

No. 47885-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PROVIDENCE PHYSICIAN SERVICES CO.,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH
and ROCKWOOD HEALTH SYSTEM D/B/A VALLEY
HOSPITAL,

Respondents.

OPENING BRIEF OF PROVIDENCE PHYSICIAN
SERVICES CO.

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I. INTRODUCTION

For at least fifteen years, the Washington State Department of Health (the “Department”) allowed physician groups owned by hospitals or health systems to rely upon an exemption from Certificate of Need (“CON”) review set forth in the Department’s regulations. Although new ambulatory surgical facilities (“ASFs”) typically cannot be established without CON approval, the regulatory exemption provides that CON approval is not required for surgical facilities in the offices of private physicians that are used only by those physicians. Between 1999 and 2013, the Department issued several formal determinations that the ownership of a physician practice is irrelevant, and that physician practices owned by hospitals or health systems may rely upon the exemption just as physician practices owned by their members may do so.

In 2013, the Department changed its position and began requiring physicians in groups owned by hospitals or health systems to obtain CON approval before establishing surgical facilities in their offices that would be used only by those physicians. The Department also began requiring CON approval for surgical facilities located in leased space in larger medical complexes that otherwise would qualify for the exemption, which was not required previously. The Department went through no rulemaking process before adopting these rules. This is impermissible.

The Administrative Procedure Act (the “APA”) requires an agency to follow specific rulemaking procedures before adopting new rules. Because the Department failed to do so here, the Court should declare the Department’s new rules to be invalid.

II. ASSIGNMENTS OF ERROR

1. The Department erred by adopting rules, requiring CON approval for (a) a surgical facility in the offices of a physician practice owned by a hospital or health system used only by the members of that practice and (b) a surgical facility located in leased space in a larger medical complex used only by the members of the physician practice leasing the space (the “New Requirements”), without following statutory rulemaking procedures.

2. The Department erred through the CON Program’s disavowal and refusal to be bound by the Department’s Applicability Determination, dated March 26, 2013, that CON approval was not required for Providence Physician Services Co. (“PPSC”) to use operating rooms in leased space at Providence Medical Park Spokane Valley (the “Medical Park”) on an exclusive basis (Administrative Record (“AR”) 315-18).

3. The Department erred through the Presiding Officer’s entry of Prehearing Order No. 2: Order on Summary Judgment, served on

February 25, 2014, denying PPSC's motion for summary judgment, granting the motion for summary judgment of Rockwood Health System d/b/a Valley Hospital ("Rockwood"), and granting the CON Program's motion for summary judgment (the "Initial Order") (AR 223-231).

4. The Department erred through the Reviewing Officer's entry of the Final Order on Summary Judgment, served on June 26, 2014, denying PPSC's motion for summary judgment, granting Rockwood's motion for summary judgment, and granting the CON Program's motion for summary judgment (the "Final Order") (AR 299-304).

5. The Department erred through the Reviewing Officer's entry of the Corrected Final Order on Summary Judgment, served on July 3, 2014, denying PPSC's motion for summary judgment, granting Rockwood's motion for summary judgment, and granting the CON Program's motion for summary judgment (the "Corrected Final Order") (AR 307-12).

6. The Department erred by determining that PPSC are not private physicians.

7. The Department erred by determining that PPSC's surgeons are not in an individual or group practice.

8. The Department erred by determining that the surgical facility at issue would not be in the offices of PPSC.

9. The Department erred by determining that CON approval was required for PPSC to use operating rooms in leased space at the Medical Park on an exclusive basis.¹

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the New Requirements constitute “rules” as defined in RCW 34.05.010(16). (Assignment of Error no. 1.)

2. Whether the New Requirements constitute “significant legislative rules” as defined in RCW 34.05.328(5)(c)(iii). (Assignment of Error no. 1.)

3. Whether the New Requirements are invalid because they are rules adopted without following statutory rulemaking procedures. (Assignment of Error No. 1.)

4. Whether the Exclusive Use Exemption, set forth in WAC 246-310-010(5), may be relied upon by a physician practice owned by a hospital or health system. (Assignments of Error Nos. 2-7 & 9.)

5. Whether the Exclusive Use Exemption, set forth in WAC 246-310-010(5), may be relied upon with respect to a surgical facility

¹ Additionally, the Thurston County Superior Court erred in entering its Order Affirming Department of Health’s Final Order, dated July 8, 2015. CP 50-52. However, “[i]n an administrative appeal,” this Court “*disregard[s]* the trial court’s findings and conclusions and review[s] the administrative record by applying the [Administrative Procedure] Act’s standards directly to the agency record.” *Point Allen Serv. Area v. Wash. State Dep’t of Health*, 128 Wn. App. 290, 297, 115 P.3d 373 (2005) (emphasis added); *see also* discussion *infra* at § V (Standard of Review).

located in leased space in a larger medical complex. (Assignments of Error Nos. 2-5 & 8-9.)

