals Turning Patients Away*, Everett Herald, Feb. 15, 2008, available at http://www.heraldnet.com/article/20080215/NEWS01/161058164 (last accessed March 25, 2008).

[3] The Enguidanos Dec. is Thurston County Superior Court Docket Sub No. 13.

[4] The Williams Dec. is Thurston County Superior Court Docket Sub No. 16.

Disabilities Act. CP 130 at 49:4-12; Brooks Dec. at 3; Declaration of Mike Holcomb ("Holcomb Dec.") at 2.[5]

B. Providence Everett Plans to Modernize and Expand.

Providence Everett has worked for several years with community leaders to determine how to best modernize and expand its facilities. Holcomb Dec. at 2; Declaration of Ray Stephanson ("Stephanson Dec.") at 2.[6] *See also* Declaration of Louise Stanton-Masten ("Stanton Masten Dec.) at 2.[7] The hospital's main Colby Campus is located in an urban residential neighborhood surrounded by single family homes. CP 120 at 6:14-21; Holcomb Dec. at 2-3. It is not possible to modernize and expand on a piecemeal basis. *Id.* Therefore, the hospital studied whether to build a new hospital tower to modernize and expand its existing facilities or relocate to a "greenfield" suburban location. CP 134 at 62:5-18.

Through consultation with community leaders, health planning experts, doctors and nurses, Providence Everett decided it would be more cost effective to stay in Everett and build a new hospital tower on its Colby Campus. The new tower is designed to include modern replacement beds primarily in single-occupancy rooms, an expanded emergency room and state-of-the-art surgical suites, and newly licensed

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[5] The Holcomb Dec. is Thurston County Superior Court Docket Sub No. 14.

[6] The Stephanson Dec. is Thurston County Superior Court Docket Sub No. 18.

[7] The Stanton-Masten Dec. is Thurston County Superior Court Docket Sub No. 15.

hospital beds. CP 163. The total estimated cost for the project was $461,009,197. CP 164.

On April 11, 2006, Providence Everett applied to the Department of Health for a Certificate of Need for an additional 166 hospital beds to be located in the proposed tower.[8] A Certificate of Need is not required for the vast majority of the project, the replacement beds, new emergency room and surgical suites. Of the $461,009,197 for the proposed hospital tower, $72,824,543 was attributable to the 166 new hospital beds. CP 164.

Because it is not practical to add floors for new rooms after the tower is completed, the expansion part of the project is tied to the modernization portion. Holcomb Dec. at 2-3. Therefore, Providence Everett proposed to open new beds in three phases: Phase I, a tower that would include replacement beds, a new, expanded emergency department and surgical suites, 106 new beds, and one "shelled," or unfinished, floor for an additional 60 beds. Phases II and III would build out this unfinished space to include 30 hospital beds each. CP 164.

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[8] Bed need projections using Department of Health methodology show the Central Snohomish Planning Area will need an additional 106 hospital beds by 2015, four years after the hospital tower is projected to open. (CP 171).

C. Community Support for Providence Everett's Modernization and Expansion Plans.

The Department of Health conducted a public hearing on Providence Everett's expansion and modernization plan on September 18, 2006. The proposal was supported by every person who provided oral testimony at the hearing, including representatives of the Snohomish County Executive's Office, the Mayor of Everett, doctors, nurses, emergency medical service providers, and business groups. CP 118-134. No competing health care provider opposed the application, *see id.*, in significant contrast to many certificate of need applications.[9]

The Campaign's Brief misleadingly states that it and "its members participated in the public comment process, offering oral and written comments to the proposed expansion." Campaign Brief at 17. None of the Campaign members who are parties to this lawsuit testified at the September 18, 2006 hearing. *See* CP 118-134. Most of the unions that were Campaign members at the public hearing, including the only union that testified orally – the Boeing Machinists – withdrew after the

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[9] *See, e.g., DaVita Inc. v. Washington State Department of Health*, 137 Wn. App. 174, 151 P.3d 1095 (2007); *St. Joseph Hospital and Health Care Center v. Department of Health*, 125 Wn.2d 733, 887 P.2d 891 (1995).

hearing.[10] The Boeing Machinists testified at the hearing that they "are not opposed to the expansion of the facility . . .." CP 132 at 56:12-15.

The "Campaign to Make Healthcare Work" named in this lawsuit consists of other labor organizations, including Service Employees International Union ("SEIU"). SEIU has also formed the "Make Health Care Work" Campaign in Oregon to pursue union organizing for Providence nurses. *See* Declaration of Edmund W. Robb ("Robb Dec."), Ex. D.[11]

D. Department of Health Approves 106 Beds and Implements Cost Containment Measures.

The Department of Health issued a Certificate of Need on December 18, 2006, denying the request for 166 beds but concluding that "the addition of 106 beds to Providence Everett Medical Center (phase one) is consistent with [the Certificate of Need] criteria." CP 160.

The Department of Health determined that the first phase of Providence Everett's new hospital tower meets all four Certificate of Need criteria:

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[10] SEIU and WashCAN are the only groups from the original Campaign that have not abandoned this appeal. The "Campaign" identified at the public hearing included: Service Employees International Union (SEIU), International Association of Machinists and Aerospace Workers District 751 (Aerospace Machinists), International Brotherhood of Teamsters Local 38 (Teamsters), and Washington Community Action Network (WashCAN). (CP 115) The Aerospace Machinists and Teamsters are not parties in this appeal.

[11] The Robb Dec. is Thurston County Superior Court Docket Sub No. 35.

- Bed Need: Data indicate that "if this project is not approved the planning area is projected to have a need for . . . 106 beds by the end of year 2015." CP 171.

- Financial feasibility: "The use of cash is a very appropriate and inexpensive financing method." CP 178.

- Structure and process of care (quality): Providence Everett will provide services "in a manner that ensures safe and adequate care to the public." CP 181.

- Cost-containment: "Superior alternatives, in terms of cost, efficiency, or effectiveness, are not available." CP 181.

As part of its cost-containment analysis, the Department of Health reviewed the eight alternatives Providence Everett "considered in addition to the project proposed," including options to do nothing, expand outward by purchasing neighboring homes, or build a campus at a new location. CP 181. The Department of Health concluded that the "basis for rejecting these alternatives was reasonable." *Id.* Other options would have required a "longer implementation time," "[h]igher costs and financial risk," and "[g]reater disruptions to existing operations during construction." *Id.*

The Department of Health also concluded that the cost-containment criteria were satisfied because the capital cost for the new beds was "reasonable" and "within past construction costs reviewed by this office." CP 182. It explained that "the project is not expected to have a remarkable impact on the cost and charges," CP 178, and would include "improvements in the delivery of health services." CP 182.

The Certificate of Need also included cost-containment provisions to limit the project's total capital cost. In reducing the number of approved beds to 106 from the 166 requested, the Department of Health reduced the allowed capital costs by 18 percent, from $72,824,543 to $59,868,977. CP 164. Providence Everett is required to give the Department of Health quarterly project reports describing any changes in project costs, WAC 246-310-590, and to file a request to amend its Certificate of Need application if projections indicate actual capital costs will be more than 12 percent higher than approved capital costs. WAC 246-310-100(1)(d); WAC 246-310-570(1)(e).

E. The Campaign Alleges The Department Of Health Should Have Adopted New Cost Containment Procedures.

On January 16, 2007, the Campaign sought reconsideration by the Department of Health, and the next day filed this lawsuit in Thurston County Superior Court. CP 7-58. In its Amended Petition, filed March 2, 2007, the Campaign stated it is not opposed to the "renovation," "modernization" or an "appropriate expansion" of Providence Everett. CP 61. However, it asserted the Department of Health "did not adequately apply" the Certificate of Need cost-containment review criteria. CP 62.

The Campaign does not allege that the Department of Health failed to follow its customary cost-containment procedures. Instead, it claims

that the Department of Health should have adopted new procedures to address policy issues raised by a Joint Legislative Audit and Review Committee ("JLARC") report. CP 69-70.[12]

F. The Trial Court Dismisses the Campaign's Petition.

Providence Everett intervened in this lawsuit over the Campaign's objection. Providence Everett and the Department of Health then both filed motions to dismiss. The Department of Health argued the Campaign failed to exhaust its administrative remedies by not requesting an adjudicative hearing before the Department. *See* CP 391. Providence Everett argued the Campaign lacked standing because it had failed to properly allege an injury-in-fact. CP 76-94.

In response, the Campaign acknowledged that it does not oppose the modernization and appropriate expansion of Providence Everett, and did not argue that the Department of Health should have reduced the number of approved new beds. Instead, the Campaign argued it had standing to raise the much more generalized concern that, prior to

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[12] JLARC is a legislative committee that reviews agency programs and makes policy recommendations to the legislature about how they could be improved. RCW 44.28. In 2005, the Legislature directed JLARC to provide recommendations to a legislative task force considering whether to update the Certificate of Need program. *See* http://www.leg.wa.gov/reports/06-6.pdf (JLARC's report on the Certificate of Need program). Neither the Department of Health, through regulations, nor the Legislature has implemented JLARC's cost-containment recommendations.

approving the new beds, the Department of Health should have adopted and then implemented new cost-containment measures. CP 250-51.

