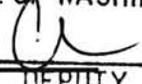


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DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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**KADLEC REGIONAL MEDICAL CENTER, a  
Washington nonprofit corporation,**

**Petitioner,**

**v.**

**DEPARTMENT OF HEALTH OF THE STATE OF  
WASHINGTON,**

**Respondent.**

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**REPLY BRIEF OF KADLEC REGIONAL MEDICAL  
CENTER**

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## I. INTRODUCTION

The Department argues that the CON Program's decision on Kadlec's CON application cannot be challenged by Kadlec before a Health Law Judge or any court. According to the Department, because the CON Program approved 55 of the 114 beds requested by Kadlec, the application was "approved" and Kadlec lacks standing to request an adjudicative proceeding. And, according to the Department, because Kadlec lacks standing to request an adjudicative proceeding, Kadlec also lacks standing to obtain judicial review. Therefore, in the Department's view, "partial" denials of CON applications by the CON Program's staff are final, and, unlike "complete" denials of CON applications and other types of agency action, such decisions are not subject to review by a Health Law Judge or any court.

The Department is wrong. Kadlec has the right to an adjudicative proceeding, under RCW 70.38.115(10)(a), regarding the CON Program's denial of Kadlec's 114-bed request. Alternatively, Kadlec has standing to obtain judicial review, under RCW 34.05.570(4), because it was prejudiced by the agency's action; its interests were among those the agency was required to consider; and a favorable judgment would redress the prejudice caused by the agency's action.

The CON Program erred by denying Kadlec's 114-bed request. Appellate review is needed to correct that error. Kadlec respectfully requests that the Court either (1) determine that Kadlec has the right to an adjudicative proceeding, and remand to the Health Law Judge to conduct

one, or, alternatively, (2) if the Court agrees with the Department that Kadlec does not have the right to an adjudicative proceeding, conduct a judicial review of the CON Program's decision on Kadlec's application.<sup>1</sup>

## II. ARGUMENT

### A. **The Court should remand to the Health Law Judge to conduct an adjudicative proceeding regarding the CON Program's denial of Kadlec's 114-bed request.**

#### 1. Kadlec has the right to an adjudicative proceeding.

Whether Kadlec has the right to an adjudicative proceeding is a statutory-interpretation question. The statute provides as follows: "An applicant denied a certificate of need ... has the right to an adjudicative proceeding." RCW 70.38.115(10)(a). The question is whether, applying the statute to an application for additional hospital beds, the statute grants the right to an adjudicative proceeding when the CON Program approves a smaller number of beds, supported by the application, than the total number of beds requested by the applicant. This appears to be an issue of first impression.

Applying the principles of statutory interpretation, the Court may consider analogous statutes, regulations, and rules. *See State v. Clark*, 129 Wn.2d 805, 811-12, 920 P.2d 187 (1996). As discussed in Kadlec's opening brief, analogous statutes, regulations, and rules support interpretation of RCW 70.38.115(10)(a) to apply to "partial" denials of CON applications, such as the CON Program's decision on Kadlec's

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<sup>1</sup> Kadlec will use terms in this reply brief as defined in Kadlec's opening brief.

application, just as it applies to "complete" denials of CON applications. See Opening Brief of Kadlec Regional Medical Center ("Op. Br."), at 17-19.

The principles of statutory interpretation also "require statutes to be given a rational, sensible construction." *Children's Hosp. and Med. Ctr. v. Wash. State Dep't of Health*, 95 Wn. App. 858, 864, 975 P.2d 567 (1999). Review of the CON Program's CON decisions by the Department's Health Law Judges—i.e., adjudicative proceedings—is an essential part of the CON system adopted by the Legislature. See *Univ. of Wash. Med. Ctr. v. Wash. State Dep't of Health*, 164 Wn.2d 95, 104, 187 P.3d 243 (2008) (describing the role of the Health Law Judge and the adjudicative proceeding as "part of the entire certificate of need petition process established by chapter 70.38 RCW"). In light of this statutory structure, it would not be "rational" or "sensible" to interpret the statute to exclude the Health Law Judges from the process in situations like this, where the CON Program's decision is a partial denial, as opposed to a complete denial, of a CON application.