IV. STATEMENT OF THE CASE

A. A CON is required to establish an ambulatory surgical facility.

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

B. CON review is not required for surgical facilities used exclusively by one physician practice.

ASFs are defined, in the CON regulations, as follows:

‘Ambulatory surgical facility’ means any free-standing entity, including an ambulatory surgery center that operates primarily for the purpose of performing surgical procedures to treat patients not requiring hospitalization. This term does not include a facility in the offices of private physicians or dentists, whether for individual or group practice, if the privilege of using the facility is not

extended to physicians or dentists outside the individual or group practice.

WAC 246-310-010(5) (emphasis added). The last sentence of the regulation, italicized above, provides that a surgical facility in the offices of a physician practice does not require CON review so long as it is used only by the members of that practice (the “Exclusive Use Exemption”).

C. Until 2013 the Department applies the Exclusive Use Exemption to physician groups owned by hospitals or health systems.

The Exclusive Use Exemption states that the surgical facility must be in the offices of the physician practice and that use of the surgical facility must be limited to the members of the practice. It says nothing about ownership of the practice. Prior to 2013, the Department applied the Exclusive Use Exemption to all physician groups irrespective of their ownership.

The Department allows a healthcare provider to request “a formal determination of applicability of the certificate of need requirements” to an action that the healthcare provider proposes to take. WAC 246-310-050(1). The Department is required to make such “applicability determinations,” which are “binding upon the department” so long as “[t]he nature, extent, or cost of the action does not significantly change.” WAC 246-310-050(3) & (5). Over the years, several physician groups not owned by their members, but instead owned by hospitals or health

systems, requested determinations by the Department that the physician groups could rely upon the Exclusive Use Exemption. PPSC is aware of four such requests.

In 1999, the Department determined that a physician group owned by Virginia Mason Medical Center qualified for the Exclusive Use Exemption, and that the operating rooms at Virginia Mason Federal Way Ambulatory Surgery Center did not require CON approval so long as use of the operating rooms was limited to that group. AR 90-103.²

On May 9, 2002, the Department determined that KGH Northwest Practice Management, a physician group owned by Kennewick General Hospital, qualified for the Exclusive Use Exemption, and that the operating rooms at KGH Medical Mall did not require CN approval so long as use of the operating rooms was limited to that group. AR 82-83.

On March 26, 2013, the Department determined that PPSC, a physician group owned by Providence Health & Services – Washington (“Providence”), qualified for the Exclusive Use Exemption, and that the

² PPSC does not have a copy of the Department’s 1999 applicability determination. However, the Department’s 2006 evaluation of Virginia Mason’s application for a CON, to open the facility to other physicians, describes the Department’s earlier applicability determination. AR 90 (“Virginia Mason Federal Way ASC has been in continuous operation since 1999. The current legal structure of the facility qualified it for an exemption from Certificate of Need review as an ASC under Washington Administrative Code (WAC) 246-310-010. [source: CN historical files]”). The Department denied Virginia Mason’s CON application, and therefore use of the facility continued to be limited to the physician practice pursuant to the Exclusive Use Exemption. AR 92.

operating rooms at the Medical Park did not require CON approval so long as use of the operating rooms was limited to PPSC. AR 315-18. This, of course, is the facility that is the subject of this proceeding.

On July 23, 2013, the Department determined that Port Townsend Surgical Associates, which operated a surgical facility pursuant to the Exclusive Use Exemption, could continue to rely upon the Exclusive Use Exemption after being purchased by Jefferson Healthcare, which in turn was owned by Jefferson County Public Hospital District #2. AR 176-79.

Therefore, until at least July 23, 2013, the Department did not require CON approval for surgical facilities in the offices of physician groups owned by hospitals or health systems, just as it did not require CON approval for surgical facilities in the offices of physician groups owned by their members, so long as use of the facilities was limited to the members of those groups. It confirmed this in four formal applicability determinations issued between 1999 and 2013. AR 82-83, 90-103, 315-18, 176-79.

D. The Department determines that the surgical facility at the Medical Park does not require CON approval, so long as use of the facility is limited to PPSC.

Providence is a not-for-profit health system that operates healthcare facilities throughout the state. AR 183. Providence employs physicians directly as well as through the hospitals it operates. AR 183.

Providence's facilities include the Medical Park, which is an approximately 134,000-square-foot outpatient medical campus in Spokane Valley. AR 403. The Medical Park houses a wide range of healthcare services. AR 323. Much of the Medical Park is devoted to medical office space. AR 403. It also includes outpatient operating rooms. AR 403.

PPSC is a physician practice in Spokane founded more than thirty years ago. AR 569. PPSC employs twenty-seven surgeons. AR 576. PPSC proposed to lease office space and the ambulatory surgery area of the Medical Park, and that PPSC's surgeons be able to perform surgery on an exclusive basis in the operating rooms at the Medical Park. AR 321-23.

Providence, the not-for-profit health system, is the sole shareholder of PPSC, the physician group, through an intermediary company. AR 109. There is nothing unusual about such an arrangement. According to the American Medical Association, 23% of U.S. physicians work for physician practices at least partially owned by a hospital or health system. AR 181.