The trial court dismissed the Campaign's petition in a letter opinion dated July 18, 2007. Judge Hirsh held that the Campaign had exhausted its administrative remedies, but determined that the Campaign "fail[s] the injury-in-fact prong of standing under the APA." CP 467.[13]

Judge Hirsch ruled the Campaign failed to show it would be injured "in a way which is not a generalized injury to all members of the public;" failed the injury-in-fact test because it would not suffer "any specific impact as a result of DOH's approval of the CN at issue;" and, cannot "establish a concrete interest that has been harmed." CP 467-68.

G. Providence Everett Plans To Open New Interim Beds Before The Hospital Tower Is Completed.

Surging demand for hospital beds has required Providence Everett to take extraordinary measures to open several new beds under the Certificate of Need well before the new hospital tower is completed. Snohomish County hospitals are operating at capacity, and are routinely forced to transfer patients to hospitals in Bellevue and Seattle.[14]

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[13] Judge Hirsch's letter opinion is attached as Exhibit A.

[14] *See* Sharon Salyer, *Hospitals Turning Patients Away* Everett Herald, Feb. 15, 2008, available at http://www.heraldnet.com/article/20080215/NEWS01/161058164 (last accessed March 25, 2008).

Providence Everett's overcrowding is exacerbating a serious regional shortage of hospital beds.[15]

In its motion to intervene, Providence Everett informed the trial court, the Department of Health and the Campaign that it would move forward with increasing the number of licensed beds even before the new tower was built because the hospital was increasingly full and diverting patients. Providence Everett's Motion to Intervene at 4-5.[16] Providence is now renovating existing space to open several new acute care beds. *Id.*[17]

Providence Everett also informed the trial court that it is moving forward with the first phase of construction to complete the new hospital tower. *Id.* at 5. Providence Everett is proceeding because delays in the first phase of construction could delay subsequent phases, significantly increasing construction costs. Construction costs are currently rising at more than 12 percent a year, representing a potential increase of $36 million for each year of delay in completing the tower. Holcomb Dec. at 3. *See also* Exhibit C.

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[15] *See* Carol M. Ostrom, *Code-Red Situation Has Local Hospitals Diverting Patients*, Seattle Times, March 22, 2008, available at http://seattletimes.nwsource.com/html/localnews/2004298810_hospitals22m.html (last accessed March 25, 2008).

[16] The Motion to Intervene is Thurston County Superior Court Docket Sub No. 19.

[17] *See also* Sharon Salyer, *Providence Sees Need For 17 New Beds Now*, Everett Herald, August 25, 2007, available at http://www.heraldnet.com/article/20070825/NEWS01/108250036 (last accessed March 25, 2008). Copies of all cited newspaper articles are attached as Exhibit B.

IV. ARGUMENT

A. Standard Of Review.

In an appeal from agency action, "the court decides constitutional, procedural, statutory, jurisdictional and other questions of law de novo, without any stated deference to agency views." Washington Administrative Law Practice Manual § 10.05[C] at 10-26. *See, e.g., Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588-89, 90 P.3d 659 (2004). To have standing, a petitioner must demonstrate to the court that it has suffered "a concrete and particularized injury." *Gettman v. Drug Enforcement Administration*, 290 F.3d 430, 433 (D.C.Cir. 2002) (emphasis added). *See also Fund Democracy LLC v. Securities and Exchange Commission*, 278 F.3d 21, 27 (D.C.Cir. 2002) (courts do not defer to agencies on standing).[18]

In response to Providence Everett's Rule 12(b)(6) motion to dismiss, the Campaign filed several declarations from individuals and union representatives alleging they would one way or another pay higher health care costs as a result of the proposed expansion. CP 197-228. When in response to a motion to dismiss "matters outside the pleadings

[18] Administrative agencies are not subject to court jurisdictional rules, so a "petitioner would have had no need to establish its standing to participate in the proceedings before the agency. When the petitioner later seeks judicial review, the constitutional requirement that it have standing kicks in, and that requirement is the same, of course, as it would be if such review were conducted in the first instance by" the court. *Sierra Club v. Environmental Protection Agency*, 292 F.3d 895, 899 (2002).

are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56." CR 12(b). A court may not presume that general allegations in the plaintiff's pleading "embrace those specific facts that are necessary to support the claim." *Allan v. University of Washington*, 140 Wn.2d 323, 328, 997 P.2d 360 (2000) (quoting *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). Plaintiffs must make "a factual showing of perceptible harm." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). When challenging an agency decision, a petitioner must "either identify in the record evidence to support its standing to seek review or, if there is none because standing was not an issue before the agency, submit additional evidence to the court . . .." *Sierra Club v. EPA*, 292 F.3d at 899. *Cf. Concerned Olympia Residents for Environment (CORE) v. City of Olympia*, 33 Wn.App. 677, 683-84, 657 P.2d 790 (1983) (conclusory allegations do not establish injury-in-fact).[19]

[19] Because the Campaign is asserting its members' rights, it must establish standing by showing: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). The Campaign fails this test because it has not demonstrated its members would have standing in their own right.

Granting Providence Everett's motion to dismiss was appropriate whether under Rule 12(b)(6) or Rule 56.[20] Even if the facts alleged in the Petition and the declarations are assumed to be true, the Campaign failed to show that its members will likely suffer a direct injury in the form of higher health care charges as a result of the Department of Health's application of its established cost-containment measures to Providence Everett's Certificate of Need application, instead of adopting new procedures.

B. The Trial Court Correctly Determined That The Campaign Has Not Suffered An Injury-In-Fact.

The injury-in-fact requirement developed as a separation of powers limitation on the judicial branch. A court's role is to decide only controversies alleging concrete, direct injuries that are fairly traceable to the defendant's conduct. The Administrative Procedure Act (APA) incorporates this limit, leaving generalized grievances with agency policy to the legislative and executive branches. *See, e.g., Lujan v. Defenders of Wildlife,* 504 U.S. at 573; *Allan v. University of Washington,* 140 Wn.2d at 332.

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[20] Judge Hirsh's ruling does not implicate Thurston County Local Rule 56(b), as the Campaign asserts, because it did not need to rely on the administrative record. That rule limits summary judgment motions in administrative review cases when "reference to the record or transcript of the administrative proceeding is required." (emphasis added).

The APA's standing test is "derived from federal case law," and Washington Courts "look to federal cases addressing standing" to determine whether a litigant meets the APA's standing requirements. *Seattle Building and Construction Trades Council v. The Apprenticeship and Training Council ("Training Council")*, 129 Wn.2d 787, 793, 794 n. 1, 920 P.2d 581 (1996); *St. Joseph Hospital,* 125 Wn.2d at 739.

The APA requires a two-part showing to establish that an injury-in-fact would likely result from an agency decision: (1) the decision "has prejudiced or is likely to prejudice that person;" **and** (2) a favorable court decision "would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action." RCW 34.05.530(1), (3) (emphasis added); s*ee also St. Joseph Hospital*, 125 Wn.2d at 739 (describing these two conditions as the APA's "injury-in-fact requirement").[21]

The injury alleged by the Campaign does not satisfy the APA's injury-in-fact test. The Campaign alleges that the Department of Health failed to adopt new cost-containment procedures in response to the JLARC recommendations. *See* CP 251.

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[21] The APA test for standing includes an additional component: the "zone-of-interest" test. RCW 34.05.530(2); *St. Joseph Hospital*, 125 Wn.2d at 739-40. The trial court found the Campaign met the zone-of-interest test, but not the injury-in-fact test.

What the Campaign does not allege is significant. It does not allege that the new hospital beds are unnecessary, or that the Department of Health failed to properly apply three of the four Certificate of Need standards: the need for new hospital beds; the financial feasibility of the project; and the structure and process of care to ensure the quality of care to be provided.

It also does not allege the Department of Health misapplied its customary procedures for addressing the fourth standard, cost containment. Indeed, following this customary approach, the Department of Health incorporated several significant cost containment measures in its decision by: (i) limiting the number of new beds to 106 instead of the 166 requested; (ii) lowering the approved capital cost of the expansion by 18 percent, from $72,824,543 to $59,868,977; and (iii) requiring Providence Everett to file an amended application if actual construction costs will exceed approved costs by 12 percent.

