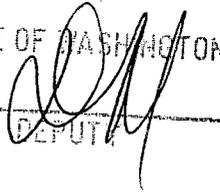


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DIVISION II

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STATE OF WASHINGTON

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No. 50109-1-II

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

SIGNATURE HEALTHCARE SERVICES, LLC,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent.

BRIEF OF APPELLANT

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Administrative Decisions

In Re: CWS and Davita, Kuntz, J., Cause No. M2008-118469,
dated July 7, 2009 24, 25

I. INTRODUCTION

Washington has a dire unmet need for inpatient acute care behavioral health services, ranking third worst in the nation for bed capacity at only 8.25 beds per 100,000 people. Clark County is much worse with just 3.2 beds per 100,000. Local providers have been unwilling to address the bed shortage. Appellant, Signature Healthcare Services, LLC (“Signature”) is an established provider of acute care inpatient behavioral health services operating several hospitals across the United States. It seeks to provide a long-term solution to the critical bed shortage in Clark County. On November 5, 2014, Signature was the first to file for a Certificate of Need (“CN”), with Washington’s Department of Health (“the Department”), as required by RCW 70.38 *et seq.* Signature proposed building a 100-bed inpatient behavioral health hospital. Respondent, Springstone later applied to build a 72-bed inpatient psychiatric hospital. The projections show a need for at least 109 beds through 2021. AR 3671.

Signature had three meetings with the Department’s personnel prior to submitting its CN application and one meeting shortly after the first screening of its application. The purpose was to ensure Signature knew of all necessary documentation for the hospital project, including site control. The public policy for the site control requirement is to demonstrate applicants have a long-term commitment to the community. The requirements for establishing site control are not codified in the CN enabling legislation, RCW 70.38.115, or the Department’s CN regulations, Ch. 246-310 WAC. It is only addressed in the Department’s form CN

application used generically for all hospitals. All parties agree that the form application controls the requirements for issuance of a CN.

The application form provides four methods for establishing site control. The methods are listed in the disjunctive, meaning that meeting the requirements of one method is sufficient to establish site control. Providing a binding real estate purchase and sale agreement (“REPSA”) is one such method. Signature submitted a binding REPSA. Signature also showed that its President and CEO Dr. Soon Kim would own, directly or indirectly, all of the entities involved in Signature’s hospital project. *See* Appx. A. Dr. Kim would be buying the real property, funding the hospital facility, and operating the hospital all through his wholly owned entities.

On September 23, 2015, the Department denied Signature’s application on summary judgment based on a flawed interpretation of the CN application’s site control requirements. The Department refused to apply standard canons of interpretation. Instead of addressing the application requirements, the Department based its decision solely upon: (1) Signature not inserting its pro forma Rent Expense into a draft lease; and (2) the draft lease not being for a period of 20-years. It disregarded the REPSA and controlling plain language in the CN application for site control. The Department further erred in granting a CN to Springstone, LLC, because genuine disputed issues of material fact existed and the Department failed to follow regulatory review requirements.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1. The Department erred in defining site control to mean “that the applicant can show it can use the site for the stated purpose and for the relevant period time set out in the Program’s application form.” AR 1520. The CN application specifies no relevant time for situations where site control is established by showing (1) clear legal title; or (2) a legally enforceable agreement to give such title.

Assignment of Error 2. The Department erred in stating Signature “did not provide a proposed lease in response to [the screening] question.” AR 1520. This finding indicates the Department requested a copy of a lease in the first screening. That is incorrect. Unlike Springstone, the lease was never requested of Signature until the second screening and it was provided. AR 389. The Department’s executive director Mr. Eggen testified he would have expected his analysts to request a copy of a lease in the first screening if there were any issues with site control. AR 534-35.

Assignment of Error 3. The Department arbitrarily and capriciously ruled: “[h]owever, Signature’s draft Lease Agreement was incomplete. It was for a five-year period with no option to renew beyond the five years. It did not include the amount of the rent of the lease.” AR 1530. Signature already provided its “lease/rent” cost to the Department in response to the first screening question. AR 2125. Springstone’s first screening made the same request for a copy of the lease agreement. AR 2648. The Department also made an *explicit request* to Springstone for including costs associated with the lease. AR 2648 (“[t]he draft agreement

does not include any costs associated with the lease. Please provide.”). No explicit request was ever made to Signature.

It also omits that Signature requested in its response to the second screening that the Department “continue screening until the information is complete” as permitted by agency rule. AR 457. This request was disregarded. Instead of requesting Signature put the rent cost into its draft lease agreement as it had explicitly done with Springstone in a separate and independent screening question, it chose to arbitrarily deny Signature. As discussed in the cross-motion for summary judgment, in Pierce County, when the Department determined applicants had submitted incomplete lease/condominium agreements for site control, it issued a pivotal unresolved issue (“PUI”) explicitly requesting the information. The same was not done here. This highly inconsistent treatment between applicants constitutes arbitrary and capricious decision-making.

Assignment of Error 4. The Department erred in stating: “Signature did not show that it has control over the proposed hospital building for twenty-years as required by the application form.” AR 1530. The application form does not require showing 20-years when establishing sufficient site control by way of a binding purchase and sale agreement. Neither does the enabling CN statute, RCW 70.38.115, or the CN regulations, Ch. 246-310 WAC.

Assignment of Error 5. The Department erred in stating: “Signature Healthcare Services, LLC (the applicant) will not have any control over the site. Signature Healthcare Services, LLC will only have the

right to use the building (i.e. site control) through the lease between Signature Healthcare Services, LLC and Vancouver Life Properties, LLC.” AR 1530-1531. Signature established site control under the plain language of the application by providing a binding purchase and sale agreement. The statement disregards that Dr. Kim, through his wholly owned entities, will own both the land and the facility and will operate the hospital. This is not a leaseback arrangement.

Assignment of Error 6. The Department erred in stating there is “no genuine issue of material fact that Signature failed to show that its project would not result in an unreasonable impact on the cost and charges for healthcare services. Without a completed lease showing rent expenses and long-term site control, there is no way to accurately judge whether there is any impact, either reasonable or unreasonable. Signature, therefore, does not meet the WAC 246-310-220(2) criterion.” AR 1531. This contradicts The Department’s evaluation by Mr. Ordos, who concluded that “[t]he costs of the project, including any construction costs, will probably not result in an unreasonable impact on the costs and charges for health services.” AR 2676. Mr. Ordos made this determination because Signature had provided the rent/lease cost. Mr. Ordos concluded “Vancouver Behavioral Healthcare Hospital which will be a subsidiary of Signature Healthcare Services, LLC does have the financial capacity to proceed with this project **and that the project is financially feasible**.” AR 684 (bold added).

Assignment of Error 7. The Department erred in stating “Signature’s Lease Agreement was incomplete.” AR 1521. Signature

already provided the “lease/rent” cost to the Department in response to the first screening question. AR 2125. Springstone’s first screening made the same request for a copy of the lease agreement. AR 2648. The Department also made an *explicit request* to include costs associated with the lease. AR 2648 (“[t]he draft agreement does not include any costs associated with the lease. Please provide.”). No such explicit request was ever made to Signature. The same draft lease form used by Signature here was approved by the Department during the Pierce County review.

Assignment of Error 8. Signature requested in response to the second screening that the Department “continue screening until the information is complete” as permitted by agency rule. AR 925. This request was disregarded. Instead of explicitly requesting Signature put the rent cost into its draft lease agreement as it had explicitly done with Springstone in a separate and independent screening question, it chose to arbitrarily deny Signature. In Pierce County when the Department determined applicants had submitted incomplete lease/condominium agreements, it issued a PUI requesting the information. The same was not done here. This inconsistent treatment constitutes arbitrary and capricious decision-making.

Assignment of Error 9. The Department erred in omitting that the Department also made an explicit request to Springstone asking it to include the costs associated with the lease. AR 2648 (“[t]he draft agreement does not include any costs associated with the lease. Please provide.”). No such request was ever made to Signature.

Assignment of Error 10. The Department erred in stating Springstone “clarified that Springstone, LLC, not Springstone, Inc., was the parent company.” AR 1653. Springstone clarified Springstone, LLC was the “ultimate” parent. AR 2653. Springstone never contended Springstone, Inc. was not a parent—the organization chart shows it is a parent. AR 2670.

Assignment of Error 11. The Department erred in stating “[a] complete review of Springstone’s project shows that the application was for 72 psychiatric beds and not for a 48-bed psychiatric hospital with a 24-bed chemical dependency facility. Signature’s argument to the contrary fails.” AR. 1525. Springstone directly stated that it “propose[s] a 24-bed adult psychiatric unit, a 24 bed geropsychiatric unit and a 24-bed chemical dependency unit.” AR 2657.

Assignment of Error 12. The Department erred in applying the wrong summary judgment standard. Under the established summary judgment standard where all facts and reasonable inferences must be considered in a light most favorable to the nonmoving party, *Korlund v. Dyncorp Tri-Cities Svcs.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005), summary judgment should have been denied on Springstone’s application on the Need criteria. Because Springstone provided no forecast of need for its proposed 24-bed chemical dependency unit as required, Springstone’s application should have been denied. WAC 246-310-210(1) mandates that Springstone must demonstrate that the population to be served has need for the 24-bed chemical dependency unit it proposes. AR 2657.

Assignment of Error 13. The Department erred in stating: “The examination showed four of the five applicable ratios in Springstone’s proposed CN project were within the appropriate range.” AR1658-1659. The Department’s Hospital and Data System’s office found Springstone, LLC failed each of the four ratios that were examined. AR 3722.

Assignment of Error 14. Under WAC 246-310-220, Springstone must establish that it can be “appropriately financed.” AR 1527. Springstone has yet to reveal its financing for the project. CP 242.

Issue 1. The Department erred in indicating no genuine issues of material fact exist regarding Springstone satisfying the regulatory criteria for cost containment. AR 1681. Because Springstone cannot meet the regulatory criteria for Need and Financial Feasibility, as stated above, a *fortiori*, it does not satisfy the criteria for cost containment.

Issue 2. The Department erred in finding Springstone to be the “superior” alternative even though Signature unequivocally showed how its psychiatric hospital project was less expensive on a cost per bed basis compared to Springstone and even though Signature’s project provides more psychiatric beds and services and better fits the overall forecasted need for the Clark County behavioral health community. AR 1539.

Issue 3. The Department erred in stating the test for establishing site control: “[f]or a psychiatric hospital, that means showing sufficient interest (that is, site control) in both the property and the facility.” AR 1541-1542. That is not what the plain language or the application requires, nor is it consistent with the testimony from the Department’s personnel. The CN

application is written in four disjunctive elements and only requires an applicant establish one of the stated methods. AR 1519.

Issue 4. The Department erred in stating “[t]he only way that Signature Healthcare Services, LLC (the applicant) can exercise site control is by leasing the facility from Vancouver Life Properties, LLC. Signature failed to provide a completed (but not executed) copy of the lease.” AR 1543. Signature provided a copy of the lease in response to the second screening questions and it had explicitly provided the Department with the rental/lease cost, *pro forma*, in response to the first set of screening.

This conclusion also disregards that Dr. Kim through his wholly owned affiliated entities own and control both the hospital facility and the real property. Dr. Kim has full control over both the real property and facility through his 100% ownership interest in all affiliated entities.

Issue 5. The Department erred in stating Signature failed to prove site control by submitting an incomplete lease that showed a five-year term, but did not provide renewal for another 15 years. AR 1543. There is no 20-year requirement. That requirement applies to situations where an applicant shows site control through a lease. Here, Signature demonstrated site control per the plain language of the CN application by providing an executed binding purchase and sale agreement. AR 1884-1892. In Pierce County, the Department permitted a term of 15-years on a condominium agreement to establish site control. The Department’s CN Program Executive Director, Mr. Bart Eggen testified as it relates to any draft lease that the Department has “tried to be somewhat flexible.” AR 969.