PPSC proposed that use of the operating rooms at the Medical Park be limited to PPSC's surgeons. AR 316. PPSC proposed that neither the physicians directly employed by Providence nor any other physicians outside of PPSC would be permitted to use the operating rooms. AR 316.

On August 23, 2012, PPSC requested an applicability determination, pursuant to WAC 246-310-050, that the operating rooms at the Medical Park would not require CON approval so long as they would be used exclusively by PPSC's surgeons. AR 319-64. On March 26, 2013, the Department issued the requested reviewability determination. Consistent with the Department's longstanding approach, as reflected in the previous applicability determinations discussed above, the Department determined that CON approval was not required for the operating rooms at the Medical Park so long as use of the operating rooms would be limited to PPSC's surgeons. AR 315-18.

E. In 2013, the Department changes its position and narrows the Exclusive Use Exemption to apply only to physician groups owned by their members.

Rockwood is the Washington d/b/a of Community Health Systems ("CHS"), a publicly traded company that operates for-profit hospitals throughout the country, including Valley Hospital in Spokane Valley. On April 22, 2013, Rockwood commenced an adjudicative proceeding to challenge the Department's March 26, 2013 determination that PPSC could rely upon the Exclusive Use Exemption. AR 1-2. Health Law Judge John F. Kuntz (the "Presiding Officer") was designated by the Department to conduct the adjudicative proceeding. AR 13.

On November 4, 2013, the CON Program informed the Presiding Officer that it had changed its position regarding the scope of the Exclusive Use Exemption, and that physician groups owned by hospitals or health systems would no longer qualify for the exemption. AR 37-38. Although this was seven months after the Department's March 26, 2013, applicability determination regarding the Medical Park, which was "binding upon the department" pursuant to WAC 246-310-050(5), the CON Program informed the Presiding Officer that it was disavowing the applicability determination that it had issued to PPSC. AR 37-38.

F. The Presiding Officer determines that physician groups owned by hospitals or health systems may not rely upon the Exclusive Use Exemption.

The putative issue in the adjudicative proceeding commenced by Rockwood was whether Providence's ownership of PPSC precluded PPSC from relying upon the Exclusive Use Exemption. All of the parties agreed that this issue was dispositive, and cross-moved for summary judgment. AR 40-69, 70-132, 133-49.

In the Presiding Officer's Initial Order, served on February 25, 2014, the Presiding Officer granted the summary judgment motions filed by Rockwood and the Program and denied the summary judgment motion filed by PPSC. AR 223-31. The Presiding Officer ruled as follows: "The Presiding Officer concludes that if the 27 PPSC surgeons owned the

proposed ambulatory surgery center rather than Providence, PPSC would qualify for the WAC 246-310-010(5) exemption and not be required to file a CN. But a narrow reading of the exemption means that Providence's corporate ownership of PPSC's ambulatory surgery center does not qualify for an exemption from the CN process." AR 229.

On its face the Presiding Officer's order appears to have been based on the ownership of *the Medical Park*. PPSC was given no notice that the Department considered the ownership of the Medical Park to be relevant to PPSC's request for an applicability determination, and was given no opportunity to present evidence regarding the details of PPSC's planned lease of medical office space and the outpatient surgery area of the Medical Park, or the extent to which PPSC would control this portion of the Medical Park. However, the Presiding Officer's references to the "ambulatory surgery center" also may have been intended to be references to "PPSC," and the Initial Order accordingly may have been based on the ownership of *PPSC*, the issue that was briefed by the parties.

G. The Reviewing Officer affirms the Presiding Officer's decision.

On March 18, 2014, PPSC sought Department review of the Initial Order pursuant to WAC 246-10-701. AR 233-58. Kristin Peterson, the Department's Deputy Director of Policy, Legislative, and Constituent Relations (the "Reviewing Officer") was designated by the Secretary of

Health to conduct the review. AR 271. In the Reviewing Officer's Final Order, served on June 26, 2014, the Reviewing Officer affirmed the Presiding Officer's Initial Order on two grounds.

First, the Reviewing Officer affirmed the Initial Order on the ground that operating rooms located in what the Reviewing Officer described as a "mixed use[] ambulatory health care facility" are not "in the offices of private physicians" and therefore are not covered by the Exclusive Use Exemption. AR 301. Thus, because PPSC's surgery suite would be located in leased space within the Medical Park, the Reviewing Officer determined that it is not covered by the Exclusive Use Exemption. To PPSC's knowledge, the Department had never before determined that operating rooms were not covered by the Exclusive Use Exemption due to their location in a larger medical complex.

Second, the Reviewing Officer affirmed the Initial Order on the ground that physicians who do not own their own practice are not "private" physicians and therefore are not covered by the Exclusive Use Exemption. AR 301-2. Thus, because PPSC ultimately is owned by Providence, the Reviewing Officer concluded that PPSC's physicians are not covered by the Exclusive Use Exemption. This reflects a change of position for the Department, which historically considered the Exclusive Use Exemption to apply both to physician groups owned by their members

and to physician groups owned by hospitals or health systems, as reflected in the applicability determinations discussed above.³

In a Corrected Final Order, served on July 3, 2014, the Reviewing Officer corrected a typographical error in the Final Order. AR 307-12. This was the agency's final decision regarding PPSC's request for an applicability determination.