The Department argues that the Court should defer to the Department's interpretation of the statute. However, the Court need only "give 'substantial weight ... to the agency's view of the law if it falls within the agency's expertise in that special field of law.'" *Children's Hosp.*, 95 Wn. App. at 864-65 (citation omitted). The Department has no special expertise regarding the right to appellate review, and certainly less expertise than the Court with respect to such issues.

The Department's only substantive argument in support of its proposed interpretation is that Kadlec's application supported multiple options (114, 75, or 55 beds), and that the CON Program approved the smallest of these options. However, this argument avoids the question at hand. The question is not whether Kadlec prepared an application which supported multiple options, but rather whether Kadlec has the right to appeal when the CON Program approves only the smallest option. Kadlec concedes that it received *something* (i.e., 55 beds); the Department conversely must concede that Kadlec did not receive *everything* (i.e., 114 beds). The question is whether Kadlec has the right to appeal in these circumstances.

In light of the statutory structure as a whole, in particular the central role the Health Law Judges play in CON decision-making, as well as the analogous statutes, regulations, and rules which recognize appeals of decisions in part, the only "rational, sensible construction" of the statutory language is that when a CON applicant does not receive *everything* it requested in its application, it has the right to appeal the CON Program's decision, just as it would have the right to appeal if it did not receive *anything* it requested in its application.

2. Kadlec's right to an adjudicative proceeding was confirmed by the Department in writing.

Kadlec's right to an adjudicative proceeding was confirmed by the Department in writing. In the cover letter accompanying the Department's decision, the Department informed Kadlec as follows: "You ... may

request an adjudicative proceeding to contest this decision[.]" AR 1605. The CON Program's denial of Kadlec's larger bed request would be the only "decision" to which the Department could have been referring. Following the Department's instructions, Kadlec requested an adjudicative proceeding to contest the CON Program's denial of its larger bed request.

The Department argues that this language could have referred to the "conditions" imposed on the approval, specifically "the type of service and the approved capital expenditure." Department of Health Brief ("Dept. Br."), at 10. However, the CON Program approved precisely the type of service and capital expenditure which Kadlec requested. The "type of service" was acute care beds, which was the only subject of Kadlec's application. AR 1606. The "approved capital expenditure" was \$65,456,228. AR 1606. This was the exact amount requested in Kadlec's application. AR 685. Therefore, there would be no reason for Kadlec to challenge either of these provisions.

The only aspect of the CON Program's decision which Kadlec may have wished to challenge was the award of only 55 beds, rather than all 114 beds requested by Kadlec. Therefore, this is the only aspect of the decision which the Department could have been referring to when it told Kadlec that it had the right to request an adjudicative proceeding. The Department plainly understood at the time of its decision that Kadlec had this right. Kadlec was entitled to rely upon the Department's statement and request an adjudicative proceeding.

3. Kadlec did not waive its right to an adjudicative proceeding.

The Department argues that Kadlec waived its right to appeal the CON Program's denial of its 114-bed request by adding the 55 beds approved by the Department. However, the Department knows perfectly well that Kadlec had no other choice. Kadlec already was operating at 70-80% occupancy, well above the State's recommended level, and some Kadlec units were operating near 100% occupancy. AR 633 & 1591. The Department surely does not really believe that Kadlec should have been required to not set up hospital beds which were needed *immediately*, and which were approved by the Department, in order to preserve its right to appeal the Department's denial of Kadlec's larger bed request.