What the Campaign does allege fails to meet the "injury-in-fact" requirement for standing in at least three ways: (1) in asking the Department of Health to adopt new cost-containment procedures, the Campaign asserts the kind of generalized grievance about a government program or policy that should be addressed in the legislative or executive branches of government, not the courts; (2) it fails to establish a direct link

in a causation chain between the Department of Health's failure to adopt new cost-containment procedures and the alleged increase in health care charges paid by its members; and (3) the Campaign does not show that this lawsuit is likely to offer any redress by lowering health care charges.

1. The Campaign's Demand For New Cost-Containment Procedures Is A Generalized Grievance.

Judge Hirsch correctly determined that the Campaign's alleged injury is no different than the "generalized injury to all members of the public" that may be caused by the Department of Health's decision not to adopt new Certificate of Need procedures. CP 468. Such claims are properly dismissed as generalized grievances because they raise general concerns with a government program, not an individual injury-in-fact.

a. A General Concern About Whether The Government Is Following The Law Is Not An Injury-In-Fact.

The Campaign alleges that the Department of Health is not properly applying the Certificate of Need statute and has "habitually failed to adequately review" cost-containment issues in Certificate of Need applications. Campaign Brief 1-2. It seeks through this litigation to remake the "flawed procedures criticized by the JLARC audit." Campaign Brief at 3. In other words, the Campaign does not allege that the Department of Health failed to follow its own existing cost-

containment procedures, but that it failed to develop and adopt new procedures in response to the JLARC review.

The United States Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every other citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than the public at large – does not state" a justiciable case or controversy. *Lujan,* 504 U.S. at 573. *See also Kadoranian v. Bellingham Police Department*, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992) (alleged injury must be "more than a general dissatisfaction with the statute" being challenged).

The generalized grievance doctrine prevents individuals from suing if their only injury is as a citizen or taxpayer concerned with having the government follow the law. *See, e.g., Federal Election Commission v. Akins*, 524 U.S. 11, 23, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998) ("common concern for obedience to law" will not support standing). *See also Vovos v. Grant*, 87 Wn.2d 697, 699-700, 555 P.2d 1343 (1976) (no standing based on "abstract interest of the general public in having others comply with the law"); *State v. Human Relations Research Foundation*, 64 Wn.2d 262, 269, 391 P.2d 513 (1964) (no standing to raise "dissatisfaction with the general framework of the statute").

The generalized grievance doctrine recognizes that lawsuits challenging "the particular programs agencies establish to carry out their legal obligations . . . [are] , even when premised on allegations of several instances of violations of law, . . . rarely if ever appropriate" for court adjudication. *Lujan v. Defenders of Wildlife*, 504 U.S. at 568 (quoting *Allen v. Wright,* 468 U.S. 737, 757, 104 S. Ct. 3315, 82 L.Ed.2d 556 (1984)). To decide such cases would have courts "assume a position of authority over the governmental acts of another and co-equal department" of government. *Id.* at 577 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 489, 43 S. Ct. 597, 67 L.Ed. 1078 (1923)).

The Campaign's allegations do not contest whether Providence Everett should be allowed to modernize and expand – it has conceded that point – but whether the process used by the Department of Health to review the cost of that expansion is appropriate. The Campaign acknowledges the "fundamental problem" that the Certificate of Need statute is designed to address is "rising cost of care brought on by an oversupply of health facilities (such as hospital beds) in some areas." (Campaign Brief at 1) (emphasis added). However, it argues that the court should use the statute to ensure no costs of expansion are "passed on to PEMC patients and other payers." *See* Campaign Brief at 3.

To achieve this goal, the Campaign asks the court to adopt concerns raised in the JLARC report and use this case to "develop new methods to implement the cost-containment criteria." Campaign Brief at 2. In essence, the Campaign asks the court to amend a statutory scheme that the legislature and the Department of Health have chosen to leave unchanged. Judge Hirsh correctly concluded that the Campaign may not use the courts to pursue "a generalized injury to all members of the public." CP 468.

The Campaign has available to it many other forums to address Certificate of Need issues specifically or health care costs generally. It may petition the Department of Health to adopt the JLARC recommendations. RCW 34.05.330. S*ee* Section D, *infra*. It also may pursue legislative action at the state and federal level. SEIU says it "recently participated in a state wide task force to review and recommend changes to Washington's certificate of need regulations." CP 206.

b. The Campaign Raises A General Societal Issue, Not An Individual Injury.

The Campaign argues that its claims are not a generalized grievance merely because the alleged injury will "also affect the general public." Campaign Brief at 30-31. When an individual right is concretely and directly invaded, individuals are not necessarily precluded from

standing to raise their injuries in court even though many others may have been similarly injured. *See, e.g., FEC v. Atkins*, 524 U.S. at 23-25.

However, plaintiffs do not have standing to pursue general injuries that are of an "abstract and indefinite nature – for example, harm to the common concern for obedience to law." *FEC v. Atkins*, 524 U.S. at 23 (internal quotation omitted). As cases cited by the Campaign demonstrate, plaintiffs must allege an injury to a concrete individual right for courts to find standing. *See, e.g., FEC v. Atkins*, 524 U.S. at 23-25 (standing to challenge government's refusal to provide public documents when statute explicitly grants citizens right to documents); *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 174, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (standing to challenge enforcement of environmental standards because statute explicitly grants citizens a right to file such claims).

As Judge Hirsch found, the Campaign's challenge does not allege an injury with the "concrete specificity" that is required for court review. The Campaign generally questions whether the Department of Health's current cost-containment procedures are good enough, calling its approach "perfunctory" and "inadequate." CP 62. However, the Campaign has not articulated what standard the court could use to judge whether an agency program is "adequate," or how new standards could insulate the Campaign's members from increased health care charges.

2. The Campaign Has Not Shown That The Department's Failure To Adopt New Procedures Will Likely Cause Patients To Pay Higher Hospital Charges.

As the trial court correctly found, to have standing under the APA a petitioner must show an injury-in-fact that is "neither imaginary nor speculative." *Allan v. University of Washington,* 140 Wn.2d at 332. An association must show a "direct injury" and demonstrate that the relief requested would benefit its members more directly than other citizens. *Lujan v. Defenders of Wildlife,* 504 U.S. at 573-74; *Allan*, 140 Wn.2d at 332. An injury is only direct when it is the "result of the challenged . . . conduct." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). If a petitioner cannot demonstrate that government action or inaction will result in an "immediate, concrete and specific injury," the claim must be dismissed. *Trepanier v. City of Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992).

When a plaintiff is the direct object of the agency action, "there is ordinarily little question that the action or inaction has caused him an injury, and that a judgment preventing or requiring the action will redress it." *Lujan v. Defenders of Wildlife*, 504 U.S. at 561-2. However, "when the plaintiff ***is not himself the object of the government action or inaction he challenges***, standing is not precluded, but is ordinarily substantially more difficult to establish." *Id.* at 562 (emphasis added).

To make the requisite showing in a claim against a regulatory agency, a plaintiff must present an injury that "fairly can be traced ***to the challenged action of the [government agency]***, and not injury that results from the independent action of some third party not before the court." *Eastern Kentucky Welfare Rights Organization v. Simon*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976) (emphasis added). Injuries that are "highly indirect" do not meet this requirement, as such injuries are not the result of "the Government conduct [alleged to be] unlawful." *Allen v Wright*, 468 U.S. 737, 757, 104 S. Ct. 3315, 82 L.Ed.2d 556 (1984); *c.f. CORE v. City of Olympia*, 33 Wn.App. at 683-84 (a litigant must "be specifically and perceptibly harmed" so courts are not "a vehicle for the vindication of value interests of concerned bystanders").

This lawsuit is not brought by a party who is the "object" of government action. Instead, the Campaign alleges an indirect injury, claiming its members will be harmed because another party, Providence Everett, has been the object of government action. The Campaign alleges an injury resulting from third-party conduct, not the actions or inactions of a government agency. The Campaign asks the court to improperly presume the impact that is alleged.

a. The Injury Alleged By The Campaign Is Not The Result Of Department Of Health Inaction But Of The Independent Actions Of Third Parties.

The Campaign has not alleged that its injuries are the direct result of the Department of Health's failure to adopt new cost-containment procedures in light of the JLARC recommendations. Rather, it alleges injuries that are "a direct result of [Providence Everett's] proposed expansion," and explains that this case is about whether "hospital consumers should have to pay more to fund" this expansion. Campaign Brief at 1. The Campaign fails to allege how adopting new JLARC cost-containment measures to review Providence Everett's expansion will lower hospital charges paid by patients.