III. STATEMENT OF THE CASE

Since 1979, Washington has controlled the number of healthcare providers entering the market.¹ RCW 70.38 *et seq.*; *Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 99, 187 P.3d 243 (2008). Providers may open certain healthcare facilities only after receiving a CN from the Department. RCW 70.38.115. The legislature intended the CN requirement to provide accessible health services and assure the health of all citizens while controlling costs. RCW 70.38.015(1), (2).

Signature seeks to establish a 100-adult bed acute care behavioral health hospital in Clark County. AR 1812. Washington has a dire unmet need for inpatient acute care behavioral health services. AR 1553. It ranks third worst in the United States for psychiatric bed capacity at just 8.2 beds per 100,000 people when there should be at least 27.25 per 100,000. AR 1825. Washington's legislature has made it a top priority to get more inpatient acute care behavioral health beds into Washington's local communities. The bed shortage is especially dire in Clark County where there are only 3.7 beds per 100,000. AR 1826. Noticing the need for inpatient acute behavioral health services in Clark County, Signature was first to apply for a CN on November 5, 2014. AR 1811-2104. Springstone,

¹ Washington's CN process has been sharply criticized because it contradicts supply and demand—artificially depressing supply as the need rapidly escalates. Washington residents suffer because the system restricts market competitors and encourages monopolistic behavior. *See* <http://www.washingtonpolicy.org/publications/detail/why-washingtons-restrictive-certificate-of-need-medical-services-law-should-be-repealed> and <https://www.heartland.org/publications-resources/publications/the-failure-of-government-central-planning-washingtons-medical-certificate-of-need-program> (last visited August 18, 2017). Many states as a result have abolished the CN system. *Id.*

LLC later applied on December 23, 2014. AR 2458-2641.

Springstone's application was legally defective for many reasons. First, Springstone did not meet the CN criteria for Need, Financial Feasibility and Cost Containment. AR 3730. Springstone provided no need methodology or financials to support its proposed 24-bed chemical dependency unit included in the 72-bed CN application. *Id.*

Second, audited financial documents prove Springstone, LLC "has experienced both losses and negative cash flows from operations since its inception." AR 1121-1122. Such troubling financial information is magnified by Springstone's failure to identify the terms of its 100% "capital investment" for Welsh, Carson, Anderson & Stowe ("WCAS"). AR 1157. WCAS is a venture capital firm that generally imposes burdensome terms on capital investment. AR 695. Such terms have included above market interest rates and exit events where investors can cash out their investments in the entity in a short period. *Id.* Springstone's audited financials show such an exit event is scheduled in 2020; hardly a signal of stability and cost containment for consumers of psychiatric care. AR 2609.

Third, this less than forthcoming financial arrangement made it difficult for the CN Program to identify Springstone's applicants accurately. AR 2653. Disregarding the regulatory definition of an applicant under WAC 246-310-010(6), the Department now claims to only look at the "ultimate parent" to determine the applicant. *Id.* Springstone represented that WCAS was the primary owner of Springstone, LLC, as it was providing 100% of the capital investment. AR 2468. The Department never evaluated

whether WCAS should be evaluated as the applicant. *Id.* The Department admitted that had WCAS been determined to be the parent, the financial examination would have been more critical due to the financial backing being structured as a high-risk loan. AR 621.

Fourth, Springstone made many material misrepresentations that misled the review. For example, (1) it repeatedly used Springstone, Inc. and Springstone, LLC interchangeably throughout the application process; (2) Springstone misrepresented who would be running the hospital; (3) Springstone stated Springstone, LLC formed Rainer Springs, LLC when the Washington Secretary of State's records established it being formed by Springstone, Inc., not Springstone, LLC. AR 2597. The Department stated that it relied upon Springstone being "truthful." AR 464.

As both applications were being evaluated, the Department overlooked several red flags raised by Springstone's financing and its failing hospital enterprise. Such an oversight could be disastrous for the residents seeking care in Clark County. Even more concerning was the disparate treatment Signature received regarding the lease when it had already submitted the binding REPSA.

For example, on May 11, 2015, in response to a request from the Department, Signature provided a comprehensive draft lease for the payment arrangement between Vancouver Life Properties, LLC and Vancouver Behavioral Healthcare Hospital, LLC (both entities wholly owned by Dr. Soon Kim, President and CEO of Signature). AR 2198-2246. Signature clarified it was not a leaseback agreement. *Id.* Signature also

requested the Department continue to screen “until the information is complete, consistent with WAC 246-310-090(2)(c).” *Id.* The Department took the position that it could not conduct a third screening even though it did so in the Pierce County Review through a PUI—another round of screening designed to obtain needed information.

Prior to submitting its application, Signature met with the Department’s personnel no less than four times. AR 453. Signature proactively engaged in these meetings to make certain it was complying with all CN requirements. *Id.* Signature laid out its organizational structure to the Department’s personnel and informed them that Signature’s President and CEO, Dr. Soon Kim, would wholly own, directly or indirectly, both the hospital facility and the real property upon which the hospital would be built and operate the hospital. *Id.* Signature would purchase the real property and Dr. Kim’s Vancouver Life Properties, LLC would fund development of the hospital. *Id.* The Department never objected or even raised concerns with this organizational structure. *Id.* Signature’s transparency was aimed at ensuring the *site control* requirement was met. *Id.*

Signature, the Department, and Springstone agree the Department must specify in the CN application all information required to obtain a CN. WAC 246-310-090(1)(a) (“a person proposing an undertaking subject to review shall submit a certificate of need application in such form and manner and containing such information as the department has prescribed and published as necessary to such a certificate of need application.”); AR 1786 (Signature); AR 320 (Springstone); AR 1388 & 1672 (the

Department). The parties understood the language of the CN application controls what the applicant must provide.² *Id.*

The requirements for establishing site control are not mentioned in the CN enabling statute, RCW 70.38.115, or the CN regulations, Ch. 246-310 WAC. The CN requirements for site control are in addition to the statutory or regulation requirements and provided in a form application maintained by the Department. AR 1811-2104. The form application applies to all types of hospitals including acute care inpatient behavioral health hospitals. *Id.* It is maintained and published by the Department so applicants will know what is required. *Id.* The Department provides four alternative methods for establishing site control:

8. Provide documentation that applicant has sufficient interest in the site **or** facility proposed. Sufficient interest shall mean **one** of the following:
 - (a) Clear legal title for the proposed site; **or**
 - (b) Lease for at least five years with options to renew for no less than a total of twenty years in the case of a hospital or psychiatric hospital, tuberculosis hospital or rehabilitation facilities; **or**
 - (c) Lease for at least one year with options to renew for not less than a total of five years in the case of freestanding kidney dialysis units, ambulatory surgical facilities, hospices or home health agencies; **or**

² As discussed further below, the Department ignored Signature's repeated requests to apply standard legal canons of interpretation to the CN application language. Both the Department and Springstone avoid discussion of interpretation and the REPSA even though the Department's CN personnel agreed with Signature's interpretation.

- (d) Legally enforceable agreement to give such title or such lease in the event that a Certificate of Need is issued for the proposed project.

AR 1821-22.

Signature submitted a binding REPSA signed by the sellers and buyers as proof of sufficient site control under 8(d) of the CN application.³ AR 1881-1906. The Department's executive director for the Department testified that a purchase and sale agreement satisfies section (d) above for site control consistent with its plain language. AR 970-71.

On December 4, 2014, the Department issued its first set of screening questions to Signature. AR 3728. Screening questions are used to ensure application completeness. *Id.* In its first set of screening, the Department requested nothing related to the lease elements listed in (b) and (c) respectively above. *Id.* But on December 31, 2014, the Department issued a screening question that asked Signature to identify its lease/rent costs in the pro forma. *Id.* In response, Signature specifically identified its "Rent Expense" of \$2,113,980 per year. AR 3683. In the same response, Signature also showed the Department how its psychiatric hospital project was much less expensive on a cost per bed basis than Springstone, which corresponds to lower healthcare costs for the consumers. AR 2136-37.

On September 23, 2015, the Department denied Signature's application solely on Signature submitting a lease between Vancouver Life

³ Signature has continued to make substantial payments in compliance with the RESPA since the agreement was memorialized.

Properties, LLC and Vancouver Behavioral Healthcare Hospital, LLC without performing a ministerial task of transferring its pro forma rent expense to the lease, and not including a term of 20 years. AR 3739. The Department stated Signature's lease failed to state a pro forma rate and only stated that "the hospital will be leased at 'fair market rates.'" AR 145. This is not true. Signature submitted yearly Rental Expenses for those yet to be formed entities in the pro forma amount of \$2,113,980, which was annotated: "Rental Expenses." *Id.* The Department had it backwards: Springstone, had failed to state a rental amount in pro forma on its application, and had instead stated that it will "lease, at fair market value, the hospital to Rainer." AR 2471.

This disparate treatment is illustrated by review of similar reviews in other counties. In Pierce County, Signature Tacoma Behavioral Healthcare Hospital, LLC ("Signature Tacoma") and the Alliance for South Sound Health (the "Alliance"), comprising MultiCare and Franciscan, were under comparative review. CP 134. Signature's site control methods via a lease approach were identical to the approach in Signature's Clark County project. *Id.* The Alliance planned to construct its hospital under an airspace condominium. *Id.* This arrangement is nearly identical to Signature's arrangement in Clark County; however, in the Pierce County project, MultiCare/Franciscan did not have to meet a 20-year commitment for its project. The company documents showed that MultiCare or the Franciscans could pull out after a period of just 15 years (despite the Department stating Signature's lease failed for not have a 20-year renewal period). AR 2737.

Even after declaring a Pivotal Unresolved Issue, there was no specification about the number of years required for the airspace condominium to prove site control. AR 84. Despite this, the project was approved with the Department knowing that the partners could exit after 15-years. The Department also never required the Alliance to provide a draft of the condominium declaration to detail the arrangement. Because the Alliance had the airspace to build, the Department was satisfied.

In Spokane, where there was a comparative review of Signature, Springstone, and Providence-Fairfax applications, the Program required no lease from Signature in the first round of screening. AR 85. But Signature provided one because the Program had requested it in the Pierce County review. *Id.* The Program noted that the lease amount was left blank, but raised no objection regarding the lack of a term on the lease. Springstone's first lease submitted in Spokane had a term of 10 years with one two-year renewal and provided rent at "fair market value." *Id.* Springstone also proposed a development through affiliated entities. *See* Appx. B.

IV. STANDARD OF REVIEW

Where the original administrative decision is on summary judgment, the reviewing court must overlay the APA standard of review with the summary judgment standard. *Verizon Nw., Inc. v. Washington Employment Sec. Dept.*, 164 Wn.2d 909, 916, 194 P.3d 255, 260 (2008). Facts are viewed in the light most favorable to the nonmoving party. *Id.* Summary judgment is appropriate only where the undisputed facts entitle the moving party to judgment as a matter of law. *Id.* Facts in the administrative record are

reviewed *de novo* and issues of law are reviewed under the “error of law” standard. *Id.* The court affords great weight to an agency’s interpretation of an ambiguous statute or regulation within its area of expertise so long as the interpretation does not conflict with the plain language. *Puget Soundkeeper All. v. State, Pollution Control Hearings Bd.*, 189 Wn. App. 127, 136, 356 P.3d 753, 757 (2015). Deference is not appropriate where the agency’s interpretation conflicts with a statutory mandate; where it is not applied uniformly, or where it contradicts the plain language. *Id.* Relief may also be granted if the agency’s order is arbitrary or capricious, meaning willful, unreasoned and taken without regard to the attending facts or circumstances. *Wash. Indep. Tel. Ass’n v. Wash. Utils. Transp. Comm’n*, 149 Wn.2d 17, 26, 65 P.3d 319 (2003).