H. The Department issues a CON to Providence.

On May 22, 2013, shortly after Rockwood commenced, on April 22, the adjudicative proceeding to challenge the Department's determination that CON review is not required for PPSC to use the operating rooms at the Medical Park on an exclusive basis, Providence filed a letter of intent, pursuant to WAC 246-310-080, to apply for a CON for the Medical Park. On November 14, 2013, ten days after the Department disavowed its applicability determination on November 4, Providence filed the CON application, consistent with WAC 246-310-090.

³ The Reviewing Officer also stated in a footnote that PPSC "characterized its practice as neither a solo or group practice." AR 302, n.7. The Reviewing Officer is referring to the Department's Ambulatory Surgical Center Determination of Non-Reviewability Exemption Request form, in which the Department asks physician practices to describe themselves as a "group practice," an "IPA," or "other." AR 321. The applicant is given the opportunity to provide details regarding its organizational structure only if it selects "other," which is what PPSC did. AR 321. The Reviewing Officer's footnote would suggest that this is a trick question on the form, and that any applicant that checks "other" should be denied. This is wrong. Rather, applicants plainly are given the opportunity to select "other" so that they can explain the details of their organizational structure. If it were not possible to qualify for the Exclusive Use Exemption if "other" is checked, this would not be an option provided on the application form.

On October 20, 2014, the Department granted Providence's CON application. Therefore, the operating rooms at the Medical Park are now available to all qualified surgeons who wish to perform surgery there, including PPSC's surgeons. *See Evaluation dated October 20, 2014, of the Certificate of Need application submitted by Providence Health & Services-Washington proposing to establish an ambulatory surgery center in Spokane County* (available at: <http://www.doh.wa.gov/Portals/1/Documents/2300/2014/14-16EvalCoverLetter.pdf>) (last visited October 22, 2015).

However, Rockwood is challenging the Department's issuance of the CON to Providence. *See In Re Certificate of Need #1538 concerning Providence Medical Park*, Case No. M2014-1290 (Wash. Dep't of Health). Therefore, the present judicial review proceeding not only is necessary to determine whether PPSC may rely upon the Exclusive Use Exemption, but also to determine whether the operating rooms at the Medical Park, specifically, may continue to be used by PPSC's surgeons, in the event that Rockwood's challenge to Providence's CON is successful.

I. The Thurston County Superior Court affirms the Department's Final Order.

On July 25, 2014, PPSC sought judicial review in Thurston County Superior Court. CP 4-48. On July 8, 2015, the Honorable Erik D. Price affirmed the Department's Final Order. CP 50-52.

J. PPSC seeks judicial review in the Court of Appeals.

On August 6, 2015, PPSC filed a Notice of Appeal, requesting judicial review by this Court of the Department's Final Order. CP 53-77.

V. STANDARD OF REVIEW

The Court reviews the Department's actions pursuant to the judicial review standards set forth in the APA. *See* RCW 34.05.510.

If the Court determines that the New Requirements constitute "rules," the Court reviews the rules pursuant to RCW 34.05.570(2). The validity of a rule may be determined in the context of a judicial review proceeding. *See* RCW 34.05.570(2)(a). If the Court determines that a rule was adopted without following statutory rulemaking procedures, the Court shall declare the rule invalid. *See* RCW 34.05.570(2)(c).

If the Court determines that the New Requirements do not constitute "rules," the Court reviews the Department's Final Order pursuant to RCW 34.05.570(3), which provides that the Court shall grant relief from an agency order in an adjudicative proceeding if the agency has erroneously interpreted or applied the law. *See* RCW 34.05.570(3)(d).

Such relief may include setting aside the Department’s decision and entering a declaratory judgment order regarding the correct interpretation of the regulation at issue. *See* RCW 34.05.574(1). Alternatively, the Court may remand to the Department for further proceedings. *See* RCW 34.05.574(1).

VI. RELIEF REQUESTED

PPSC requests that the Court determine that the New Requirements constitute rules that are invalid because the Department did not adopt them in compliance with statutory rulemaking requirements.

If the Court determines that the New Requirements do not constitute rules, PPSC requests in the alternative that the Court determine that the Department’s historical interpretation of WAC 246-310-010(5) was correct, that the Department’s new interpretation of the regulation is erroneous, and that PPSC’s proposed action does not require CON approval, pursuant to the correct interpretation of the regulation.

VII. ARGUMENT

A. The Court should determine that the New Requirements constitute rules that are invalid because they were not adopted in compliance with statutory rulemaking requirements.

1. Agencies can adopt new rules only in compliance with statutory rulemaking requirements.

An agency’s rules “are invalid unless adopted in compliance with the APA.” *Hillis v. State, Dep’t of Ecology*, 131 Wn.2d 373, 398, 932

P.2d 139 (1997). The Court “shall declare the rule invalid” if “the rule was adopted without compliance with statutory rule-making procedures.” RCW 34.05.570(2)(c).