The indirectness of the Campaign's alleged injury is demonstrated by the long and attenuated causal chain that the Campaign asks the court to presume. For the Department of Health's inaction to translate to the likelihood that charges to patients will increase, the Campaign must establish: (1) the Department of Health's customary methods of cost-containment review would be materially different from methods developed in light of the JLARC recommendations; (2) adoption of new cost-containment procedures would have resulted in either denial of the 106 new beds or significant conditions that were not already imposed; (3) new cost containment procedures would have lowered Providence

Everett's expansion costs; (4) expansion costs subject to Certificate of Need review (13 percent of project total) can be segregated from costs not subject to Certificate of Need review (87 percent) in hospital rate negotiations with payers; (5) third-party payers will agree to pay those costs for covered patients in negotiations with Providence Everett; (6) employers will agree to pay those additional expansion costs through negotiations with third-party payers; and (7) employers will be able to pass on costs to workers through labor negotiations. For the purposes of mathematical illustration, if a 50% probability is assumed (for the purposes of argument only) for each of the seven links in this causal chain, the probability that the Department of Health's failure to adopt new cost-containment procedures will affect hospital charges is less than 1%.[22]

b. The Campaign Improperly Asks The Court To Presume Patient Charges Will Increase.

The Campaign alleges an injury by pointing to accounting projections that Providence Everett submitted with its Certificate of Need application showing that the capital costs for each of the approved new beds will increase during the first few years the new tower is open.

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[22] For example, if there is a 50% chance that materially different cost-containment procedures would be adopted (causal link No. 1) and a 50% chance that those procedures would lead to project denial or materially different conditions (causal link No. 2), there is only a 25% percent probability that both will occur. Carrying this analysis through the causal chain demonstrates that it is only ¾% likely that all seven links will occur: 25% x 50% x 50% x 50% x 50% x 50% = .75%, or ¾%.

Campaign Brief at 16-17. The Campaign asks the court to presume that Providence Everett's cost projections will ultimately lead to higher patient charges because, it asserts, the cost of expansion is not "absorbed into the ether." Campaign Brief at 17. The Campaign must prove its "into the ether" assertion. Courts may not presume a plaintiff will be injured when reviewing standing. *See, e.g., CORE v. City of Olympia*, 33 Wn. App. at 683-84 (requiring actual injury prevents courts from vindicating the interest of "concerned bystanders").

The Campaign's presumption of injury is also inconsistent with the uncontested facts in the record: (1) the new tower is projected to lower Providence Everett's cost of providing care after the first few years; (2) rising health care costs are a societal problem, and any changes to the Certificate of Need cost-containment program will not stem the rising tide of health care costs; and (3) patient rates are determined through a complex series of third-party negotiations, and hospitals do not simply pass their costs through to patients like regulated utilities.

(1) The New Tower Will Ultimately Lower Providence Everett's Cost To Treat Patients.

Accounting projections the Campaign relies on indicate capital costs for the 106 new hospital beds will be slightly higher for the first few years of the project. AR 179. However, Providence Everett's total cost

for providing care, when capital and operating costs are considered, will decrease as the hospital realizes higher volumes and efficiencies. By 2014, Providence Everett's total cost of providing care is projected to be lower with the tower than without; by 2016, total costs per patient day will actually decrease by $240. AR 179; AR 719-25; AR 244-307; AR 858.

(2) Rising Health Care Costs Are Not Caused By The Department Of Health's Failure To Adopt New Cost-Containment Procedures.

SEIU is a proponent for a national health care reform campaign that states "nothing is certain but death, taxes and rising health costs."[23] The "Divided We Fail" campaign argues that "insurance premiums, deductibles and co-payments seem to rise faster than our paychecks." *Id.*

The seemingly unrelenting rise in health care costs is an important policy issue facing our nation and our state. However, any increase or decrease in health care charges at Providence Everett is the result of forces too great to be addressed through changes in the cost-containment portion of the Certificate of Need program. Costs of this project subject to Certificate of Need review represent a tiny drop in the rising sea of health care spending in Washington.

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[23] *See* http://www.aarp.org/issues/dividedwefail/about_issues/the_quiet_health_insurance_crisis_of_rising_costs.html. The Divided We Fail campaign is comprised of SEIU, AARP, Business Roundtable and the National Federation of Independent Businesses. *See* http://www.aarp.org/issues/dividedwefail/.

(3) Hospitals Cannot Pass Their Costs Directly To Patients.

Health care charges paid by patients are determined through a series of complex negotiations and other forces involving federal or state government, insurers, unions, employers and individuals. Union members generally receive health benefits from their employers, as determined through labor negotiations, *see, e.g.,* CP 206-7; CP 210; CP 227, and many Campaign members do not pay any out-of-pocket costs for hospital care. *See, e.g.,* CP 201; CP 206; CP 210; CP 214; CP 234. Employers negotiate with health insurers for the cost of coverage, and insurers negotiate with hospitals to set hospital charges. Given this complexity, the Campaign cannot establish that the Department of Health's failure to adopt new cost-containment procedures will increase hospital charges to specific patients.

None of the cases cited by the Campaign would allow the court to ignore this complexity and presume an injury will occur. Unlike telephone charges,[24] hospital charges are not directly regulated by the

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[24] *See, e.g., Jewell v. Washington Utilities and Transportation Commission*, 90 Wn.2d 775, 776, 585 P.2d 1167 (1978); *U.S. West Communications, Inc. v. Washington Utilities and Transportation Commission*, 134 Wn.2d 48, 60, 949 P.2d 1321 (1997); *Washington Independent Telephone Association v. Telecommunications Ratepayers Association for Cost Based and Equitable Rates*, 75 Wn. App. 356, 362, 880 P.2d 50 (1994).

state. Likewise, this is not a case where taxes have been passed through directly to the plaintiff.[25]

The Campaign also misplaces reliance on *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). The Washington Supreme Court has refused to import *SCRAP's* reasoning into our state's APA, explaining that the last thirty years have "left the viability of *SCRAP's* commentary on standing doubtful . . .." *Allan v. University of Washington*, 140 Wn.2d at 327.[26] Additionally, Washington courts have dismissed challenges indistinguishable from that in *SCRAP* for lack of standing. *See, e.g., CORE v. City of Olympia*, 33 Wn. App. at 683-84 (general injury allegations do not confer standing to challenge failure to require an Environmental Impact Statement); *Trepanier v. City of Everett*, 64 Wn. App. at 383 (same).

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[25] *See, e.g., General Motors Corp. v. Tracy*, 519 U.S. 278, 285-86, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (standing to challenge natural gas tax directly passed through to purchaser); *Nelson v. Appleway Chevrolet, Inc.,* 160 Wn.2d 173, 186, 157 P.3d 847 (2007) (standing to challenge B&O tax directly passed through to car purchaser).

[26] The Campaign also cites *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1330 (D.C. Cir. 1986) to support its argument that the court may hear generalized grievances. However, as the *Center for Auto Safety* Court bases its standing determination on *SCRAP*, its commentary is also irrelevant to standing under RCW 34.05.530.

3. The Campaign Has Not Shown That This Lawsuit Will Provide A Remedy.

To challenge an agency action, a petitioner must show it is "'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. at 561; *Allan v. University of Washington*, 140 Wn.2d at 326. When a petitioner is unable to prove that the alleged injury is "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief," there is no standing. *Allen v. Wright*, 468 U.S. at 751.

The Campaign suggests that there are "a number of ways in which the Department could have acted to secure lower costs to consumers." Campaign Brief at 40. It states that the Department of Health had three tools that, in "properly conducted Certificate of Need review," can be used to ensure hospital expansion does not result in increased patient costs. *Id.*

- Rate Regulation, with the Department of Health establishing "a ceiling on charges to individual and/or third party payers" and requiring "the provision of services at or below cost to low-income consumers." *Id.*

- Cost-Containment Conditions, with the Department of Health including conditions to ensure "the construction project fully complies with the Certificate of Need cost-containment requirements, such as requiring PEMC to

absorb any excessive construction costs, rather than passing those costs on to its patients." Campaign Brief at 39.

- More Analysis, with the Department of Health undertaking "a more searching analysis of PEMC's application in order to ensure that the efficiencies PEMC claims will be achieved by the expansion actually result in lower, not higher, charges to patients." Campaign Brief at 40.

None of these proposed remedies, however, makes it more likely that the Campaign's members will pay less for their hospital costs because of this lawsuit: rate regulation is beyond the Department of Health's authority; cost-containment is already a condition of Providence Everett's Certificate of Need; and "more analysis" would result in the opposite of what the Campaign seeks, delaying the project and increasing the cost of an expansion even the Campaign acknowledges is needed.

a. Rate Regulation Is Not Permitted Under The Certificate Of Need Statute.

As the Campaign acknowledges, the Certificate of Need statute addresses "the oversupply of health facilities (such as hospital beds) in some areas." Campaign Brief at 1. The program "seeks to control costs by ensuring better utilization of existing institutional health services and major medical equipment." *St. Joseph Hospital*, 125 Wn.2d at 736.