V. SUMMARY OF ARGUMENT

On September 23, 2015, the Department denied Signature’s application. Signature applied for review, and on October 24, 2016, the Department of Health issued a final order. AR 1641-1759. In that order, the Department concluded, without legal analysis, that an application had to show site control over both the land and the facility, even though the application’s plain language states that only one of the four methods was required to establish site control.⁴ AR 1666. The Department further stated that the lease Signature provided was incomplete because it did not identify

⁴ As stated above, Signature provided a purchase and sale agreement, which met the requirement for site control under Section III.O.8 of the application.

“all costs associated with the agreement....” and that its pro forma rental amount was “not reliable or enforceable given incomplete and fluctuating nature of the draft lease.” AR 1773-1775. But the Department accepted Springstone’s lease that only stated the amount would be set a “fair market value.” AR 1679. Signature also used the same draft form lease for Pierce County, which was accepted under that review.

Furthermore, the Department stated the issue of examining rental amounts in a lease was not to determine site control, but determine “whether the project will cover its costs by the third full year of operation[.]” *Id.* This is bizarre considering that the Department passed the following judgment against Signature: “While [the pro forma rental amount] may allow calculation of the monthly rental rate, it does not answer whether Signature provided sufficient evidence of its control over the proposed facility as required.” AR 1674.

On January 13, 2017, Signature sought judicial review of this decision in the Superior Court in and of Thurston County. CP 4-13. On March 17, 2017, that court entered an order granting application to certify this case for direct review. CP 262. Signature brings this appeal for the following reasons. First, the Summary Judgment Order omits crucial legal analysis of the primary issue, specifically, what does the CN application require for site control. The Department has not only taken inconsistent positions between Pierce, Clark, and Spokane regarding what is required, it also disregarded long-accepted canons of statutory interpretation by stating site control had to be established by more than one of the stated

methods, despite the methods being listed in the disjunctive “or.” The methods are listed in the disjunctive, or, not the conjunctive, and. The Department is bound to “give effect to [the] plain meaning [of a statute] as an expression of legislative intent.” *Jametsky v. Olsen*, 179 Wn.2d 756, 762 317 P.3d 1003 (2014). Signature met the site control requirement by providing an enforceable REPSA.

Second, the Department erred in determining the correct applicant for Springstone’s project under WAC 246-310-010. This is essential in determining project feasibility and cost containment. The fact that Springstone’s project is financed 100% by Welsh Carson Anderson and Stowe, a private equity firm with liquidity events in the financing proposal, creates ambiguity regarding who really is the applicant.

Third, the Department erred when it determined that Springstone satisfied sufficient site control where its two five-year lease renewal periods were based on “fair market value.” The Department adversely ruled against Signature for having a pro forma yearly amount in its rental amount. Therefore, the Department can have no way of determining the long-term financial viability of Springstone’s project if the lease amount is listed at “fair market value” instead of an exact dollar figure.

Fourth, the Department erred by disregarding significant inaccurate information and misrepresentations made by Springstone. The Department committed errors of law on the evaluation of Springstone’s application and granted summary judgment when genuine disputed issues of material fact existed requiring a adjudicative hearing.

VI. ARGUMENT

A. **The Department committed reversible error by interpreting site control in the conjunctive instead of the disjunctive.**

A challenge to an agency's interpretation is reviewed *de novo* under the error of law standard. *Bond v. Department of Social & Health Services*, 111 Wn. App. 566, 571–72, 45 P.3d 1087 (2002). Ultimately, it is for the court to determine the meaning and purpose. *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). When the language is ambiguous, courts give some deference to the agency's interpretation. *Budget Rent A Car Corp. v. State, Dep't of Licensing*, 144 Wn.2d 889, 901, 31 P.3d 1174, 1180 (2001). Such deference is not applied when the language is unambiguous. *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 221, 173 P.3d 885 (2007). Where the language is unambiguous, its meaning is derived from the wording itself. *HomeStreet, Inc. v. State, Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297, 300 (2009). Interpretation of unambiguous language focuses on the plain language, not what seems most reasonable or “makes sense” from a policy perspective. *Protect the Peninsula's Future v. Growth Mgmt. Hearings Bd.*, 185 Wn. App. 959, 972, 344 P.3d 705, 711 (2015).

The requirement for site control is not mentioned in the CN statute (Ch. 70.38 RCW) or regulations (Ch. 246-310 WAC). It is only addressed in the form template used generically for all hospitals. To establish site control, it states that Signature must:

8. Provide documentation that applicant has sufficient interest in the site or facility proposed. Sufficient interest shall mean one of the following:
- (a) Clear legal title for the proposed site; or
 - (b) Lease for at least five years with options to renew for no less than a total of twenty years in the case of a hospital or psychiatric hospital, tuberculosis hospital or rehabilitation facilities; or
 - (c) Lease for at least one year with options to renew for not less than a total of five years in the case of freestanding kidney dialysis units, ambulatory surgical facilities, hospices or home health agencies; or
 - (d) Legally enforceable agreement to give such title or such lease in the event that a Certificate of Need is issued for the proposed project.

AR 1821-22.

The elements above are listed in the disjunctive "or" and not the conjunctive "and", meaning that Signature had to show evidence of the methods listed. Under the plain terms, sufficient interest is established through "one" of the listed methods. Signature provided a legally enforceable agreement to give title through a binding real estate purchase and sale agreement under subsection (d).

Despite the unambiguous language, the Department imposed new, unforeseen site control requirements on Signature's project: a lease with a minimum term of 20-year had to be provided. AR 681. This new requirement was affirmed by the Department in its summary judgment order when it stated that: "Without a completed lease showing rent expenses and

long-term site control, there is no way to accurately judge whether there may be any impact, either reasonable or unreasonable.” CP 35. Although Signature provided the Department a legally enforceable agreement to give title if a CN was issued, and a lease agreement with a *pro forma* rent amount, the Department, *sua sponte*, held that a complete draft lease with all rent expenses was also required in addition to the REPSA. *Id.* Effectively, the Department disregarded the disjunctive nature of “or” in the four methods listed and substituted its own conjunctive “and” interpretation.

Generally, Washington courts presume that when “or” is used in a statutory scheme, it is construed in the disjunctive unless there is clear legislative intent to the contrary. *State v. Weed*, 91 Wn. App. 810, 813, 959 P.2d 1182 (1998). For example, in *Childers v. Childers*, the Supreme Court construed the meaning of or in a child support statute to be disjunctive. 89 Wn.2d 592, 595-596, 575 P.2d 201 (1978). The Supreme Court was asked to construe the following statute:

[T]he court may order either or both parents owing a duty of support to any child of the marriage dependent upon either or both spouses to pay an amount reasonable or necessary for his support.

RCW 26.09.100 (emphasis added).

The Supreme Court stated that when “or” is used it is to be construed disjunctively, unless the legislative intent is clearly contrary. *Childers*, 89 Wn.2d at 595. The Supreme Court reiterated the long-standing canon of statutory interpretation in this State that “or” does not mean “and”, absent

explicit legislative intent. *See State v. Tiffany*, 44 Wash. 602, 604, 87 P. 932 (1906) (holding that “the plain meaning of a statute can only be disregarded, and this exceptional rule of construction can only be restored to where the act itself furnishes cogent proof of the legislative error.”).

Here, Signature met element (d) listed above by submitting a copy of the Purchase and Sale Agreement and Receipt for Earnest Money for the site between Signature Healthcare Services, LLC [buyer] and The Donald E. and Florence R. Eby Trust [seller]. AR 45-46. The Department has regularly accepted purchase and sale agreements as evidence of sufficient site control. AR 969-970; *See In Re: CWS and Davita*, Kuntz, J., Cause No. M2008-118469, at 6, dated July 7, 2009 (copy of decision attached) (holding that purchase and sale agreement *or* a draft lease showing a specific physical location and that the applicant has sufficient interest is acceptable to demonstrate sufficient site control).

Signature further established Dr. Kim, through his wholly owned affiliated entities, will also own the hospital facility using 35% equity capital and 65% bank financing. AR 45. Vancouver Behavioral Hospital LLC will be the entity operating the hospital. AR 20. Vancouver Life Properties LLC will be the entity owning the building. AR 45. Dr. Kim is the sole owner of both entities. *Id.* Signature also provided a draft lease and explicitly informed the Department of the “lease/rent” costs in the *pro forma*. AR 46. Dr. Kim established sufficient site control by showing he has a legally enforceable agreement to obtain title to the land, and 100% of the entities participating in the venture are wholly owned by him. *Id.*

Applying the plain meaning of the language in the Department's form, Signature met the requirement for proving site control by providing a legally enforceable agreement to the land. *See In Re: CWS and Davita, Kuntz, J., Cause No. M2008-118469, at 6, dated July 7, 2009* (copy of decision attached) (holding that a purchase and sale agreement or a draft lease showing a specific physical location and that the applicant has sufficient interest is acceptable to demonstrate sufficient site control). AR 470. Signature provided evidence of two methods in the Department's form to establish site control. Signature went further by providing a draft lease with a *pro forma* rent amount even though that was not required by the plain language. AR 46. Even the Program's Executive Director Bart Eggen testified site control is met when the applicant shows just one of the methods listed in the CN application. AR 506-507. The Department engaged in an erroneous interpretation of the term "or" in its CN application. *See Tiffany, 44 Wash. At 604* (holding that "or" must be construed in the disjunctive absent explicit legislative intent). The term "or" listed in the Department's CN application should be interpreted in the disjunctive and not conjunctive because there is zero legislative intent to suggest otherwise. *Childers, 89 Wn.2d at 595-596*. Signature met the requirement for site control when it produce a purchase/sale agreement and a copy of its lease between entities wholly owned by Dr. Kim, with a rent amount listed in the pro forma.

B. The Department engaged in arbitrary and capricious decision-making for the Clark, Pierce and Spokane County psychiatric hospital evaluations.

Judging whether an agency's decision is arbitrary and capricious involves evaluating the evidence considered by the agency in making its decision. *Pierce County Sheriff v. Civil Service Commission of Pierce County*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). An agency's decision is arbitrary and capricious if it results from willful and unreasoning disregard of the facts and circumstances. *Overlake Hospital Association v. Department of Health*, 170 Wn.2d 43, 50, 239 P.3d 1095 (2010). Although this Court must give due deference to the “specialized knowledge and expertise of the administrative agency,” such deference does not extend to agency actions that are arbitrary, capricious, and contrary to law. *Hayes v. Yount*, 87 Wn.2d 280, 289, 552 P.2d 1038 (1976).

Arbitrary and capricious decision making was found in *Children’s Medical Center and Hospital*, 95 Wn. App. at 873. There, the Department of Health determined it did not need to conduct a CN review of Tacoma General’s request to perform pediatric open-heart surgeries. *Id.* at 861-863. In reversing the Department’s decision, the Court of Appeals found the legislature implemented the Certificate of Need review to maximize the quality of specialized medical care and its affordability by avoiding unnecessary duplication of services. *Id.* at 873. The Legislature “authorized and directed” the Department “to implement the certificate of need program in this state pursuant to the provisions of this chapter.” *Id.* (Emphasis added). Although the Department can promulgate implementing

regulations, it has no power to contravene this legislative directive. *Id.* The Court of Appeals found the decision was arbitrary and capricious because the Department had not used “specialized knowledge and expertise” in concluding that “the CN review...was unnecessary.” *Id.* at 873-874. Instead, the Department’s determination was based on its erroneous interpretation of the statutes and its own regulations as applied to the facts. *Id.*

The Department also must not act cursorily in considering facts and circumstances surrounding its actions. *Puget Sound Harvesters Association v. Washington State Department of Fish and Wildlife*, 157 Wn. App. 935, 951, 239 P.3d 1140 (2010). There, the Washington Department of Fish and Wildlife (“WDFW”) adopted rules setting the 2008 fishing season for purse and gillnet fishing. *Id.* at 939. The rules set fishing time for the two groups, instead of capping the total catch for either. *Id.* The WDFW stated that the rationale behind the decision:

WDFW believes that this is the most equitable means of regulating this fishery given the historical variations in catch, differences in fishing efficiency between the two groups, economics of the fishery market forces, and fluctuations in the fishing effort and fleet sizes between the two groups.