“To meet the intent of providing greater public access to administrative rule making and to promote consensus among interested parties,” an agency must solicit public comments on the subject of any possible rulemaking. RCW 34.05.310(1)(a). The agency must then conduct a formal rulemaking hearing, with notice published in the state register at least twenty days beforehand. *See* RCW 34.05.320. If a rule is a “significant legislative rule,” additional requirements apply. *See* RCW 34.05.328.

2. The New Requirements constitute “rules.”

“Rules” are defined to include “any agency order, directive, or regulation of general applicability ... which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession ...” RCW 34.05.010(16)(d). “A rule is one of ‘general applicability’ if it applies to individuals only as members of a class, regardless of the size of the class.” *Hunter v. Univ. of Wash.*, 101 Wn. App. 283, 289, 2 P.3d 1022 (2000). Where “the challenge is to a policy applicable to all participants in a program, not its implementation under a single contract or assessment

of individual benefits, the action is of general applicability within the definition of a rule.” *Failor’s Pharmacy v. Dep’t of Soc. & Health Servs.*, 125 Wn.2d 488, 495, 886 P.2d 147 (1994). A “license” is “a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law.” RCW 34.05.010(9)(a).

There can be no question that the New Requirements constitute “rules.” They are generally applicable because they apply to PPSC as members of a class, i.e., physician groups that wish to operate surgical facilities. PPSC challenges the New Requirements not merely based on the denial of its request for a determination that its use of the operating rooms at the Medical Park on an exclusive basis does not require CON approval, but also on the basis of the Department’s articulation of a new policy that is applicable to any physician group that is owned by a hospital or health system or leases space in a larger medical complex. The New Requirements establish or alter the qualifications or standards for the issuance of a CON, which is a permit, certification, or approval to operate a healthcare facility and is therefore a “license.” Indeed, CON approval would be required for a type of activity that prior to 2013 did not require CON approval.

A directive need not be a published WAC provision to qualify as a “rule.” *See, e.g., Failor’s Pharmacy*, 125 Wn.2d at 494 (holding that

reimbursement schedules inserted into Medicaid prescription providers' contracts were rules requiring adherence to rulemaking procedures). The Supreme Court has been "vigilant in insisting that administrative agencies treat policies of general applicability as rules and comply with necessary APA procedures." *McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs. of State of Wash.*, 142 Wn.2d 316, 322, 12 P.3d 144 (2000). The directives here are policies of general applicability and therefore must be treated as rules.

3. Because the New Requirements were "significant legislative rules," additional rulemaking procedures were required.

"Significant legislative rules" are defined to include a rule that "establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit." RCW 34.05.328(5)(c)(iii)(B). They also include a rule that "adopts a new, or makes significant amendments to, a policy or regulatory program." RCW 34.05.328(5)(c)(iii)(C).

By narrowing the scope of the Exclusive Use Exemption, the Department has both made significant amendments to a regulatory program and established or altered the standards for the issuance of a license or permit. Until the Department announced the New Requirements, a physician group owned by a hospital or health system did

not need CON approval to establish a surgical facility in its offices; now such a group *does* need CON approval to do so. Similarly, a physician group previously did *not* need CON approval to operate a facility in leased space in a larger medical complex; now it *does* need CON approval to do so. It is difficult to imagine a more significant change to the CON regulatory program than requiring CON approval for an activity that previously was not subject to CON review.

Because the New Requirements constitute significant legislative rules, the standards governing their implementation are even more stringent. The requirements for adoption of a significant legislative rule include identifying the “general goals and specific objectives of the statute that the rule implements,” conducting a cost-benefit analysis, and providing notice that a preliminary cost-benefit analysis is available. RCW 34.05.328(1).

4. The Department engages in regular rulemaking to update the CON regulations.

The Department is aware that it must comply with the statutory rulemaking requirements to change the CON requirements. Indeed, when the Department determines that the CON regulations should be revised, for policy reasons, it typically has engaged in rulemaking to do so. *See, e.g.,* WAC 246-310-700 *et seq.* (adopting CON requirements for elective

percutaneous coronary interventions, effective 2008). Indeed, the Department currently is engaged in rulemaking processes with respect to *several* aspects of the CON regulations. See <http://www.doh.wa.gov/LicensesPermitsandCertificates/FacilitiesNewReneworUpdate/CertificateofNeed/RulemakingActivities> (last visited October 22, 2015) (describing current rulemaking activities).