When the Legislature first passed the Certificate of Need statute, it considered whether to give rate setting power to the agency that originally administered the program, including power to condition a Certificate of

Need on a hospital's agreement to adopt a specific rate structure. *See* Proposed Amendments by Senate Committee on Medicine to 1971 Sub. HB 553. However, that amendment was not adopted, and rate setting was not made part of the law. *See* Laws of 1971, 1st Ex. Sess., ch. 198 (repealed 1979) (original Certificate of Need statute).

The Legislature later created the Hospital Commission as a separate rate setting authority. *See* 1973 ESSB No. 2113. However, in 1982 the Legislature repealed that power, terminating the Hospital Commission, and hospital rates are no longer regulated in the State of Washington. *See* 1982 SHB 875 (1982 c 223) (repealing Hospital Commission, effective 1985); *c.f.* 1984 ESSB 4403 (1984 c 288) (extending sunset period until 1990).

Thus, the Department of Health does not have the power to impose rate standards, the only specific remedy Campaign proposes to redress the alleged injury of increased hospital rates.

b. The Department of Health Has Already Imposed Significant Cost Containment Measures.

The Department of Health sought to contain costs with a number of conditions. First, it limited the total number of approved beds. Providence Everett originally applied for a Certificate of Need allowing it to add 166 new hospital beds at a cost of $72,824,543. CP 164. The

Department of Health contained costs by approving only 106 new beds, reducing the approved capital expenditure by 18 percent to $59,868,977. CP 160; 162.

Second, it imposed conditions on Providence Everett's Certificate of Need to ensure that the cost of its expansion does not materially escalate. Project costs, as represented by construction bids and estimates, may not exceed an application's projected costs by more than 12 percent. WAC 246-310-570(1)(e).

Finally, the Department of Health monitors approved projects, including their cost, through completion "with quarterly project reports." CP 161. If project costs increase more than 12 percent, the hospital must submit an amended Certificate of Need application reflecting the project's new cost. WAC 246-310-570.

The Campaign does not allege any conditions the Department of Health could have required that would better contain costs than the conditions already imposed.

c. More Process Will Delay The New Tower And Increase Costs.

The Campaign states it does "not oppose the renovation and modernization of PEMC; nor does it oppose an appropriate expansion of the facility." CP 61. It is therefore very, very likely, if not a certainty,

that despite relief sought in this lawsuit, the renovation, modernization and "appropriate expansion" of the hospital will eventually proceed, as the Campaign concedes it should. However, if the Campaign is successful in reversing the Department of Health's decision, Providence Everett's expansion may be delayed, resulting in significantly increased costs. Instead of containing hospital expansion costs, this lawsuit will increase them.

The total cost for the new tower is projected to be approximately $461,009,197, with $59,868,977 representing the approved cost of the 106 room expansion that is subject to Certificate of Need review. CP 164. The hospital modernization and renovation represents 87 percent of the project cost, and the additional rooms approved by the Department of Health represent 13 percent. *See* Exhibit C. The two components are tied together into one project because of the tower configuration.

Construction costs are rising at more than 12 percent a year. Each year of delay caused by the relief sought by the Campaign will increase the overall project cost by approximately $36 million, or 50 percent of the total cost of the expansion approved by the Department of Health. Holcomb Dec. at 3.

The U.S. Supreme Court has repeatedly held that a party does not have standing if it is unlikely or speculative that the alleged harm will be

redressed through action against the government agency. For example, in *Eastern Kentucky Welfare Rights Organization v. Simon*, 426 U.S. at 41-45, the Court held that groups promoting health care access lacked standing to challenge an Internal Revenue Service regulation which they claimed would encourage non-profit hospitals to deny some services to the poor. The Court found because hospitals might elect to forgo the favorable tax treatment, it was "equally speculative whether the desired exercise of the court's remedial power ... would result in the availability ... of such services." *Id.* at 43. In other words, if the odds are even that the requested relief will not redress the harm, a party does not have standing.

Likewise, in *Lujan v. Defenders of Wildlife*, 504 U.S. at 571, the Court found that a claimed injury was not "redressable" because the challenged agency action represented only a fraction of the source of the alleged harm: "Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm . . ., if that fraction is eliminated." *Id.*

The Campaign has not shown that this lawsuit will result in "less harm" to its members. Its only effect will be to delay Providence Everett's modernization and expansion, and increase the project's cost.

C. The Campaign Was Not Deprived of Procedural Rights.

The Campaign also claims that its members have "suffered a direct procedural injury." Campaign Brief at 40. The Campaign does not, however, identify any procedure it was denied. There is no support for standing based on this novel legal theory.

1. The Campaign Has Not Identified Any Procedure It Has Been Denied.

A petitioner who fails to identify a concrete interest is not entitled to standing "merely on the basis of an asserted failure on the part of the agency to follow procedural requirements." *Allan*, 140 Wn.2d at 333. This holding is consistent with the Washington Supreme Court's previous decision in *Training Council*, where it rejected the premise that one with no concrete interest could assert such procedural rights. *Id.* at 330; *Training Council*, 129 Wn.2d at 794.

The Campaign bases its procedural argument almost entirely on *Earth Island Institute v. Ruthenbeck*, 490 F.3d 687 (9th Cir. 2007), where the Ninth Circuit found that an environmental group had standing because the United States Forest Service refused to provide it with the notice, comment and administrative procedure rights mandated by Congress in the Appeals Reform Act ("ARA"). *Ruthenbeck*, 490 F.3d at 691-93. The court found the environmental groups had standing because "the ARA is a

procedural statute giving rise to a procedural injury within the zone of interests Congress intended to protect." *Id.* at 693.[27]

Unlike the petitioners in that case, the Campaign has not identified any specific procedure it was denied. The Department of Health held a public hearing, recognized the Campaign as an "affected party," considered each written statement submitted by the Campaign, and allowed it to submit a motion for reconsideration. *See* CP 380. The Campaign itself argued it did not have the right to seek an adjudicative proceeding, and the trial court agreed. CP 465-66. The Campaign was afforded every procedural right provided by Department of Health statutes and regulations.

2. The Department's Regulations Allow It To Partially Grant A Certificate Of Need Application.

Under Certificate of Need regulations, when a "proposed project is to be multiphased, the secretary's designee may take individual and different action on separable portions of the proposed project." WAC 246-310-490(2). Providence Everett proposed a three-phase project, adding the first 106 beds in phase one, and the remaining beds in

[27] The other environmental cases the Campaign cites also concern government failure to follow specific statutory procedures mandated by Congress. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1514-15 (9th Cir. 1992) (injury when statutory procedures of National Environmental Policy Act not followed); *Friends of the Earth v. United States Navy*, 841 F.2d 927, 931 (9th Cir.1988) (injury when statutory procedures included in the National Defense Authorization Act not followed).

two subsequent phases. *See* CP 164. The Department approved the certificate of need as to phase one, but denied it as to phases two and three. *Id.*

The Campaign suggests that *Southern Maryland Hosp. Center, Inc. v. Fort Washington Community Hosp., Inc.*, 519 A.2d 727 (Md. 1987) supports the proposition that the Department of Health did not have the authority to approve only the first phase of Providence Everett's project. However, the Maryland Supreme Court found precisely the opposite, holding that the Maryland Health Commission has the authority to "approve portions of the applicant's proposal if the application contained the information necessary to support the need for these individual pieces." *Id.* at 732 n. 5. In that particular case, though, the applicant did not propose a phased project; therefore, it had to submit an entirely new application when, after the original application was denied, it sought approval for a significantly reduced number of beds. *Id.*

In this case, the Department of Health reviewed a proposal stating the number of beds that would be added during each phase and the capital cost associated with those additions. *See* CP 164. The Department's regulations do not require Providence Everett to submit a new application prior to the approval of Phase I.

D. Patients Challenging A Certificate Of Need Decision Are Not Exempt From The APA's Injury-In-Fact Standing Test.

The APA's three-part standing test applies to all appeals from an administrative agency decision. There is no exemption for appeals from Certificate of Need decisions. A party who meets the zone-of-interest portion of the APA test (part 2) still must meet the "injury-in-fact" requirements (parts 1 and 3). RCW 34.05.530.

This case does not present the issue of whether patients could ever have standing to challenge a Certificate of Need decision. It addresses whether the specific parties represented by the Campaign have met their burden to show an injury-in-fact. As demonstrated above, the Campaign has not met this test.

The Campaign suggests that the court should relax the injury-in-fact test for standing because the issues raised in this case are "significant" and are of "great interest and import to the public." Campaign Brief at 35. It claims that if the standards of review are too tough, patients may have no forum to raise grievances about a Certificate of Need.

However, "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Lee v. State of Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*

Inc., 454 U.S. 464, 489, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227, 94 S.Ct. 2925, 2935, 41 L.Ed.2d 706 (1974)).