Id. at 939-940. This rule gave an advantage to purse seiners due to their efficiency. *Id.* at 945. In challenging the decision, the PSHA stated that the record established no rational basis to advantage purse seiners. *Id.*

This Court reviewed the statute authorizing the WDFW’s authority and scope for making the rule. *Id.* at 946. This Court found that the

administrative record reflected that the WDFW had sufficient data and information to forecast how to meet each fishing groups' needs under the purpose of the statute. *Id.* at 949. Specifically, by considering its statutory objectives, the WDFW could rationally formulate a policy by analyzing its statistical catch data and considering efficiency in formulating a policy. *Id.* at 951. By not doing so, WDFW "provided no rational basis for the disparity that resulted from its adopted schedule...[and] WDFW acted arbitrarily and capriciously in adopting the 2008 schedule." *Id.*

Here, the Department's actions have been highly arbitrary, capricious, and consistently unreasoned as they have failed to show the rational basis for the disparate treatment of Signature in the review process. AR 176-177. For example, in the Pierce County adjudication, Signature submitted a draft lease of 20 years and included the lease amount on it. *Id.* It did so because of what had occurred in the Clark County adjudication. *Id.* The Alliance (MultiCare/Franciscan), however, did not have to meet a 20-year commitment for its building. *Id.* The arrangement called for MultiCare to provide the "airspace" to the Alliance. *Id.* The Alliance then would erect an airspace condominium. *Id.* The company documents showed that either MultiCare or Franciscan could pull out from the partnership after a period of just 15 years (no twenty-year requirement as required in the Clark County adjudication). *Id.* If the purpose of site control is to demonstrate commitment for at least 20 years on a lease, the Department cannot explain allowing the 15-year withdrawal period in Pierce County.

Furthermore, the Pierce County concurrent review, instead of holding outright that the parties failed to establish site control, the Department declared a pivotal unresolved issue to address the submission of leases, revision or submission of operating agreements and other required documents. *Id.* The Department did not do so in Signature's Clark County review and ordered an outright rejection of Signature's application based solely on the lease issue, despite Signature's request for continued screening. AR 177.

The executive director of the Department, Mr. Bart Eggen, knew that in the Pierce concurrent review, the Department had declared a pivotal unresolved issue around the same issue on leases. AR 530-31. Mr. Eggen irrationally indicated the difference between Pierce and Clark was that in the former, all of the applicants had submitted deficient leases and in the latter, it had a sufficient lease from Springstone. *Id.* Therefore, based upon this unprincipled rationale, Mr. Eggen claimed it was appropriate to declare an unresolved pivotal issue in Pierce, but not Clark. *Id.* Mr. Eggen stated that had Springstone in Clark submitted a lease that the Program did not like (if there was a problem with the lease so the Program could not move forward on either CN application), the Department would likely have also declared a pivotal unresolved issue to obtain the missing information. *Id.* For example, if both leases showed no 20-year term, the Program would have issued a PUI. *Id.* This is arbitrary and capricious.

However, in Spokane County, during the Department's concurrent review of Signature and the Providence Health System—Fairfax, Signature

did not have to submit a draft lease or an operating agreement in its original application. *Id.* Although Signature was later asked by the Department to submit a draft lease between Spokane Life Properties, LLC and Signature Spokane Healthcare, it was never asked to provide a draft operating agreement. *Id.*

This is not a rational review policy by the Department that relates to its statutory duty, imposed by the legislature, to create a review process for the certificate of need requirement to provide accessible health services and assure the health of all citizens in the state while controlling costs. RCW 70.38.015 *et seq.* To penalize an applicant in Clark County for submitting a lease that the Department does not like, while not conducting a similar review in the Spokane and Pierce County applications is the epitome of the Department acting “cursorily in considering the facts and circumstances surrounding its actions.” *Puget Sound Harvesters Association*, 157 Wn. App. at 951. The disparate review of applications by the Department has no rational basis. *Id.* The Department acted arbitrarily and capricious by not maintaining the same standards in reviewing multiple applications. *Id.* Such a cursory review of the facts and circumstances warrants overturning of the Departments decision denying Signature their CN.

C. Springstone’s misrepresentations led to an erroneous factual determination that Springstone, LLC is the Applicant, not Rainer Springs, LLC.

Springstone contends, with no legitimate support that its creation, Rainier Springs, LLC, is the application for a CN in Clark County. AR 1446.

However, the Department analyst concluded that Springstone, LLC is the applicant based upon the “ultimate parent” rationale. AR 621. The agency rule, however, identifies an “applicant” as including “any company owning a 10% or greater ownership interest in an entity engaging in any undertaking subject to CN review.” WAC 246-310-010. This follows CN Program’s executive director Mr. Bart Eggen’s understanding that: “If anybody has a 10 percent ownership interest in a project, they’re an applicant.” AR 518. Mr. Eggen also testified that the applicant is generally determined by who will be responsible for operating the project and who will really finance the project. AR 515-516.

While Washington case law on the subject of identifying an applicant for analyzing a certificate of need application is scant, other jurisdictions provide instruction. In Florida, the First District Court of Appeals held that when a corporate entity relies heavily on the funding of a parent corporation in applying for a certificate of need, the entities are considered acting “as one” and as co-applicants in applying for a Certificate of Need for the purposes of discovery. *Medivision of East Broward County, Inc. v. Department of Health and Rehabilitative Services*, 488 So.2d 886, 887-888 (Fla. 1st DCA 1986). While this is instructive, the Washington rule goes further and unambiguously states that “any company owing a 10% or greater ownership interest in an entity engaging in any undertaking is subject to CN review.” WAC 246-310-010.

Even more troubling, Springstone has never revealed Welsh, Carson, Anderson & Stowe’s (WCAS) actual ownership percentage, but it

is funding 100% of the project. AR 693. It should be presumed that WCAS owns a 10% or greater interest. Also, Springstone, Inc. is wholly owned by Springstone, LLC, and Springstone, Inc. is the sole member of Rainier Springs, LLC. Springstone has been tactically evasive in identifying the actual roles of Springstone, Inc. and Springstone, LLC. AR 689. The website for Springstone, Inc. and the audited financials performed by Deloitte for Springstone, LLC demonstrate these entities are doing much more than proclaimed in the application process. AR 695-696. Nobody from Springstone, LLC has ever appeared.

But there is a reason that Springstone wants the lowest common denominator (Rainier Springs) to be the applicant—it does not want the Department to carefully and responsibly evaluate the parent financials, particularly not the likely onerous terms being imposed by the venture capital giant, WCAS. *See, e.g.*, AR 1156-1159. Such terms include above market interest rates (10%), exit events, and the audited financials even expressly describe a liquidity event in 2020. AR 1121-1123. Liquidity events are used by investors as an exit strategy to convert their ownership in a company into cash. A liquidity event scheduled as soon as 2020 should have done little to comfort the Department relative to the financial stability Springstone's project. The legislature intended the CN requirement to provide accessible health services and assure the health of all citizens in the state while controlling costs; onerous financial terms imposed by a private equity firm do little to achieve this goal. *See RCW 70.38.015 et seq.* However, the Department did not focus on this angle because Springstone,

evasively, held out WCAS' financial role in the process as an investment, not a debt financed loan to Springstone. AR 45.

Based upon the totality of the factual misrepresentations and evasive responses, WCAS, Springstone, LLC and Springstone, Inc. should have been considered applicants under WAC 25-310-010(6). Another review by the Department of all applicants as defined by agency rule is required.

D. Springstone Failed Criteria for Need (WAC 246-310-210), Financial Feasibility (WAC 246-310-220) and Cost Containment (WAC 246-310-240).

The purpose of WAC 246-310-290(7) methodology is to ensure a CN application is approved only if a county for which the new facility is proposed has an unmet need for healthcare services. WAC 246-310-290(7)(g). Therefore, an application proposing a hospital must show determinations of need, financial feasibility, and cost containment. WAC 246-310-210, WAC 246-310-220, WAC 246-310-240.

1. Springstone Provided No Methodology to Establish a Need for its 24-bed Chemical Dependency Unit.

The Department must evaluate whether a sufficient need for issuing a Certificate of Need is warranted. RCW 70.38.115. In determining whether Springstone provided the proper methodology to show sufficient need for its 24-bed chemical dependency unit, this Court must determine whether the evidence supporting the Department's decision can be found in the record. RCW 34.05.570(3)(e); *City University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). This Court should overturn an agency's factual findings if the entire record leaves the court with the firm and definite

conviction that a mistake was made. *University of Washington Medical Center*, 164 Wn.2d at 102.

Here, Springstone provided no methodology for documenting demand and revenue for chemical dependency rehabilitation services, which represents one-third of the bed allocation for the 72-bed hospital. AR 1164. Of the 72-beds proposed, 24-beds are devoted to chemical dependency services. *Id.* Without a methodology to document the need for the services, Springstone cannot document pro forma utilization projections for determining financial feasibility. *Id.* Further, chemical dependency and psychiatric and involuntary dependency patients cannot be mixed on the same unit in Washington due to patient confidentiality concerns. AR 703. This is not a case of Signature disagreeing with the method of calculation, this is a complete lack of any methodology to account for the 24-bed chemical dependency unit.

2. Springstone's Has Not Met Financial Feasibility.

As discussed above, without providing a methodology for the 24-bed chemical dependency unit, Springstone's CN application cannot satisfy financial feasibility as a matter of law. Further, Springstone's application is fatally deficient because it is inaccurate, incomplete, and misrepresents its funding scheme.

a. The Department erred in its financial feasibility review of the applicant, Springstone, LLC.

The Department must review the financial feasibility of a project to determine if issuing a Certificate of Need is proper. RCW 70.38.115. The

financial feasibility of Springstone, LLC has not been properly reviewed because the Department reviewed the feasibility of Ranier Springs, LLC rather than Springstone. AR 654-55. The Department's executive director, Mr. Eggen, indicated that to determine the appropriate applicant party, the Department looks at organizations with ten percent (10%) or more ownership interest in the proposed hospital. AR 517-518. In this review, the financial feasibility was determined based on Ranier Springs, LLC, not the organization that ultimately determined the CN applicant, Springstone, LLC. AR 652. And Springstone has not proven there is a need for its proposed 24-bed chemical dependency unit. AR 1164. Without providing need, the financial feasibility element cannot be established because "capital and operating expenses incurred pursuing this project would be an unnecessary duplication of those made by existing providers and may result in an increase in the costs and charges for health services in the county." *King Cty. Pub. Hosp. Dist. No. 2 v. Washington State Dep't of Health*, 178 Wn.2d 363, 378, 309 P.3d 416 (2013). Springstone's project is not financially feasible.

b. The Department erred by not reviewing the legally defined applicant for financial feasibility, thus engaging in arbitrary and capricious decision-making.

Judging whether an agency's decision is arbitrary and capricious involves evaluating the evidence considered by the agency in deciding. *Pierce County Sheriff*, 98 Wn.2d at 695. An agency's decision is arbitrary and capricious if it results from willful and unreasoned disregard of the facts

and circumstances. *Overlake Hospital Association*, 170 Wn.2d at 50. Although this Court must give due deference to the “specialized knowledge and expertise of the administrative agency,” such deference does not extend to agency actions that are arbitrary, capricious, and contrary to law. *Hayes*, 87 Wn.2d at 289.