Moreover, the Department cites no legal authority whatsoever for the proposition that Kadlec could not implement the 55 beds which the Department approved, while challenging the Department's denial of the additional 59 beds (i.e., the difference between the 114 requested and the 55 approved). Again, looking to analogous statutes, regulations, and rules, an appellant generally may appeal a decision in part. *See, e.g.*, RAP 2.4(a) ("The appellate court will ... review the decision *or parts of the decision* designated in the notice of appeal ...") (emphasis added). Moreover, unless the underlying decision has been stayed, it generally may be enforced and relied upon by the parties. *See, e.g.*, RAP 7.2(c) ("Any person may take action premised on the validity of a trial court judgment or decision until enforcement of the judgment or decision is stayed ...").

Kadlec had every right to add the 55 beds approved by the Department. There is no reason why doing so would waive Kadlec's right to obtain an adjudicative proceeding regarding whether more beds than this should have been approved.

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Because Kadlec has the right to an adjudicative proceeding, under RCW 70.38.115(10)(a), regarding the CON Program's denial of its 114-bed request, the Court should remand to the Health Law Judge to conduct the adjudicative proceeding requested by Kadlec.

**B. Alternatively, the Court should conduct a judicial review of the CON Program's denial of Kadlec's 114-bed request.**

If the Court agrees with the Department that Kadlec does not have the right to an adjudicative proceeding, the Court should conduct a judicial review of the CON Program's denial of Kadlec's 114-bed request.

Under the APA, Kadlec may obtain judicial review of the CON Program's decision by this Court. *See* RCW 34.05.570(4). Kadlec has standing to do so because (1) the CON Program's action has prejudiced Kadlec; (2) Kadlec's interests were among those the CON Program was required to consider when making its decision; and (3) a judgment in favor of Kadlec would substantially eliminate or redress the prejudice caused by the CON Program's action. *See* RCW 34.05.530. Kadlec's satisfaction of this standard is addressed in Kadlec's opening brief. *See* Op. Br., at 25-26.

Kadlec's standing to obtain judicial review by this Court is a different question than whether Kadlec has the right to an adjudicative proceeding before a Health Law Judge.

An unsuccessful CON applicant always will request an adjudicative proceeding rather than immediately seek judicial review by a court. First, if the CON applicant has the right to an adjudicative proceeding, it likely is required to exercise that right, because the APA generally requires a party to exhaust its administrative remedies before seeking judicial review. *See* RCW 34.05.534. Second, the standard of review is more favorable to an unsuccessful CON applicant in an adjudicative proceeding than in a judicial review. *Compare* WAC 246-10-602(2)(a) *with* RCW 34.05.570(4)(c).

Here, however, the Department argues that Kadlec does not have the right to an adjudicative proceeding. Therefore, the *only* means available to Kadlec, to challenge the CON Program's denial of its 114-bed request, would be judicial review. The CON Program's decision plainly is "agency action" as defined in the APA. *See* RCW 34.05.010(3) ("Agency action' means licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits."). Therefore, the CON Program's decision is subject to judicial review. *See* RCW 34.05.570(4)(a) ("All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection."). And, as

discussed above, Kadlec has standing to obtain such judicial review, under RCW 34.05.530.

Nevertheless, the Department continues to try to conflate adjudicative proceedings and judicial review into a single type of appellate process, and continues to argue that because, in the Department's view, Kadlec does not have the right to an adjudicative proceeding, Kadlec also lacks standing to obtain judicial review.

Specifically, the Department argues that because Kadlec sought judicial review, pursuant to RCW 34.05.570(3) ("Review of agency orders in adjudicative proceedings"), of the Health Law Judge's order dismissing the adjudicative proceeding based on standing, Kadlec cannot alternatively seek judicial review, pursuant to RCW 34.05.570(4) ("Review of other agency action"), of the CON Program's denial of Kadlec's 114-bed request. To the contrary, in Kadlec's petition for judicial review, Kadlec plainly sought judicial review of both decisions. First, Kadlec sought judicial review, under RCW 34.05.570(3), of the Health Law Judge's order dismissing the adjudicative proceeding because the Health Law Judge determined that Kadlec did not have the right to an adjudicative proceeding. Second, in the event the Court were to agree with the Health Law Judge that Kadlec did not have the right to an adjudicative proceeding, Kadlec sought, in the alternative, judicial review under RCW 34.05.570(4), of the CON Program's denial of Kadlec's 114-bed request. CP 6-7.