However, the Department occasionally has attempted to change CON requirements without following proper rulemaking procedures. For example, the Department's regulations require CON approval to establish "new" healthcare facilities, including new ASFs. See WAC 246-310-020(1)(a). In 2014, the Department announced that CON approval would also be required to add operating rooms to *existing* ASFs. This changed the Department's longstanding position that CON approval was *not* required to add operating rooms to existing ASFs. Providers challenged this new requirement. The Thurston County Superior Court determined that the new requirement constituted a rule, and that it was invalid because it was not adopted in compliance with statutory rulemaking procedures. See *The Polyclinic, et ano. v. Dep't of Health*, No. 14-2-01413-6 (Thurston County Super. Ct. Oct. 31, 2014). After the court invalidated the Department's new rule because it was not adopted in compliance with statutory rulemaking procedures, the Department commenced a

rulemaking process to adopt this requirement. See <http://www.doh.wa.gov/LicensesPermitsandCertificates/FacilitiesNewReneworUpdate/CertificateofNeed/RulemakingActivities/AmbulatorySurgeryFacilities/AmbulatorySurgeryFacilityExpansion> (last visited October 22, 2015) (ASF expansion rulemaking).⁴

5. The Department adopted the New Requirements without any rulemaking process.

As of July 23, 2013, the date of the Port Townsend Surgical Associates applicability determination, there was no prohibition against a physician group owned by its members relying upon the Exclusive Use Exemption. AR 176-77. As of March 12, 2013, there was no prohibition against a physician group relying upon the Exclusive Use Exemption for a surgical facility in leased space. See *Applicability Determination Regarding Meridian Surgery Center, dated March 12, 2013* (allowing physician practice to rely upon exemption through time-share/lease agreement) (available at: <http://www.doh.wa.gov/portals/1/documents/2300/dor13-29.pdf>) (last visited October 22, 2015). Pursuant to the New Requirements, these now are both prohibited.

⁴ Judicial review also has been necessary to restrain the Department where it has followed the rulemaking process but has done so to create CON requirements that exceed the scope of its authority. See, e.g., *Wash. State Hosp. Ass'n v. Wash. Dep't of Health*, 183 Wn.2d 590, 595, 353 P.3d 1285 (2015) (holding that Department exceeded its authority in expanding, by rule, its ability to review hospital ownership changes).

The Department conducted no rulemaking process whatsoever before creating these new CON requirements. The Court should determine that these new requirements constitute rules that are invalid because they were not adopted in compliance with statutory rulemaking requirements. If, for policy reasons, the Department wishes to narrow the scope of the Exclusive Use Exemption, it must follow proper rulemaking procedures to do so, just as it is doing with respect to other CON requirements that are the subjects of current rulemaking processes.

B. The Court should determine that the Department’s historical interpretation of the Exclusive Use Exemption was correct, and that the Department’s current interpretation of the regulation is erroneous.

1. Providence’s ownership of PPSC is irrelevant to PPSC’s reliance upon the Exclusive Use Exemption.

a. The Exclusive Use Exemption does not contain a “practice-ownership” requirement.

When interpreting a regulation, the Court should not “add words to the regulation.” *MultiCare Med. Ctr. v. State, Dep’t of Soc. & Health Servs.*, 114 Wn.2d 572, 591, 790 P.2d 124 (1990), *superseded by statute on other grounds*, *Neah Bay Chamber of Commerce v. Dep’t of Fisheries*, 119 Wn.2d 464, 832 P.2d 1310 (1992). The nature of regulatory interpretation “is not to question the wisdom of a particular regulation” but rather to “determin[e] what the regulation requires.” *Id.*

The plain language of WAC 246-310-010(5) provides that the Exclusive Use Exemption applies to *all* “offices of private physicians or dentists, whether for individual or group practice.” WAC 246-310-010(5). It does *not* require that the physician practice be owned by its members. The Court should not add such a term to the regulation.

The Reviewing Officer concluded that the Exclusive Use Exemption cannot be relied upon by physician groups owned by hospitals or health systems because it only applies to private physicians. The Reviewing Officer defined “private” physicians to be physicians who are not employees. Because PPSC’s physicians are employed by PPSC, and PPSC is owned by Providence rather than the physicians, the Reviewing Officer concluded that PPSC’s physicians are not private physicians. AR 302.

The Reviewing Officer’s definition is inconsistent with the ordinary meaning of “private” when it comes to physicians, or any other category of professionals for that matter. For example, using the Reviewing Officer’s definition, associates at law firms are not engaged in the private practice of law because they do not own their law firms.

“Private” means “[b]elonging to a particular person or persons, as opposed to the public or the government” or “[c]onducted and supported primarily by private individuals or by a nongovernmental agency or

corporation.” *The American Heritage College Dictionary* (3d ed. 2000). “Physician” is defined as “[a] person licensed to practice medicine; a medical doctor.” *Id.* Using the ordinary meaning of these words, PPSC’s physicians plainly are “private physicians,” irrespective of whether they are shareholders.⁵

Adding a practice-ownership requirement to the regulation would prevent the large percentage of physicians in physician practices owned by hospitals or health systems from relying upon the Exclusive Use Exemption, even though their colleagues who own their own practices could continue to do so. Such an important change to the CON laws should be made by the Legislature, or by the Department through statutory rulemaking procedures, after considering the effect this would have on all stakeholders, including those physician practices like PPSC that would no longer be able to rely upon the Exclusive Use Exemption.