In determining financial feasibility, the Department did not properly review both the Signature and the Springstone applications, which resulted in an arbitrary and capricious decision. With Signature’s review, Signature, and Vancouver Behavioral Healthcare Hospital, LLC, were reviewed for financial feasibility. In Springstone’s review, only Rainier Springs, LLC was reviewed for financial feasibility. AR 652, 666-669. The review should have included Springstone, LLC, the legal applicant as defined under WAC 24-310-010(6). The program reviewed the financials for Springstone, LLC for 2013 indirectly, and they failed miserably; however, Mr. Richard J. Ordos of the Department testified that the results were disregarded since he was only looking at Rainier Springs and the associated pro forma submitted for it. AR 655.

The Department never analyzed Springstone directly for financial feasibility. AR 654-55. Review of the Rainier Springs, LLC’s pro forma is insufficient. Without reviewing Springstone, LLC financials, Rainier Springs, LLC’s financial feasibility cannot be determined. AR 662. The Department’s review methods were plainly arbitrary and capricious and should be overturned. *Pierce County Sheriff*, 98 Wn.2d at 695.

c. The facts show that Springstone is not financially feasible and cannot establish site control. This will detrimentally impact the behavioral health crisis.

The Department did not properly review the audit provided by Deloitte & Touche, LLP (“Deloitte”) of Springstone’s financials, as evidenced by the testimony of Mr. Richard Ordos, feasibility analyst for the Department. AR 652, 655-56. Springstone is financially backed by WCAS, a venture capital firm, but only through likely onerous “Capital Investment.” AR 667-668. The terms on which WCAS contributes equity to Springstone have *not* been analyzed. AR 652. A liquidation or exit event by WCAS would most likely result in the destabilization of Springstone. AR 658. Such a breakdown in the proposed Springstone project which would lead to perpetuating the mental health crisis in Clark County.

Springstone depends strongly on WCAS for most its equity and capital. AR 464. Importantly, after four years in operation (as of December 31, 2013), Springstone is still operating on a consolidated basis at a net loss of \$13,250,835. AR 943. Deloitte indicated that “...the Company [Springstone] has experienced both losses and negative cash flows from operations since inception,” and that, “the Company [Springstone] has drawn down on its available line of credit from the bank and received debt financing from its significant member.” AR 943. Deloitte noted that, “...management requires its principal member [WCAS] continue to provide capital for additional expansion and, if necessary, for working capital. *Id.*

Springstone depends upon WCAS for a significant portion of its long-term debt. AR 2619-2641. Springstone borrowed \$17,000,000 from a

WCAS related party as of December 31, 2013. *Id.* It further borrowed another \$6,000,000 from a WCAS related party in February 2014. *Id.* As of December 2013, there was \$1,930,000 in interest expense accrued to the benefit of the WCAS related party based on the \$17,000,000 in notes payable only. *Id.*

Springstone has several construction projects outstanding. *Id.* As of December 31, 2013, the construction-in-progress total was \$16,805,360. *Id.* Deloitte reported Springstone acquired two additional projects in Olathe, Kansas and Cleveland, Ohio, as of February 2014 and March 2014, respectively. Mr. Ordos did not analyze the impact of these additional projects on developing Ranier Springs if limitations are placed on WCAS's capital contributions. *Id.*

Many notes from the audited statement reference what may be planned "liquidation" or "exit events," based off a controlling agreement that was not provided. Deloitte notes a defined "Exit Event" and alludes to what may be a significant \$100,000,000 threshold for WCAS. *Id.* Deloitte notes definitively that WCAS has an expectation of a liquidity event by December 2020. *Id.* Furthermore, Deloitte references an "LLC Agreement" that provides for definitions to certain capitalized terms in the auditor's notes. *Id.* Deloitte notes that in October 2010, Springstone entered into a management agreement with WCAS. *Id.* To Signature's knowledge, no operating or management agreement was ever provided to or reviewed by the Department.

For Springstone to establish its proposed project and maintain site control, it must be financially feasible, but the audited financials and the Department's testimony both demonstrate that at the very least, additional diligence must be conducted by the Department to satisfy financial feasibility criterion. The Department admitted it did not review the audited financials closely because it was only determining financial feasibility on Ranier Springs, LLC. Mr. Ordos also indicated that if it had, he would have had additional questions. CP 51, footnote 21.

Even a cursory review of the audited financials should lead to more questions, which should be answered by Department to ensure behavioral health will actually be provided to the community. For example, if WCAS can liquidate by 2020 as stated in the audited financials and if Springstone, LLC continues to lose money as it has since its inception, then how will that impact Springstone's project? What is the significance of the \$100,000,000 referred to by Deloitte? Has WCAS pledged or committed to only a certain amount of money for Springstone? Is there an LLC or management agreement that dictates these terms? To provide assurances to the community that the Springstone project will be actualized and these services will be provided, the Department must evaluate the correct applicant – WCAS, Springstone, LLC and Springstone, Inc.

The Department's conclusion on financial feasibility should have included Mr. Ordos' analysis and the financials of Springstone. They did not. AR 652, 654-55. The analysis conducted by Mr. Ordos showed Springstone, LLC was out of range of the markers A and B (Mr. Ordos uses

these markers to determine financial feasibility). AR 653-54. Therefore, it is likely that if the analysis had been proper, then Mr. Ordos would have found Springstone to be not financially feasible.

Under the totality of the circumstances, including review of the audited financials of Springstone, LLC, its hospital enterprise appears heavily distressed financially, perhaps more than anyone knows right now. At a minimum on remand, the Department should act responsibly and evaluate the clear red flags.

3. Springstone's Cost Containment is Unmet.

The Department automatically treats cost containment as unmet when an applicant has failed one of the other CN criterion. AR 3705. Therefore, using the same approach and Springstone's failure to meet the Need and Financial Feasibility criteria for the reasons discussed above, cost containment is likewise not met here for Springstone.

E. Springstone Has Not Demonstrated Site Control.

If the Department's decision on site control is affirmed, Springstone's CN application should be denied for the same reason—it fails to specify the cost for the renewal terms in the lease (even though Rent Expense is stated in the pro forma). AR 720; AR 1558. Springstone's original lease had an initial period of 10-years with one two-year renewal at "Fair Market Rental Value." AR 720. Springstone's amended lease had an initial period of 10-years with two 5-year renewals at "Fair Market Value." If having the words "fair market value" in a lease make it somehow

“defective” as claimed by the Department, AR 1880, then Springstone’s CN application should also be denied.

VII. CONCLUSION

For the foregoing reasons, the Court should reverse the Department’s Administrative Law Judge and remand for a hearing.

Dated this 18th day of August, 2017

LIFE POINT LAW

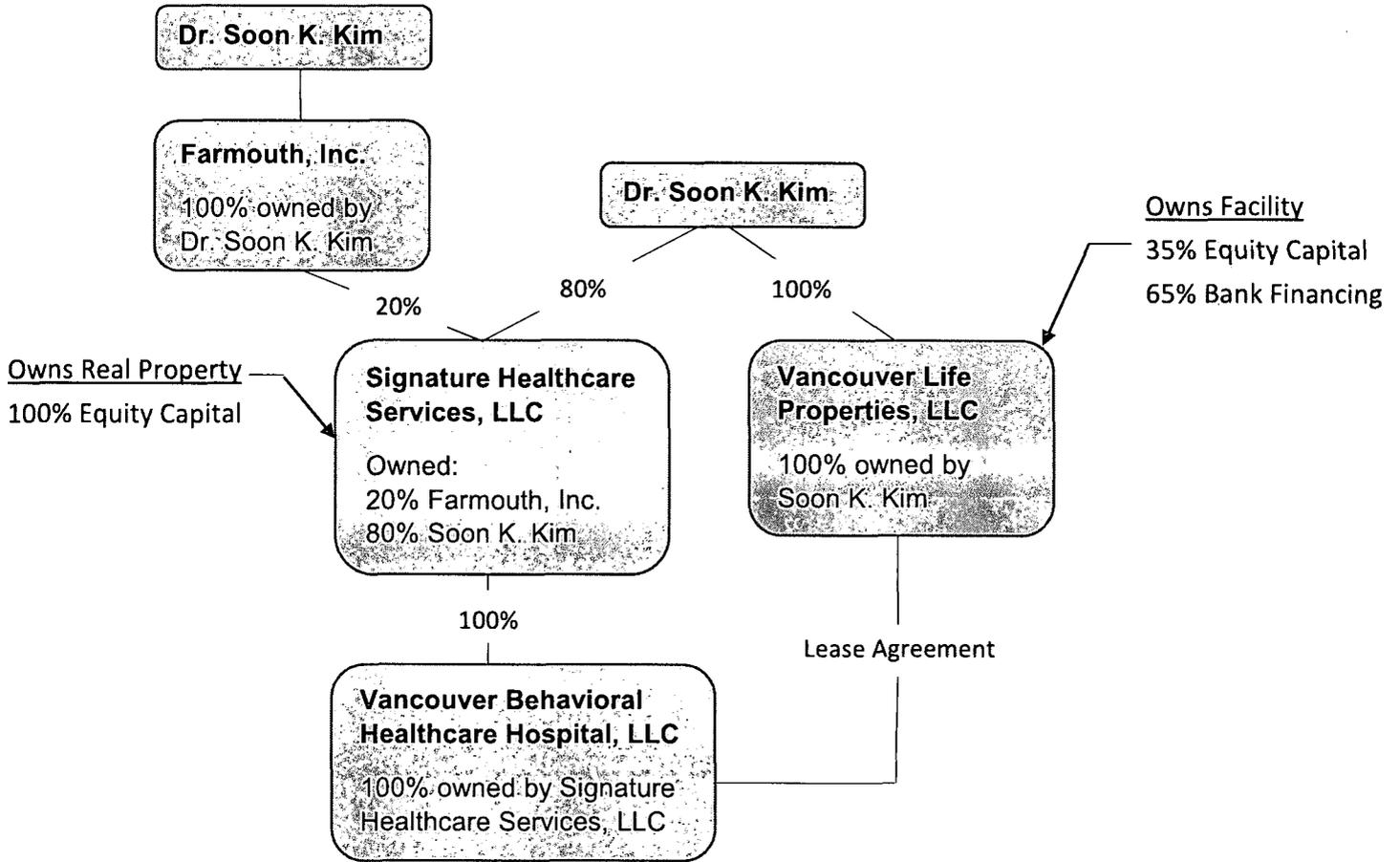


Gregory A. McBroom, WSBA No. 33133
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Attorneys for Appellant Signature Healthcare, LLC

APPENDIX A

Signature's Hospital Organizational Structure

Signature Healthcare Services, LLC
 Psychiatric Hospital Organizational Structure
 AR 55-58



All entities are either wholly owned and controlled by Dr. Soon K. Kim or by an affiliated entity wholly owned and controlled by Dr. Soon K. Kim.

Ms. Nidermayer testified that “ultimately the owner of Signature Healthcare Services is the same person [referring to Vancouver Life Properties, LLC and Vancouver Behavioral Healthcare Hospital, LLC]. Nidermayer Dep. at 73:12-13. She also testified that Dr. Kim “owns 100% of everything” and agreed that he has total control over the land and the facility. Nidermayer Dep. at 83:13-25 & 84:1-25. The CN Program considered all these entities to be the same because of the common wholly ownership through Dr. Kim.