Moreover, if the Department's position were adopted by the Court, this would mean that Kadlec would be entitled to no appellate review whatsoever regarding the CON Program's decision on its application, even though the APA provides for judicial review of such "other agency action." The Department argues that the Health Law Judge's dismissal order "went to the merits"—but it plainly did not. Dept. Br., at 12. The Health Law Judge never considered whether Kadlec should have been approved for 114 or 55 beds, only whether Kadlec had the right to an adjudicative proceeding on this issue. The Health Law Judge concluded that Kadlec had no right to an adjudicative proceeding, and therefore never addressed the merits of Kadlec's appeal.

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Either Kadlec has the right to an adjudicative proceeding, in which case the Court should remand to the Health Law Judge to conduct one, or Kadlec does not have the right to an adjudicative proceeding, in which case the Court should conduct a judicial review. This is a straightforward proposition. There is no basis whatsoever for the Department's assertion that the lack of right to an adjudicative proceeding somehow eliminates standing to obtain judicial review.

**C. The CON Program's use of the "medium" population projection, in lieu of the more accurate "high" population projection, was arbitrary and capricious.**

In a judicial review, the Court should reverse the CON Program's denial of Kadlec's 114-bed request if that denial was "arbitrary or capricious." RCW 34.05.570(4)(c)(iii). "An agency action is arbitrary or

capricious when the action is a 'willful and unreasoning action in disregard of facts and circumstances.'" *Children's Hosp.*, 95 Wn. App. at 864 (citation omitted).

As discussed in detail in Kadlec's opening brief, whether 114 beds or 55 beds should be approved depends on whether the Department projects future need using the "high" population projection or the "medium" population projection prepared by the Office of Financial Management. The Department's need methodology directs the Department to use the "most accurate" of the OFM forecasts. The OFM high population projection is more accurate than the OFM medium projection for the Benton-Franklin planning area. Therefore, the CON Program was required to use the OFM high population projection to project future need for purposes of Kadlec's application. *See Op. Br.*, at 29-36.

The CON Program's use of the OFM medium population projection directly violated the Department's own methodology, which requires it to use the "most accurate" of the projections. This constituted "willful and unreasoning action in disregard of facts and circumstances" and therefore the Court should determine that it was "arbitrary and capricious."

KGH argues that the CON Program made other errors in its need projection. However, these appear to be the same errors alleged by KGH in its request for reconsideration following the CON Program's decision. In response to that request for reconsideration, Kadlec prepared a need

forecast making the "corrections" requested by KGH. AR 2028-2033. That forecast shows need for more than 114 additional beds in the planning area within a 7-year planning horizon, even after making the "corrections" requested by KGH, if the OFM high series population projection is used in the forecast. AR 2061.<sup>2</sup> Therefore, the "errors" asserted by KGH are immaterial.<sup>3</sup>

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The Department's stated standard is to use the "most accurate" OFM population projection, and for the Benton-Franklin planning area, the high projection is more accurate than the medium projection. The CON Program disregarded this standard here. The Court should conclude

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<sup>2</sup> KGH concedes that seven years would be an appropriate planning horizon. Response Brief of Kennewick Public Hospital District d/b/a Kennewick General Hospital ("KGH Br."), at 8. KGH asserts that Kadlec's updated need projection, making the "corrections" proposed by KGH, results in projected need for only 18 additional beds within a 7-year planning horizon. However, KGH is referring to the updated need projection using the OFM *medium* population projection. AR 2050. When the OFM *high* population projection is used, there is a projected need for 120 additional beds within a 7-year planning horizon, more than enough to warrant approval of Kadlec's 114-bed request. AR 2061. Again, this is the projection even after making KGH's proposed "corrections."