The Campaign cites cases deciding claims based on individual constitutional rights to argue that the APA's injury-in-fact test may be liberally interpreted to reach important issues. The Washington Supreme Court held, however, that the line of cases cited by the Campaign[28] does not relax standing requirements under the APA. *Allan v. University of Washington*, 140 Wn.2d at 330, n. 1. Speaking of those cases, our Supreme Court stated, "[s]ome of the cases that Allan cites to demonstrate liberalization in standing requirements are inapposite here because they did not involve the question of standing under the APA." *Id.* (refusing to import into the APA the logic of *City of Seattle v. State*, 103 Wn.2d 663, 668, 694 P.2d 641 (1985)).

The Court does not need to abandon established APA standing requirements to provide the Campaign with a forum to debate the merits of JLARC's recommendations. The APA allows anyone to "petition an

---

[28] The Campaign cites *Washington Natural Gas Co. v. Public Util. Dist. 1 of Snohomish Cy.*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969) and *City of Seattle v. State*, 103 Wn.2d 663, 668, 694 P.2d 641 (1985) to support its "public importance" standing argument. *Allan* specifically declines to import into the APA the logic of *City of Seattle*, a non-APA case. *Allan*, 140 Wn.2d 323, 330, n. 1. The *Allan* Court did not specifically address *Washington Natural Gas Co.*, but *Washington Natural Gas* is cited by the *City of Seattle* Court as the basis for its more liberal approach to standing. *City of Seattle,* 103 Wn.2d at 668.

agency requesting the adoption, amendment, or repeal of any rule." RCW 34.05.330(1). If the Campaign believes the Certificate of Need statute requires the Department of Health to develop new methods of review, it may file a petition for rulemaking with the Department of Health. If the Department of Health denies the petition, the Campaign may then file an appeal directly with the Governor. RCW 34.05.330(3). *Compare id. and* RCW 43.17.010(14) (the Governor can require the Department of Health to create new rules).

V. CONCLUSION

For the foregoing reasons, Providence Everett respectfully requests the court to affirm Judge Hirsh's decision to dismiss this case for lack of standing.

RESPECTFULLY SUBMITTED this 26th day of March, 2008.

FOSTER PEPPER PLLC

Michael K. Vaska, WSBA #15438
Edmund W. Robb, WSBA #
35948Attorneys for Plaintiff

PROOF OF SERVICE

I certify that I served a copy of ***Providence Everett Medical Center's Brief Of Respondent*** on all parties or their counsel of record on the date below as follows:

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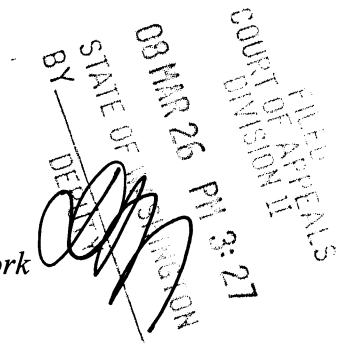

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 26th day of March, 2008, at Seattle, Washington.

Kellie DeVera

Exhibit A

Superior Court of the State of Washington

For Thurston County

FILED
JUL 19 2007
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

Paula Casey, *Judge*
Department No. 1
Richard A. Strophy, *Judge*
Department No. 2
Wm. Thomas McPhee, *Judge*
Department No. 3
Richard D. Hicks, *Judge*
Department No. 4
Christine A. Pomeroy, *Judge*
Department No. 5
Gary R. Tabor, *Judge*
Department No. 6
Chris Wickham, *Judge*
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Anne Hirsch, *Judge*
Department No. 8

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July 18, 2007

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Re: The Campaign to Make Health Care Work et al v State Health
Thurston County Cause No. 07-2-00098-1

LETTER OPINION

Dear Counsel:

As indicated at the close of argument in this matter, the court has reviewed the pleadings, applicable statutes, rules and case law, and fully considered the arguments of counsel made in court. This letter contains the court's ruling after that consideration.

This action concerns a determination made by the state Department of Health (DOH) granting a certificate of need (CN) to Providence Everett Medical Center (PEMC) to add a number of hospital beds to its Everett facility. (PEMC is performing extensive renovations to that facility, and the additional beds constitute a portion of that, roughly $60 million of a total $460 million project). As part of the required process in reviewing PEMC's request to add beds to its facility, a public hearing was conducted by DOH in

September of 2006. The Campaign participated in the public hearing and was identified by DOH as an "affected party".

DOH issued the CN at issue in this case on December 18, 2006 by letter to PEMC. In its letter DOH advised PEMC of its appeal rights pursuant to WAC 246-310. The Campaign did not receive any formal notice of any appeal rights it may have had though it did, as an affected party, receive notice of DOH's decision granting the CN to PEMC.

On January 16, 2007, both the Campaign and PEMC requested that DOH reconsider its grant of the CN to PEMC, though for different reasons. DOH notified both the Campaign and PEMC by letter dated January 16, 2007 that it would act on the request for reconsideration no later than February 16, 2007. DOH issued its denial of PEMC's request, to grant the CN for the original number of beds requested, by letter dated February 7, 2007. PEMC determined that it would not further appeal DOH's decision.

DOH also issued its denial of the Campaign's request for reconsideration on February 7, 2007. This letter contained no language advising Petitioner of any appeal rights. In fact, DOH never notified the Campaign of this "right" until months later, in briefs to this court.

On January 17, 2007, the Campaign timely filed a Petition for Judicial Review (later amended on March 5, 2007) contesting the DOH's grant of the (modified) CN to PEMC. The Campaign asserted that it had exhausted its (limited) administrative remedies. DOH shortly thereafter denied Petitioners' request for reconsideration.

In its Amended Petition to this court, the Campaign asserts that DOH acted in an arbitrary and capricious manner by failing to appropriately apply cost containment criteria in its decision making process resulting in the grant of the CN to PEMC, authorizing a CN for which no application had been submitted (106 beds when the only application had been for a CN for 166 beds) and by misapplying the appropriate standards in determining the number of beds permitted under the CN.

DOH filed a motion to dismiss the instant action, asserting that the Campaign failed to exhaust administrative remedies by not requesting an administrative hearing on DOH's grant of the CN to PEMC and that, because of that, the court lacks subject matter jurisdiction to hear this case. PEMC then filed its own motion to dismiss, arguing that the Campaign failed to exhaust their administrative remedies, not by failing to request an administrative hearing, but by not fully participating in the public hearing conducted by DOH in September 2006. PEMC further asserted that the Campaign lacks standing in any event to proceed in this case, thus also depriving the court of jurisdiction to hear its claims.

The first issue the court will address is exhaustion of remedies as raised by DOH in its Motion to Dismiss. The general rule on exhaustion of administrative remedies was

summed up by the Washington Supreme Court as follows: "When an adequate administrative remedy is provided, it must be exhausted before the courts will intervene," *Washington v. Tacoma-Pierce County Multiple Listing Service et al,* 95 Wn.2d 280, 622 P.2d 1190 (1980) quoting other cases.

RCW 34.05.534 provides that a person may file a petition for judicial review only after exhausting all administrative remedies available within the agency whose action is being challenged...except that a person need not exhaust administrative remedies "to the extent that this chapter or any other statute states that exhaustion is not required." RCW 71.38.115 contains provisions for CN's specifically providing that "any applicant denied a certificate of need or whose certificate of need has been suspended or revoked has the right to an adjudicative proceeding. The proceeding is governed by chapter 34.05 RCW, the Administrative Procedure Act." RCW 71.38.115(10) (a).

The first issue the court must address is whether the Campaign had a right to an administrative hearing and if so, whether it is now foreclosed from seeking relief in this court because it did not pursue that right. In other words, does the Campaign, not being an "applicant" whose application was denied, have a right to hearing under the APA? If the Campaign had such a right, under the facts presented here, this court would be without jurisdiction to proceed because the Campaign failed to pursue that remedy.

In making that determination, this court must first interpret the language of RCW 71.38.115(10)(a). Using rules of statutory construction, the court must consider the plain language of the statute when determining whether the Legislature intended to limit the right to adjudicatory proceedings to applicants only. If so, then the Campaign may proceed here; if not, then they failed to exhaust and this court must dismiss.

Under *State v. Delgado*, 148 Wn.2d 723, 63 P.3d 792 (2003) where the plain language of a statute unambiguously describes a specific qualifying list, that list is exclusive. The court said

> We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language. We assume that the legislature means exactly what it says. *Delgado*, at 728.

This court is not persuaded by DOH's contention that the naming of applicants is merely an example or illustrative or that the Department would have provided a hearing if the Campaign had just requested one; rather the more reasonable interpretation of this statute is that the legislature intended only applicants to have these specific rights. This conclusion is buttressed by the fact that the Department's regulations do not specifically provide for administrative hearings for "affected parties" such as the Campaign (although competitors and applicants have such rights and DOH never formally advised the Campaign that it had any such rights). Moreover, though not dispositive, this past

session the legislature declined opportunities to amend the statute to add other parties who would have such rights.