APPENDIX B

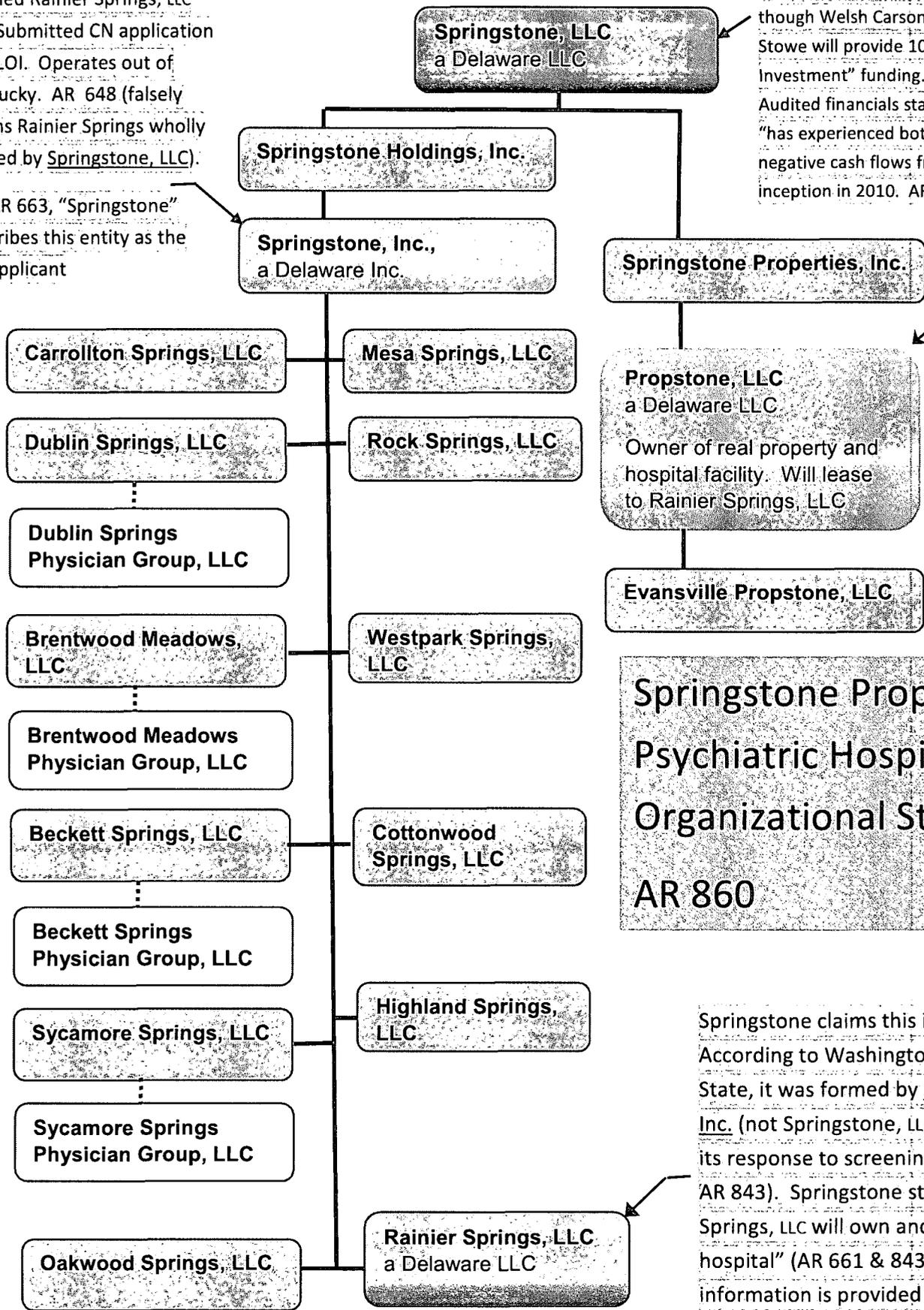
Springstone's Hospital Organizational Structure

Formed Rainier Springs, LLC and Submitted CN application and LOI. Operates out of Kentucky. AR 648 (falsely claims Rainier Springs wholly owned by Springstone, LLC).

On AR 663, "Springstone" describes this entity as the CN applicant

CN Program claims this is Applicant even though Welsh Carson Anderson and Stowe will provide 100% "Capital Investment" funding. (AR 848) Audited financials state the company "has experienced both losses and negative cash flows from operation since inception in 2010. AR 787

Owner of Real Property and Will Own Hospital Facility. It has not registered in Washington to do business even though it will lease to Rainier Springs RCW 23.95.505 RCW 23.95.520



Springstone Proposed Psychiatric Hospital Organizational Structure AR 860

Springstone claims this is Applicant. According to Washington Secretary of State, it was formed by Springstone, Inc. (not Springstone, LLC as claimed in its response to screening questions, AR 843). Springstone states "Rainier Springs, LLC will own and operate the hospital" (AR 661 & 843), but no information is provided on how Propstone, LLC will transfer ownership of the hospital to Rainier Springs, LLC.

APPENDIX C

Out of State Decisions and Department Decisions

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT**

In Re:)	Master Case No. M2008-118469
)	
Evaluation of Two Certificate of Need)	FINDINGS OF FACT,
Applications Submitted by Central)	CONCLUSIONS OF LAW, AND
Washington Health Services Association))	FINAL ORDER ON CROSS-MOTION
d/b/a Central Washington Hospital and)	FOR SUMMARY JUDGMENT
DaVita, Inc., Proposing to Establish New)	
Dialysis Facilities in Douglas County,)	
)	
Central Washington Hospital,)	
)	
Petitioner.)	
_____)	

APPEARANCES:

Petitioner, Central Washington Health Services Association,
d/b/a Central Washington Hospital, by
Davis Wright Tremaine LLP, per
Brad Fisher and Lisa Rediger Hayward, Attorneys at Law

Intervenor, DaVita, Inc., by
Law Offices of James M. Beaulaurier, per
James M. Beaulaurier, Attorney at Law

and

Law Offices of Kimberlee L. Gunning, per
Kimberlee L Gunning, Attorney at Law

Department of Health Certificate of Need Program, by
Office of the Attorney General, per
Richard A. McCartan, Assistant Attorney General

PRESIDING OFFICER: John F. Kuntz, Review Judge

Central Washington Health Services Association, d/b/a Central Washington

Hospital (Central Washington) filed a Memorandum in Opposition to DaVita Motion to

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
FINAL ORDER ON CROSS-MOTION
FOR SUMMARY JUDGMENT

Supplement Record, and Cross-Motion for Summary Judgment Ordering Withdrawal of CON.¹ Central Washington seeks an order for entry of summary judgment ruling as a matter of law that DaVita, Inc. (DaVita) did not qualify for the certificate of need awarded by the Department of Health Certificate of Need Program (Program). Both DaVita and the Program oppose the cross-motion. Central Washington's cross-motion is granted.

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

Certificate of Need

1.1 A certificate of need is a non-exclusive license to establish a new health care facility. See *St. Joseph Hospital & Health Care Center v. Department of Health*, 125 Wn.2d 733, 736 (1995). The development of health services and resources, including the construction, modernization, and conversion of health facilities, should be accomplished in a planned, orderly fashion, consistent with identified priorities and without unnecessary duplication or fragmentation. RCW 70.38.015(2).

1.2 The establishment of a new healthcare facility (including new kidney dialysis centers) requires a certificate of need. RCW 70.38.105(4)(a) and RCW 70.38.025(6). The applicant is responsible to show or establish that it can meet all of the applicable criteria. WAC 246-10-606.

1.3 When the Program receives two applications for a certificate of need for the same planning area (the geographic area designated for the calculation whether additional kidney dialysis facilities are required), it engages in a concurrent review. A concurrent review is defined as a comparative analysis and evaluation of competing or

¹ DaVita's Motion to Supplement the Record is addressed in Prehearing Order No. 11.

similar projects in order to determine which of the projects best meet the identified needs. RCW 70.38.115(7). For kidney dialysis facilities, the concurrent review process is set forth in WAC 246-310-282.

1.4 In determining whether to issue a facility a certificate of need, the Program engages in an analysis whether an applicant meets the criteria in four areas: a determination of need; a determination of financial feasibility; criteria for structure and process of care; and a determination of cost containment. WAC 246-310-200(1).² In addition to the basic criteria, the applicant seeking a kidney dialysis certificate of need must meet additional criteria specific to that type of certificate.³

1.5 For kidney dialysis applications, there are five stages for gathering information on applications.⁴ The five stages consist of: (1) the applicant's letter of intent; (2) the application; (3) the Program's screening and the applicant's response to screening; (4) any public comment received on the application; and (5) any applicant rebuttal to public comment. The Program will not consider any information regarding a certificate of need application submitted by an applicant after the conclusion of the public comment period. WAC 246-310-090(1)(a)(iii). The certificate of need rules do not restrict what information the applicant can submit to rebut information offered by competitors during the public comment period. More specifically, once a competitor identifies a possible discrepancy in the application (step 4 above), the applicant can still

² See also WAC 246-310-210 through WAC 246-310-240.

³ See WAC 246-310-280 through WAC 246-310-290.

⁴ WAC 246-310-280.

address or rebut that possible discrepancy in the rebuttal period (step 5 above) before the Program concludes the public comment period.

1.6 As part of its analysis, the Program screens the application for completeness. If it has questions after screening the application, the Program forwards those questions to the applicant for clarification. For regular reviews an applicant submitting a response to the Program's screening request can exercise one of three options:

- (a) Submission of written supplemental information and a written request that the information be screened and the applicant be given opportunity to submit further supplemental information if the department determines that the application is still incomplete;
- (b) Submission of written supplemental information with a written request that review of the certificate of need application begin without the Program notifying the applicant whether the supplemental information is adequate to complete the application; or
- (c) Submission of a written request that the application be reviewed without supplemental information.

See WAC 246-310-090(2)(c). If the application is part of a concurrent review, an applicant submitting a response to the Program's request for supplemental information may submit the supplemental information or request in writing that the incomplete application be reviewed. WAC 246-310-090(2)(e).

1.7 After completing the review, the Program issues a written decision on the application. The Program can deny an application if the applicant has not provided the information which is necessary to make a determination that the project meets all of the

applicable criteria, and which the Program has prescribed and published as necessary. WAC 246-310-490(1)(a)(ii). This presumes that the Program requested the information in the screening letter in accordance with WAC 246-310-090(1)(c).

WAC 246-310-490(1)(a)(ii).

1.8 The Program's application form requires the applicant to provide a variety of information. The Program uses the application form to "prescribe and publish" the information applicants must supply to obtain a certificate of need.

See WAC 246-310-090(1). The Program uses the same application form for each certificate of need application it receives. There is no separate kidney dialysis application form.

1.9 Under the project description section of the application form, the Program requests the applicant:

- p. Provide documentation that the applicant has sufficient interest in the site or facility proposed. "*Sufficient interest*" shall mean any of the following:
 - a. clear legal title to the proposed site;
 - b. a lease for at least five years, with options to renew for not less than a total of twenty years, in the case of a hospital, psychiatric hospital, tuberculosis hospital, or rehabilitation facility;
 - c. a lease for at least one year, with options to renew for not less than a total of five years, in the case of freestanding kidney dialysis units, ambulatory surgical facilities, hospice, or home health agency;

- d. a legally enforceable agreement to give such title or such lease in the event that a Certificate of Need is issued for the proposed project.

(Emphasis supplied in the original).⁵

1.10 Subsection (d) of the Program's application form is the basis for the Program's practice of accepting draft leases from applicants as evidence of site control.⁶ The Program will accept a draft lease if the document shows or identifies a specific physical location for the facility or planned facility, and that the applicant has sufficient interest in the facility.

1.11 Identification of a specific location and the nature of the applicant's interest in that site enables the Program to determine whether the applicant can meet the following criteria: (1) The immediate and long-range capital and operating costs of the project can be met; (2) the costs of the project, including any construction costs, will probably not result in an unreasonable impact on the costs and charges for health services; and (3) the project can be appropriately financed. WAC 246-310-220.

DaVita Application

1.12 In November 2007, DaVita and Central Washington each filed certificate of need applications to establish a new kidney dialysis facility in East Wenatchee, Douglas County, Washington.

⁵ Declaration of Brad Fisher in Support of Cross-Motion for Summary Judgment (Fisher Declaration), Exhibit I, page 6.

⁶ See Program Memorandum Opposing Central Washington Motion for Summary Judgment, page 3.

1.13 In December 2007, the Program accepted both applications under the Kidney Disease Treatment Centers-Concurrent Review Cycle #4.⁷ Under the concurrent review process, the Program could determine that either one of the applicants, both of the applicants, or neither of the applicants would be awarded a certificate of need to establish the kidney dialysis facility.