<sup>3</sup> KGH also criticizes Kadlec's financial projections. KGH appears to believe that Kadlec's financial projections are overly optimistic, because KGH believes the planning area's population is growing more slowly than Kadlec believes it is growing. The basis for Kadlec's financial projections is well-documented in the record. AR 684-696; 739-754; 807-825; 868-1028. In any event, KGH certainly has not demonstrated that it was "arbitrary or capricious" for the Department to rely upon Kadlec's financial projections and conclude that Kadlec could pay for its project, or that there is any other ground on which the Court should reverse the Department's financial-feasibility determination. Finally, KGH's gratuitous statement that it "*notes that it believes*" Kadlec's charity-care statistics are overstated is unsupported by any evidence whatsoever. KGH Br., at 9, n.1 (emphasis added). Kadlec provides millions of dollars of charity care annually, and approximately two-thirds of the charity care provided by the three Tri-Cities hospitals combined. AR 1164.

that the CON Program's use of the OFM medium population projection was arbitrary and capricious.

**D. Approval of 114 additional beds in the Benton-Franklin planning area would increase access to care.**

The principal goal of the CON system is to promote access to care. *See Overlake Hosp. Ass'n v. Wash. State Dep't of Health*, 170 Wn.2d 43, 55, 239 P.3d 1095 (2010). The Benton-Franklin planning area is one of the fastest-growing areas of the state and has been so for a long time. AR 660. The area has a shortage of hospital beds and that shortage is projected to increase dramatically over the next decade. AR 837. For Benton-Franklin residents to have local access to hospital care, there must be enough hospital beds in the planning area to accommodate them. Approval of all 114 beds requested by Kadlec will ensure that planning-area residents have access to hospital services locally.

If the CON Program is correct that Kadlec will not need 114 additional beds, but Kadlec is issued a CON, the downside is that Kadlec will have a few dozen more beds than it needs. If, however, Kadlec is correct that it will need at least 114 additional beds, and Kadlec is not issued a CON, the downside is that the Benton-Franklin area will not have enough hospital beds and its residents will not have local access to care. Kadlec needs approval for these beds now, so that it can make the capital investments for these beds to be available when the need for them arises. Approval of these beds would be consistent with the Supreme Court's

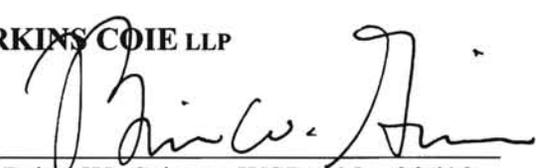
observation in *Overlake Hospital Association* that ensuring *access* to healthcare services must be the first priority in CON decisions.

### III. CONCLUSION

Kadlec respectfully requests that the Court determine that Kadlec has the right to an adjudicative proceeding regarding the CON Program's denial of its 114-bed request, and remand to the Health Law Judge to conduct one. Alternatively, Kadlec respectfully requests that the Court conduct a judicial review of the CON Program's decision. Kadlec submits that in applying the APA's judicial-review standards, the Court should determine that the CON Program's use of the OFM "medium" population projection, in lieu of the more accurate OFM "high" population projection, was arbitrary and capricious, and that use of the high projection results in a projected need that warrants approval of Kadlec's 114-bed request. The Court accordingly should order the Department to issue a CON to Kadlec approving all 114 requested beds.

Respectfully submitted this 29th  
day of August 2012.

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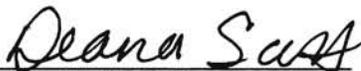
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 29th day of August, 2012, at Seattle, Washington

  
Deana Scott

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