⁵ The full dictionary definition of “private” as an adjective is as follows: “**1.a.** Secluded from the sight, presence, or intrusion of others. **b.** Designed or intended for one’s exclusive use. **2.a.** Of or confined to the individual; personal. **b.** Undertaken on an individual basis. **c.** Of, relating to, or receiving special hospital services and privileges. **3.** Not available for public use, control, or participation. **4.a.** Belonging to a particular person or persons, as opposed to the public or the government. **b.** Conducted and supported primarily by private individuals or by a nongovernmental agency or corporation. **c.** Of, relating to, or derived from nongovernmental sources. **5.** Not holding an official or public position. **6.a.** Not for public knowledge or disclosure; secret. **b.** Not appropriate for use or display in public; intimate. **c.** Placing a high value on personal privacy.” The full definition of “physician” is as follows: “**1.** A person licensed to practice medicine; a medical doctor; **2.** A person who practices general medicine as distinct from surgery. **3.** A person who heals or exerts a healing influence.” *The American Heritage College Dictionary* (3d ed. 2000).

- b. PPSC's interpretation is consistent with the Department's past practice.

As discussed above, from at least 1999 until 2013 the Department interpreted the Exclusive Use Exemption to apply to physician groups owned by hospitals or health systems. It issued at least four formal applicability determinations on this issue, relating to a physician practice owned by Virginia Mason (1999), a physician practice owned by Kennewick General Hospital (May 9, 2002), PPSC (March 26, 2013), and a physician practice being acquired by Jefferson Healthcare (July 23, 2013). Therefore, for at least fifteen years the Department allowed physician practices owned by hospitals or health systems to rely upon the Exclusive Use Exemptions just as physician practices owned by their members may do so. Two of the Department's applicability determinations (Virginia Mason and KGH) were made *before* the Department's determination in this matter, and one of the Department's

applicability determinations (Port Townsend Surgical Associates) was made *after* the Department’s determination in this matter.⁶

- c. PPSC’s interpretation is consistent with judicial interpretation of analogous language.

Prior to this case, no Washington court had addressed whether a physician group may rely upon the Exclusive Use Exemption if it is owned by a hospital or health system. However, there is at least one non-Washington case on point. The Supreme Court of South Carolina recently addressed an analogous issue under South Carolina’s CON laws. *See Amisub of South Carolina, Inc. v. South Carolina Dep’t of Health and Env’tl. Control*, 403 S.C. 576, 743 S.E.2d 786 (2013). Specifically, under South Carolina law “the offices of a licensed private practitioner whether for individual or group practice” generally are “exempt from CON requirements” subject to certain exceptions. *See id.* at 588-89.

⁶ Rockwood and the Department cited below to examples of the Department not permitting *hospitals or health systems* to rely upon the Exclusive Use Exemption. If they attempt to make the same argument in this proceeding, PPSC will address it in detail in its reply brief. However, the key point is that none of the examples Rockwood and the Department cited below, and may cite here, involved a physician practice owned by a hospital or health system seeking to rely upon the Exclusive Use Exemption, as is the case here and as was the case in the Virginia Mason, KGH, and Port Townsend Surgical Associates matters. Instead, the examples cited by Rockwood and the Department involved a hospital *itself* seeking to rely upon the Exclusive Use Exemption. If *Providence* sought to rely upon the Exclusive Use Exemption to operate an ambulatory surgical facility as an outpatient department of one of its hospitals, available to all physicians employed by Providence, those other examples would be analogous. But that was *not* the proposal before the Department. Instead, *PPSC*, a physician group, sought to rely upon the exemption. The facility would be operated by PPSC, not as an outpatient department of a hospital. PPSC is a separate legal entity from Providence. And the facility would be used only by PPSC’s employed surgeons. AR 316.

In *Amisub*, Piedmont Medical Center (“Piedmont”) argued that the urgent care center being opened by Carolina Physicians Network (“CPN”) required CON approval. Piedmont argued that because CPN was wholly owned by Carolinas Healthcare System (“Carolinas”), it did not qualify as “the offices of a licensed private practitioner whether for individual or group practice,” and therefore could not rely upon the exemption. The Administrative Law Court (“ALC”) rejected Piedmont’s argument, and determined that Carolinas’ ownership of CPN did not affect CPN’s right to rely upon the exemption. The court summarized the ALC’s ruling as follows: “The ALC observed that neither the CON Act enacted by the South Carolina General Assembly nor any associated regulations place any restriction on the type of private physician’s office that is entitled to receive the exemption from CON review. *The ALC concluded the ownership of the center ... had no bearing on whether the urgent care center is a private physician’s office[.]*” *Amisub*, 743 S.E.2d at 790 (emphasis added).

The court ultimately determined that Piedmont lacked standing to bring the ALC action. However, the court specifically noted its agreement with the ALC that the ownership of a physician group would not affect the group’s ability to rely upon the exemption: “[W]e are concerned that Piedmont’s suggestion that we should treat physicians’ offices owned by

hospitals differently from those that are not would constitute an improper judicial restriction on a legislative provision, and it would effectively eviscerate the private business model, a result that we do not believe was ever intended by the General Assembly. The statutory and regulatory provisions regarding the exemption for a private physician's office contain the only restrictions set forth by the General Assembly and by [the South Carolina Department of Health and Environmental Control], respectively, and Piedmont cannot independently engraft additional limitations that were not so specified by those authorities." *Amisub*, 743 S.E.2d at 797, n.16.