1.14 On November 13, 2007, one of DaVita's attorneys sent an email request to the Program's Executive Manager.⁸ DaVita contacted the Program for clarification on what requirements were necessary to document a developer's interest in a proposed site. The email stated, in part:

As we discussed, you wanted to first check with Richard McCartan⁹ but advised that you thought a letter of intent or similar document from the landowner would be sufficient. A letter of intent would indicate the landowners' intent to sell or otherwise convey (e.g. long-term lease) the site to the developer on the condition that the Department approve a CN for the site. You indicated the Program was not interested in the financial aspects of the seller-developer arrangement but wanted evidence the developer would have the right to develop the property for subsequent lease to DaVita.

I understand your advice is contingent on consultation with Richard and you indicated you would get back to me if your position was different than what we discussed.¹⁰

In response to DaVita's email, the Program responded by email on November 15, 2007.

The responsive email stated:¹¹

⁷ See WAC 246-310-282.

⁸ Declaration of James M. Beaulaurier in Opposition to CWH Cross-Motion for Summary Judgment (Beaulaurier Declaration), Exhibit 19.

⁹ Richard McCartan is the primary Assistant Attorney General representing the Certificate of Need Program.

¹⁰ Beaulaurier Declaration, Exhibit 19.

¹¹ *Id.*

Thanks, this is a good summary of what we discussed. I think a letter of intent is great. Please, make sure the letter identifies the parties and is signed by the land owner.

1.15 The Program's November 15, 2007 email response was issued prior to DaVita's filing of its kidney dialysis application on November 30, 2007. Between the time of the email communication between DaVita and the Program, the Program did not modify or amend its certificate of need application requirements as evidenced by its application form.

1.16 As a part of its application, DaVita identified the location of its proposed kidney dialysis facility: the North West Corner of 3rd Street and Colorado Street, East Wenatchee, WA 98802, in Douglas County (aka Douglas County Tax Lots #40100003506 and 40100003516). To show that it had a sufficient interest in the property, DaVita submitted the following information:

- A. A November 28, 2007 letter from Henry C. Lewis to the Program.¹² In the letter Mr. Lewis stated he was one of the owners (along with his wife Cathie D. Lewis) of the property in question and had agreed on terms for sale of the property to EDG-DV East Wenatchee (a limited liability company).¹³ Mr. Lewis stated they intended to sell the property to EDG-DV East Wenatchee in the event the state approved a dialysis clinic at the location.
- B. A draft lease agreement between EDG-DV East Wenatchee (lessor) and Total Renal Care, Inc. (lessee).¹⁴

¹² Beaulaurier Declaration, Exhibit 17.

¹³ Beaulaurier Declaration, Exhibit 29.

¹⁴ Beaulaurier Declaration, Exhibit 18 (referencing Application, Appendix 15). Note Total Renal Care, Inc. is owned by, or owns, DaVita. There is no dispute that they are essentially the same entity.

1.17 Following receipt of DaVita's application, the Program submitted screening questions to DaVita on a number of issues.¹⁵ In regard to the issue of site control, the Program asked DaVita whether EDG-DV East Wenatchee existed as a corporate entity.¹⁶ DaVita responded to the Program's question by stating that EDG-DV East Wenatchee did exist as an entity as of January 2008.¹⁷

1.18 When it filed its application, DaVita did not possess a sufficient interest in the Lewis property. DaVita had not received: (1) a clear legal title for the proposed site from Mr. Lewis (one half of the marital community and one of the identified property owners); (2) a lease for at least one year, with options to renew for not less than five years in the Lewis property; or (3) a legally enforceable agreement to obtain such title or such lease in the Lewis property in the event the certificate of need was issued.

1.19 In fact, DaVita took an additional step to obtain a "sufficient interest" in the proposed site as part of its application process. The additional step DaVita chose to take was to insert a third party (EDG-DV East Wenatchee, a Washington limited liability company) into the process. The first step in DaVita's plan was to have EDG-DV East Wenatchee purchase the property from Mr. Lewis. Assuming that EDG-DV East Wenatchee was successful in purchasing the Lewis property, the second step in DaVita's plan was to then lease the property from EDG-DV East Wenatchee.

¹⁵ See paragraph 1.11 above.

¹⁶ See Program Memorandum Opposing Central Washington Motion for Summary Judgment (Program Memorandum), page 2, lines 16-17 (citing Application Record page 1160).

¹⁷ Program Memorandum, page 2, lines 17-18 (citing Application Record page 1163).

1.20 EDG-DV East Wenatchee filed its Certificate of Formation with the Washington State Secretary of State's office on January 22, 2008, which was approximately one month after DaVita filed its certificate of need application with the Program.¹⁸ While it did not exist at the time DaVita filed its kidney dialysis application in November 2007, EDG-DV East Wenatchee did legally exist by the time the Program issued its decision on the DaVita's application in July 2008.

1.21 While it did legally exist prior to the issuance of the Program's decision, EDG-DV East Wenatchee neither had a clear legal title to the proposed site or a legally enforceable agreement to receive such a title to the Lewis property prior to the Program's decision to grant DaVita a certificate of need in July 2008. Because EDG-DV East Wenatchee neither had a clear legal title or a legally enforceable agreement to receive such a title to the Lewis property prior to the Program's July 2008 decision, DaVita could not obtain a legally enforceable agreement to lease the propose site from EDG-DV East Wenatchee.

II. CONCLUSIONS OF LAW

Evidence in Certificate of Need Decisions

2.1 The Department of Health is authorized and directed to implement the certificate of need program. RCW 70.38.105(1). The applicant must show or establish that its application meets all of the applicable criteria. See WAC 246-10-606. The Program issues a written analysis which grants or denies the certificate of need

¹⁸ Declaration of Brad Fisher Re Opposition to DaVita Motion to Supplement Record and Cross-Motion for Summary Judgment (Fisher Declaration), Exhibit G.

application. The written analysis must contain sufficient evidence to support the Program's decision. See WAC 246-310-200(2)(a). Admissible evidence in certificate of need hearings is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. RCW 34.05.452(1). The standard of proof is preponderance of the evidence. WAC 246-10-606.

Oral Argument

2.2 Unless otherwise ordered by the presiding officer, all motions shall be decided without oral argument. WAC 246-11-380(9). A party requesting oral argument on a motion shall so indicate by typing "oral argument requested" in the caption of the motion or the responsive memorandum. WAC 246-11-380(9).

2.3 Central Washington requested oral argument on its Memorandum on Cross-Motion for Summary Judgment Ordering Withdrawal of CON, and in its Reply in Support of Cross-Motion for Summary Judgment, consistent with the requirements set forth in WAC 246-11-380. Given the extent and detailed arguments presented by the parties in their pleadings, the Presiding Officer determines no oral argument is required in this matter.

Presiding Officer as Agency Fact-Finder

2.4 The Presiding Officer (on delegated authority from the Secretary of Health) is the agency's fact-finder and final decision maker. *DaVita v. Department of Health*, 137 Wn. App. 174, 182 (2007) (*DaVita*). The Presiding Officer is not required to defer to the Program analyst's decision or expertise. *DaVita*, 137 Wn. App. at 182-183.

Summary Judgment

2.5 Administrative tribunals are vested with the authority to rule by summary judgment. *ASARCO v. Air Quality Coalition*, 92 Wn.2d 685 (1979). Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Civil Rule (CR) 56(c).

2.6 A material fact is one upon which the outcome of the litigation depends. *Tran v. State Farm Fire & Casualty Co.*, 136 Wn.2d 214, 223 (1998). Summary judgment is not proper if “reasonable minds could draw a different conclusion from undisputed facts, or if all of the facts necessary to determine the issues are not present. *Tran v. State Farm Fire & Casualty Co.*, 136 Wn.2d at 223. In ruling on a motion for summary judgment, a court must consider “[a]ll facts and reasonable inferences...in the light most favorable to the nonmoving party, and all questions of law are reviewed de novo.” *Sundquist Homes v. Snohomish PUD #1*, 140 Wn.2d 403, 406 (2000) (citations omitted).

2.7 There is no genuine issue of material fact regarding the evidence DaVita submitted as proof of its site control for the Douglas County site. DaVita submitted a letter from one of the property owners, Mr. Lewis, in which he agreed to sell the property to a limited liability company (EDG-DV East Wenatchee). EDG-DV East Wenatchee was not the applicant for the kidney dialysis application. DaVita also submitted a draft lease between it and a limited liability company (EDG-DV East Wenatchee) that did not

own the property at the time it proposed to lease to DaVita (the applicant). DaVita did not have sufficient interest in the property, for the reasons set forth below.

2.8 “Sufficient interest” means either: clear legal title in the proposed site; a lease for at least one year, with options to renew for not less than five years; or a *legally enforceable agreement* to give such title or such lease in the event that a certificate of need is issued for the proposed project.¹⁹ DaVita has no clear legal title in the proposed site owned by Mr. and Mrs. Lewis. That leaves one of the two remaining options (a lease or a *legally enforceable agreement* to give a lease in the event that a certificate of need is issued).

2.9 EDG-DV East Wenatchee did not have a legally enforceable agreement to own the land it proposed to lease to DaVita at the time of the application. The November 2007 letter from Mr. Lewis submitted by DaVita did not contain any terms regarding the proposed sale to EDG-DV East Wenatchee. It did not contain the sale price for the property or show what consideration, if any, was given to Mr. Lewis to obtain that promise to sell. For a contract to form, the parties must objectively manifest their mutual assent, the terms assented to must be sufficiently definite, and the agreement must be supported by consideration. *Keystone Land & Development Corporation v. Xerox Corporation*, 152 Wn.2d 171 (2004) (*Keystone Land*). Otherwise it is merely a speculative “agreement to agree” (an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be

¹⁹ See Finding of Fact 1.6. The fourth option, which applies to hospitals or rehabilitation facilities, is not applicable here.

complete). *Keystone Land*, 152 Wn.2d at 175-176 (citiaton omitted). Agreements to agree are unenforceable in Washington. *Keystone Land*, at 176 (citations and footnote omitted).

2.10 In addition, Mrs. Lewis is identified as one of the owners, but her signature is absent from the November 2007 letter. Neither person shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which real estate is sold, conveyed, or encumbered. RCW 26.16.030(3). So even if Mr. Lewis's November 2007 letter had contained sufficient terms to represent the agreement between the parties (Lewis and DaVita or Lewis and EDG-DV East Wenatchee), it would not be a legally enforceable agreement without Mrs. Lewis's signature.

2.11 Based on the facts and evidence in support of the cross-motion for summary judgment, there is no genuine issue of material fact regarding DaVita's site control over the property. DaVita does not have a sufficient interest in the site it intended to use for its proposed kidney dialysis facility. Without a sufficient interest or site control over the Lewis property, DaVita (the applicant) cannot meet all of applicable criteria, specifically the criteria under WAC 246-310-220(1) regarding the financial feasibility of the project by showing that it had sufficient interest in site it proposed to use.²⁰ The Program's written analysis does not contain sufficient evidence to support its decision. There being no genuine issue of material fact regarding the site control issue,

²⁰ See WAC 246-10-606.

Central Washington's cross-motion for summary judgment should be granted on this issue as a matter of law.

Equitable Estoppel

2.12 In its Response to Petitioner CWH's Cross-Motion for Summary Judgment Ordering Withdrawal of CON (DaVita Response), DaVita contends the Department (the Presiding Officer on authority delegation from the Secretary of Health, as opposed to the Certificate of Need Program) should be estopped from denying the application based on DaVita's contact with the Program's Executive Director.²¹

2.13 Washington case law regarding equitable estoppel states:

When equitable estoppel is asserted against the government, the party asserting estoppel must establish five elements by clear, cogent, and convincing evidence: (1) a statement, admission, or act by the party to be estopped, which is inconsistent with its later claim; (2) the asserting party acted in reliance upon the statement or action; (3) injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action; (4) estoppel is "necessary to prevent a manifest injustice; and (5) estoppel will not impair governmental functions.