Additionally, this case is different than a case, such as *Seattle Building and Construction Trades Council*, 129 Wn.2d 787, 920 P.2d 581 (1996) where the regulations and statutes analyzed were silent on the issue of whether hearing rights exist. Here RCW 71.38, enacted after the implementation of the APA, specifically limits the right to request an adjudicative hearing under the APA to applicants.

The Campaign exhausted its limited administrative remedies and thus has the right to Petition this court for review under RCW 34.05.570(4).[1] The DOH's motion to dismiss is denied. However, having found that the Campaign exhausted its administrative remedies, to be entitled to seek judicial review the Campaign must also show it has standing to bring such an action. Intervener PEMC raises this issue as part of its motion to dismiss.

The Campaign to Make Health Care Work is an association made up of several smaller organizations.[2]

Under the APA standing rule, RCW 34.05.530:

> A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:
> (1) The agency action has prejudiced or is likely to prejudice that person;
> (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
> (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

The first and third prongs of this test are generally called 'injury-in-fact' requirements, while the second is called the 'zone of interest' prong." *St. Joseph Hosp. & Health Care Ctr. v. Department of Health,* 125 Wn.2d 733, 739, 887 P.2d 891 (1995)). The court analyzed this provision in *Allen v. University of Washington,* 140 Wn.2d 323, 997 P.2d 360 (2000). A person is aggrieved or adversely affected within the meaning of the APA

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[1] PEMC contends that the Campaign failed to exhaust administrative remedies by not fully participating in the September 2006 public hearing. The court is satisfied that the Campaign participated sufficiently to survive this motion to dismiss. PEMC's motion is denied regarding exhaustion of administrative remedies.

[2] Campaign to Make Health Care Work, a coalition that includes SEIU 1199 Northwest, along with the consumer-watchdog group Washington Community Action Network, the Society of Professional Engineering Employees in Aerospace and United Food and Commercial Workers Local 21.

standing test only when the zone of interest and injury-in-fact prongs are satisfied. RCW 34.05.530.

The Campaign argues that it satisfies the requirement of standing because it was allowed to participate in the public hearing as if it were a party and that this position is supported by the Court's ruling in *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council,* 129 Wn.2d 787, 920 P.2d 581 (1996). In *Trades Council*, which involved interpretation of RCW 34.05.530, labor organizations with trade apprenticeship programs sought judicial review of the question of whether an agency's approval of another apprentice program required a formal adjudicatory hearing. The court found that these organizations had standing based upon the likely diminishment of employment opportunities as a result of the agency's decision for apprentices of "existing programs, including their own." *Trades Council*, 129 Wn.2d at 796, 920 P.2d 581. Thus, the "injury in fact" and "zone of interest" prongs of the APA standing test were satisfied in that instance.

This court finds that, because of their participation in the public hearing and the policies addressed in RCW 70.38, the Campaign meets the requirements of the zone of interest test. However, whether the Campaign can establish a concrete interest that has been harmed is a more difficult issue. The Campaign has not made a showing that DOH's action "has prejudiced or is likely to prejudice" it in a way which is not a generalized injury to all members of the public. RCW 34.05.530(1). Compared to the likely economic impacts upon plaintiffs found in *Trades Council* there has been no showing that Petitioners in this case will suffer any specific impact as a result of DOH's approval of the CN at issue. Absent a concrete interest, Petitioners fail the injury-in-fact prong of standing under the APA.

Other rationale supports this conclusion. In *United Automobile Workers v. Brock*, 477 U.S. 274 (1986), the U.S. Supreme Court stated that "the doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." Thus, "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." *Id* at , 281-282. In *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977), the U.S. Supreme Court established a three-part test for determining when an organization has standing to sue on behalf of its members.

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit. *Id,* 342-343.

The second and third conditions are satisfied in this case. DOH and PEMC have not contested Petitioner's purpose as it seems that The Campaign to Make Health Care Work was founded to increase public awareness and participation in regional health care planning decisions. Further, the claims and relief requested here do not require the individual member's participation. Here the Campaign requests only either that the case be remanded to DOH for additional fact-finding or that this court make a determination on the existing record.

The only real question left to this court is whether the individual members of the Campaign would have standing to sue in their own right. On the basis of the record in this case, on which the court must rely in making its decision, there has been no showing by the Campaign that it can establish a concrete interest that has been harmed. Petitioners have not made a showing that DOH's action "has prejudiced or is likely to prejudice" it in a way which is not a generalized injury to all members of the public. Therefore they cannot be found to have standing and the court must grant PEMC's motion on that basis.

This case highlights some of the apparent problems with DOH's procedure for review of CN applications. The issues raised are significant and show the need for work by DOH to clarify the procedure it uses in granting CN's, something of great interest and import to the public. However, in this case the Campaign has failed to establish it's standing to appeal DOH's decision in this forum. As such, the petition for judicial review is dismissed.

The court will sign an appropriate order on presentation.

Very truly yours,

Anne Hirsch

Anne Hirsch
Judge

AH/tw

Exhibit B

HeraldNet
Everett, Wash.

Published: Friday, February 15, 2008

Hospitals turning patients away

By Sharon Salyer
Herald Writer

Hospitals in Snohomish County are reporting that they're jammed to capacity this week, with part of the overload caused by patients hospitalized for complications from influenza and other seasonal viruses.

At Providence Everett Medical Center, the county's biggest hospital, nurses and other staff are working overtime to keep up with demand.

"What's different about this week is we typically have a day or two where we're at or near capacity," Kim Williams, chief nurse executive. "We're in about day four of being at or near capacity."

Just about every department in the hospital is affected by the patient crunch, including doctors, nurses, respiratory therapists, pharmacists and the X-ray department, said Dr. Lawrence Schecter, Providence's chief medical officer.

With the hospital brimming with patients, "it really is all hands on deck," Williams said.

On Monday, Providence Everett Medical Center treated and then transferred two patients to Overlake Hospital Medical Center in Bellevue because of lack of space.

And four other patients were lined up in the hospital's emergency room Thursday morning, waiting for beds to open up.

Monroe's Valley General Hospital has been close to capacity for general hospital patients but has been forced to send critical-care patients elsewhere this week because of lack of available beds.

"Everybody wonders when things are going to settle down," said Brenda Rogers, clinical nurse executive at Valley General.

Cascade Valley Hospital in Arlington was at capacity and had several patients queued up in the emergency room, waiting for beds to open up on Thursday.

Hospitals often get jammed in the winter, when viruses cause extra patients to be admitted to the hospital.

But other factors are also playing a role in jamming hospitals and their emergency rooms, hospital officials said. These include the region's booming population, the nursing shortage and an emphasis on outpatient procedures that, until recently, kept hospitals from adding more rooms.

Both Providence Everett Medical Center and Cascade Valley Hospital now have building programs under way.

It isn't just hospitals in Snohomish County that are filled to capacity. Hospitals are packed "all the way up the I-5 corridor," Schecter said.

Earlier this week, the Everett hospital got a call from a hospital in British Columbia that was looking for a spot for a crucial care patient because no space was available at any hospital in the province, Williams said.

"We said at the time we didn't have any critical care capacity here," she said.

Dr. Keith Luther, who works at Stevens Center for Internal Medicine, said that there's always a hospital somewhere with space to treat a patient.

But the high number of patients now being treated at area hospitals can cause short-term jam-ups. As one example, Stevens Hospital's intensive care unit had every bed occupied earlier this week, he said.

"The whole hospital has been full -- at capacity -- for the last week or two, he said.

"I know they've also cleared a bunch of beds today," he said. "But that could change tomorrow."

Dr. Yuan-Po Tu, who works at The Everett Clinic, said he knew of one Snohomish County patient who had to be admitted to Northwest Hospital in Seattle earlier this week because the Edmonds and Everett hospitals were closed to new patients.

"I think everybody is just very, very busy," he said.

The emergency department at Children's Hospital and Regional Medical Center in Seattle has had a 22 percent increase in patients in January over the same period last year, said spokeswoman Louise Maxwell.

The hospital has been unusually busy treating patients with winter viruses and respiratory infections, she said.

Harborview Medical Center in Seattle reported that it, too, is jammed, with some patients waiting in the emergency department for hospital rooms.

Chris Martin, administrative director of emergency services, said that a check of the hospital's database Thursday afternoon showed three hospitals in King County were closed to admitting new patients.

Hospitals in King County have struggled with capacity issues since November, Martin said.

"When some of the other hospitals start to close down, then one hospital can be overwhelmed very quickly," she said. "One hospital can't take all the ambulance traffic for the entire city of Seattle."

Reporter Sharon Salyer: 425-339-3486 or salyer@heraldnet.com.

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The Seattle Times

Saturday, March 22, 2008 - Page updated at 03:17 AM

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Code-red situation has local hospitals diverting patients

By Carol M. Ostrom
Seattle Times health reporter

When Sara Nakagawa left Stevens Hospital in Edmonds recently after gallbladder surgery, she didn't realize how hard it was going to be to get back into a hospital.