The same is true here. The Exclusive Use Exemption contained in WAC 246-310-010(5) contains no "ownership" requirement, and for at least fifteen years the Department has allowed physician groups owned by hospitals or health systems to rely upon the exemption.

2. PPSC's lease of its space is irrelevant to PPSC's reliance upon the Exclusive Use Exemption.

- a.** The Exclusive Use Exemption does not contain a "space-ownership" requirement.

As discussed above, the Court should not "add words to the regulation." *MultiCare Med. Ctr.*, 114 Wn.2d at 591. The plain language of WAC 246-310-010(5) requires only that the facility be "*in the offices of private physicians,*" not that the physicians *own* that office space, or that

the leased space not be located in a larger medical complex. WAC 246-310-010(5) (emphasis added).

Just as there is no legal basis for the Department to read a “practice-ownership” requirement into the regulation, there is no legal basis for the Department to read a “space-ownership” requirement into the regulation. If the Department believes that the scope of the Exclusive Use Exemption should be narrowed, for policy reasons, to apply only to those physicians that own the buildings in which they practice, or to physicians that do not lease office space in larger medical complexes, the Department should make this change through proper rulemaking procedures, after considering the effect this would have on all stakeholders, including those physician groups, like PPSC, that wish to rely upon the Exclusive Use Exemption with respect to leased space and would no longer be able to do so.

- b.** PPSC’s interpretation is consistent with the Department’s past practice.

The Department historically has permitted physician practices to rely upon the Exclusive Use Exemption notwithstanding the fact that they would lease rather than own their office space. *See, e.g., Applicability Determination Regarding Meridian Surgery Center* (Wash. Dep’t of Health March 12, 2013) (available at: <http://www.doh.wa.gov/Portals/1/>

[Documents/2300/DOR13-29.pdf](#) (last visited October 22, 2015) (allowing physician practice to rely upon exemption through time-share/lease agreement). Thus, just as PPSC's interpretation of the regulation is consistent with the Department's past practice with respect to practice ownership, PPSC's interpretation is consistent with the Department's past practice with respect to space ownership.

3. The Court should correct the Department's erroneous interpretation of the Exclusive Use Exemption.

"The interpretation of a regulation is a question of law reviewed de novo." *Grays Harbor Energy, LLC v. Grays Harbor County*, 175 Wn. App. 578, 583, 307 P.3d 754 (2013). "If the meaning of a rule is plain and unambiguous on its face" the Court should "give effect to that plain meaning." *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 52, 239 P.3d 1095 (2010). "To ascertain a regulation's plain meaning" the court looks "to the ordinary meaning of its text." *Grays Harbor Energy*, 175 Wn. App. at 584. It also considers "the context in which the regulation appears, related regulations and statutes, and the statutory scheme of which the regulation is a part." *Id.*

The Exclusive Use Exemption plainly applies to *all* private physicians, and says nothing about the ownership of the practice. The Exclusive Use Exemption plainly applies to *all* physician offices, and says

nothing about whether or not the space is leased. Moreover, this plain-language interpretation is what the Department historically followed. It was only recently, when the Department decided that the Exclusive Use Exemption should be narrowed, that it decided to “interpret” the regulation to include new requirements.

The Court should determine that the Department’s new interpretation of the Exclusive Use Exemption is erroneous as a matter of law, and that the Department must continue to follow the correct, plain-language interpretation of the regulation. If the Department wishes to narrow the scope of the Exclusive Use Exemption, it must do so through proper rulemaking procedures.

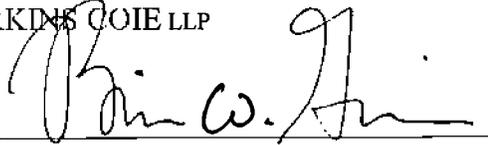
VIII. CONCLUSION

The Department changed the requirements to qualify for the Exclusive Use Exemption set forth in WAC 246-310-010(5), but did not change the regulation itself. This is impermissible. The Court should determine that the New Requirements constitute rules that are invalid because they were not adopted in compliance with statutory rulemaking procedures. In the alternative, if the Court determines that the New Requirements do not constitute rules, the Court should determine that they reflect an erroneous interpretation of WAC 246-310-010(5), and that

under the correct interpretation of the regulation PPSC's proposed action
does not require CON approval.

Respectfully submitted this 23rd
day of October 2015.

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CERTIFICATE OF SERVICE

I certify that today I caused to be served the foregoing document on the following persons by email, pursuant to the parties' eservice agreement:

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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 23rd day of October, 2015, at Seattle, Washington.



Julie K. DeShaw

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PERKINS COIE LLP

October 23, 2015 - 2:52 PM

Transmittal Letter

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