About 10 days after surgery she began suffering from complications and waited in Stevens' emergency room for six or seven hours to be admitted. In pain, she called her doctor, who said he couldn't find hospital beds, either.

So Nakagawa went back home and called 911, determined to find a hospital that would take her. But the ambulance that picked her up spent 20 minutes in the driveway of her Everett home, trying to find a hospital. The closest one taking any patients was in Monroe.

Just last week, the same thing happened to her 12-year-old stepson, Alexander Webster, who was in the midst of an acute diabetic crisis.

Although the boy's doctor and all his records were at Children's Hospital & Regional Medical Center in Seattle, it had no empty beds, the family was told, and he would have to be transferred to Swedish Medical Center in Seattle.

It was the only pediatric bed open from Everett to Tacoma, Alexander's family was told.

"We have really struggled"

More often than expected, emergency rooms at hospitals around Puget Sound closed their doors this winter, as flu, respiratory illness and insurance problems brought patients to emergency departments in droves.

As a result, hospitals around the region signaled a central ambulance-routing system to alert that patients must be diverted to other hospitals.

This winter, virtually all hospitals in King County have been closed to emergency patients as often as six times a month, said Chris Martin, former chair of the Central Region Emergency Medical Services & Trauma Care Council.

"We have really struggled," said Martin, whose group helps set hospital-divert policy. "You can only hold so many patients in your emergency departments, waiting to get a bed upstairs, before you don't have a functioning emergency room."

It's been bad all winter, she said. "We have not had a break since November. The rest of the council is worrying that this is going to be ongoing."

Here's the problem: If hospitals in Pierce County start closing emergency-room doors, ambulances start taking

patients north. When it happens in Snohomish County, ambulances head south.

Soon, all the hospitals are showing up "red" on a shared Web site that lists bed status so that ambulances can be routed to the closest hospitals.

"It's all over the state"

Two years ago, the trauma council adopted a policy that hospitals in King County would no longer divert when their own emergency departments or critical-care beds were full, or when they had staff shortages.

They agreed to stabilize critically ill patients, then send them to other hospitals.

That's still true for patients in life-threatening situations.

But patients who are not on the brink of death often have faced longer ambulance rides this winter, Martin said.

The cause of this problem is complex, all agree.

Population — and age — is increasing, said Rob Menaul, senior vice president of the Washington State Hospital Association. He also points to patients without health insurance who postpone seeking care and to a shortage of primary-care physicians.

A health-care-worker shortage sometimes means an available bed can't be filled.

"If you don't have a bed with a nurse attached to it, it's not a bed," Martin notes.

Menaul said such wintertime crowding is not new.

Jack Kirkman, vice president of Stevens, added: "Yes, divert is a problem common to hospitals in Snohomish County — but it's not just Snohomish County, it's all over the state."

At Children's, Chief Nursing Officer Susan Heath said in a memo that January was unusually busy.

"This overcrowding is unprecedented in my 25 years at Children's."

Statistics collected by the hospital association show that from December 2006 through March 2007, hospitals in King County had nearly 6 percent more patients than the rest of the year, Menaul said.

"Hospitals are busier every winter," he said.

This summer, Martin said, a new tracking system will help route ambulances to hospitals around King County more efficiently. And Harborview Medical Center, where Martin is administrative director of emergency and trauma services, will open 50 new beds.

"We, as hospitals, are very concerned about this, and we're working very collaboratively to fix the problem," Martin said. "You may not be able to go to your hospital of choice, but we are working very hard to make sure you will get to a hospital."

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HeraldNet
Everett, Wash.

Published: Saturday, August 25, 2007

Providence sees need for 17 more beds now

By Sharon Salyer, Herald Writer

EVERETT — Providence Everett Medical Center wants to add 17 more hospital beds by next spring to keep up with demand until its new $500 million medical tower opens in 2011.

Adding the beds and moving other departments to make room will cost an estimated $2 million, said Dave Brooks, the hospital's chief operating officer.

"The demand is right now," he said, and the hospital can't wait for the new tower, which will add 106 beds.

The plan must be approved by the state Department of Health, which reviews hospital expansion plans.

The number of patients admitted to the hospital during the first seven months of this year has increased 8 percent over the same period last year, he said.

"That's twice what we had budgeted," Brooks said. "We can't continue to handle that demand with our current capacity."

The hospital wants to add six beds to a 14-bed unit at its Pacific Avenue campus and 11 more beds on the third floor of its Colby Avenue campus.

Over the past three years, the hospital has added 45 beds to keep up with demand.

If the state approves adding 17 more beds, it will be using all 362 beds it's licensed to operate, Brooks said.

The additional beds would allow the hospital to admit 1,800 more patients a year, he said. Currently, about 24,000 people are admitted to the hospital each year.

Reporter Sharon Salyer: 425-339-3486 or salyer@heraldnet.com.

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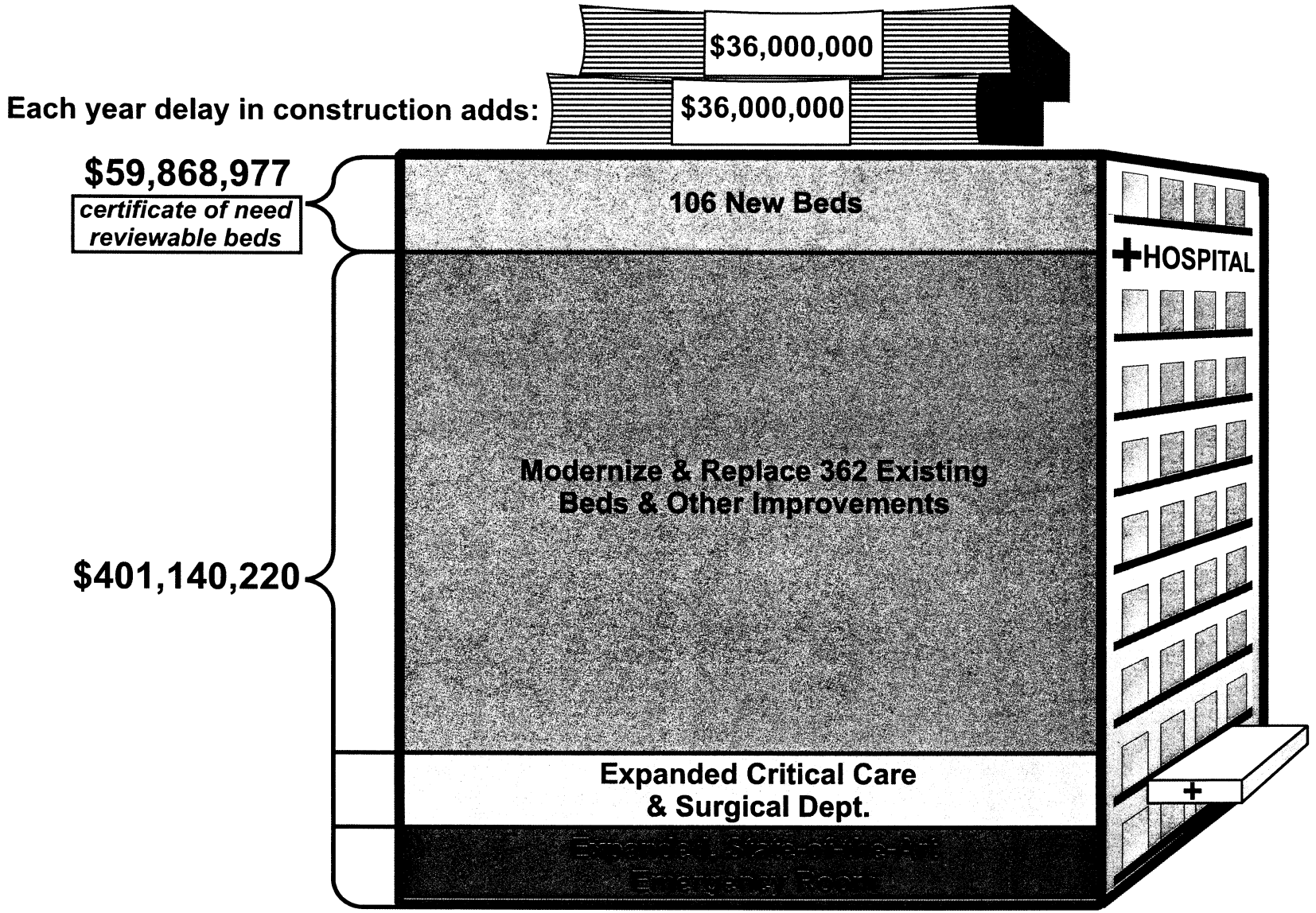
Exhibit C

PEMC's New Medical Tower