Silverstreak Inc., v. Department of Labor and Industries, 159 Wn.2d 868, 887

(2007) (citing *Kramarevcky v. Department of Social and Health Services*, 122 Wn.2d 738, 743 (1993)). Equitable estoppel against the government is not favored.

Kramarevcky v. Department of Social and Health Services, 122 Wn.2d 738, 743 (1993).

Reliance is justified only when the party claiming estoppel did not know the true facts

²¹ See Finding of Fact 1.14 above.

and had no means to discover them. *Maraski v. Lannen*, 55 Wn. App. 820, 824-825 (1989).

2.14 Clear cogent, and convincing evidence is evidence that must convince the trier of fact that the fact in issue is “highly probable.” *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn. 2d 726, 735 (1993). Two of the five elements regarding estoppel appear questionable. DaVita must prove that it is highly probable that the Program’s email response is a statement, admission, or act that is inconsistent with its later claim.²² DaVita must prove that the Program’s email statement constitutes clear, cogent, and convincing evidence (highly probable evidence) that the Program would accept the letter of intent as proof of the “significant interest” criteria contained in the certificate of need application form. DaVita must also prove that it relied on the Program’s November 15, 2007 email statement to its detriment.

Prescribe and Publish Requirement

2.15 The Program’s November 15, 2007 email response to DaVita’s email of November 13, 2007 states that:²³

- A. DaVita’s email accurately summarizes the discussion between Mr. Eggen and Mr. Beaulaurier regarding the issue of developer site documentation;
- B. Mr. Eggen believed a letter of intent is great; and
- C. A letter must identify the parties and is signed by the land owner.

²² DaVita’s estoppel claim is not against the Certificate of Need Program. The Program accepted the November 2007 email in its decision to award the certificate of need. The estoppel claim is against the Presiding Officer in his role as decision maker for the Secretary of Health.

²³ Beaulaurier Declaration, Exhibit 19.

The Program's first sentence only states that DaVita's November 13, 2007 email accurately states the discussion and is not helpful here. The second sentence of the Program's email response might be considered as evidence the Program will accept a letter of intent. The sentence, by itself, does not provide what information such a letter of intent must contain. So, by itself, the second sentence does not provide clear, cogent, and convincing evidence (that is, highly probable evidence) that the Program is authorizing the use of a letter of intent for a legally enforceable agreement to give a lease.

2.16 The second sentence must be read in conjunction with the third sentence of the Program's email response. When read together, those two sentences might be considered evidence that meets the "highly probably" standard of proof that is required for DaVita to assert equitable estoppel against the Department. Only when read together do those two sentences in the Program's email response suggest and/or indicate that the Program will accept a letter of intent as evidence of a legally enforceable agreement of a lease as required by its application form. If it will accept a letter of intent, the Program indicates in the third sentence "[p]lease make sure the letter identifies the parties and is signed by the land owner."

2.17 However, the Presiding Officer concludes the second and third sentences, as contained in the Program's November 15, 2007 email (and the email itself), do not meet the "prescribe and publish" requirements under WAC 246-310-090. The relevant subsection states:

- (a) A person proposing an undertaking subject to review shall submit a certificate of need application *in such form and manner and containing such information as the department has prescribed and published as necessary to such a certificate of need application.*
- (i) The information, which the department prescribes and publishes as required for a certificate of need application, shall be limited to the information necessary for the department to perform a certificate of need review and shall vary in accordance with and be appropriate to the category of review or the type of proposed project: Provided however, That the required information shall include what is necessary to determine whether the proposed project meets applicable criteria and standards.
- (ii) information regarding a certificate of need application submitted by an applicant after the department has given "notification of the beginning of review" in the manner prescribed by WAC 246-310-170 shall be submitted in writing to the department.
- (iii) Except as provided in WAC 246-310-190, no information regarding a certificate of need application submitted by an applicant after the conclusion of the public comment period shall be considered by the department in reviewing and taking action on a certificate of need application.

WAC 246-310-090(1) (Emphasis added).

2.18 Unlike the November 15, 2007 email, the Program's application specifies what constitutes its "prescribed and published" requirements for site control for this application. The requirements specify either a lease or a legally enforceable agreement to give such lease. A letter of intent might arguably be acceptable *if* it contained all of the criteria proving the existence of a legally enforceable agreement to grant a lease (that is, not elevating form over substance). However, the Program's November 15,

2007 email does *not* supersede or substitute for its previously prescribed and published application form requirements.

2.19 The Program and/or Department have the authority to change its application form in accordance with the “prescribed and published” requirements in WAC 246-310-090. Such an amended application form could include an appropriately drafted letter of intent under subsection (d) of the “sufficient interest” section of its application form. However, there was no such amendment prior to DaVita filing its application here.

2.20 Because it used its standard application form, the Program’s email dated November 15, 2007 does not meet the “prescribed and published” requirement set forth in WAC 246-310-090. Changing the established requirements for issuance of a certificate of need in this manner would constitute improper rulemaking.²⁴ See *Regan v. State Department of Licensing*, 130 Wn. App. 39, 54-55 (2005). For that reason, the Presiding Officer is not required to accept the November 15, 2007 email as amending the certificate of need application form.

Reliance on the Statement or Action

2.21 For DaVita to prevail on its equitable estoppel defense, it must make a showing by clear, cogent, and convincing evidence that it justifiably relied on the Program’s November 15, 2007 email. See *Maraski v. Lannen*, 55 Wn. App. 820, 824-825 (1989).

²⁴ A “rule” is any agency order of general applicability which establishes, alters, or revokes any qualifications or standards for the issuance of licenses to pursue any commercial activity, trade or profession. See RCW 34.05.010(16).

2.22 Subsequent to its November 2007 email, the Program sent its standard application form to DaVita to use in its certificate of need application. The application form clearly requires that the applicant submit a lease or legally enforceable agreement to give such lease under subsection (d). See Finding of Fact 1.9 above. It was not amended or changed in any fashion to reflect the Program's November 15, 2007 email. DaVita provided no clear, cogent, and convincing evidence in its responsive pleading to the cross-motion for summary judgment that it contacted the Program to determine what were the true facts regarding what the documentation needed to prove what constituted proof of "significant interest" in an application site. In other words, there is no evidence that DaVita requested any clarification from the Program whether it should follow the application form or the Program's email. Absent such evidence it is unreasonable for DaVita to now argue that it relied on the Program's email.²⁵

2.23 Given that the Program failed to meet its "prescribe and publish" requirement under WAC 246-310-090(1), and given that DaVita failed to produce clear, cogent, and convincing evidence that it reasonably relied on the Program's November 2007 email, DaVita's equitable estoppel claim must fail here.

²⁵ Although not a controlling factor in his decision, the Presiding Officer notes there is no evidence that the Program notified Central Washington Hospital of its willingness to accept a letter of intent in meeting the site control requirement. Neither is there any evidence that the Program issued any interpretive or policy statement to advise the public of the content of the email. The Program's failure to do so argues against its actions being considered an interpretation of the phrase "significant interest" See *Budget Rent A Car Corp. v. Department of Licensing*, 144 Wn. 2d 889, 897-898 (2001).

Ultra Vires Action

2.24 Even if the Program's email was not a failure to follow the "prescribe and publish" requirement under WAC 246-310-090, and could be viewed to authorize the use of a letter of intent or similar document, the language contained in the email clearly provides that the land owner must sign the letter. The proposed site is community property. Therefore, it requires the signature of both owners under RCW 26.16.030(3). So even if it could accept a letter of intent, the Program and/or Department must comply with the RCW 26.16.030(3) and obtain the signature of both Mr. and Mrs. Lewis, the community property owners. To contend otherwise is to suggest that the Program can ignore RCW 26.16.030(3), which would be an ultra vires action. Estoppel cannot be asserted against the government for its ultra vires actions.

See *State v. Adams*, 107 Wn. 2d 611, 614-615 (1987).²⁶ So even if DaVita relied on the Program's email (which it should not have) equitable estoppel cannot be used as a defense here.

Conclusion

2.25 The Department of Health has consistently required that an applicant show that it meets *all* of the required criteria to obtain a certificate of need. Failure to meet any one of the criteria is a sufficient basis to deny the application. One of the criteria is the applicant must show it has control over the site it proposes to use as the certificate of need facility. Without the applicant's showing that it has control over the

²⁶ There are sound policy reasons to require the applicant prove site control during the application period. Proof of site control during the application process helps to ensure that the public receive the health care services in a timely manner. See *generally* RCW 70.38.015.

proposed site, the Department cannot assess whether an applicant can meet its financial feasibility or cost containment requirements. In this matter there is no genuine issue of material fact regarding DaVita's site control over the Lewis property (the property DaVita proposed to use for its kidney dialysis facility). DaVita did not have control over the proposed site as of the date of the Program's decision in July 2008. As there is no genuine issue of material fact that DaVita did not have site control, granting Central Washington Hospital's cross motion for summary judgment is appropriate here as a matter of law. Granting summary judgment means DaVita's application must be denied.

III. ORDER

Based on the foregoing Procedural History and Findings of Fact, and Conclusions of Law, it is ORDERED:

3.1 Central Washington's request for oral argument on its Cross-Motion for Summary Judgment is DENIED.

3.2 Central Washington's Cross-Motion for Summary Judgment is GRANTED.

3.3 DaVita does not qualify for Certificate of Need No. 1381. There is no genuine issue of material fact regarding DaVita's failure to show that it had site control as required under WAC 246-310-220 and WAC 246-310-240. DaVita's application to

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FINDINGS OF FACT,
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FINAL ORDER ON CROSS-MOTION
FOR SUMMARY JUDGMENT

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establish a kidney dialysis facility in Douglas County, Washington fails as a matter of law.

Dated this 7 day of July, 2009.

_____/s/
JOHN F. KUNTZ, Review Judge
Presiding Officer

NOTICE TO PARTIES

This order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either party may file a **petition for reconsideration**. RCW 34.05.461(3); 34.05.470. The petition must be filed within 10 days of service of this order with:

Adjudicative Service Unit
P.O. Box 47879
Olympia, WA 98504-7879

and a copy must be sent to:

Department of Health Certificate of Need Program
P.O. Box 40109
Olympia, WA 98504-0109

The petition must state the specific grounds for reconsideration and what relief is requested. WAC 246-11-580. The petition is denied if the Presiding Officer does not respond in writing within 20 days of the filing of the petition.

A **petition for judicial review** must be filed and served within 30 days after service of this order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, the above 30-day period does not start until the petition is resolved. RCW 34.05.470(3).

FINDINGS OF FACT,
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The order is in effect while a petition for reconsideration or review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This order is "served" the day it is deposited in the United States mail. RCW 34.05.010(19).

For more information, visit our website at <http://www.doh.wa.gov/hearings>

488 So.2d 886
District Court of Appeal of Florida,
First District.

MEDIVISION OF EAST BROWARD COUNTY, INC., Petitioner,
v.
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, South Broward
Hospital District, Inc., and North Broward Hospital District, Respondents.

No. BL-450.

|
May 15, 1986.

In administrative proceedings in connection with application for Certificate of Need to construct and operate ophthalmic ambulatory surgical center in county, on intervenor's request, Department of Administrative Hearings, Donald R. Alexander, Hearing Officer, granted motion to compel discovery of documents of parent of corporation which sought Certificate. Parent corporation sought review of order. The District Court of Appeal, Booth, C.J., held that parent and its subsidiary, which was created by parent solely for purpose of applying for, constructing, and operating single surgical center, acted "as one" in applying for Certificate of Need, and documents of parent corporation were subject to discovery in administrative proceeding.

Petition for review denied.

Attorneys and Law Firms

*886 Robert A. Weiss, of Parker, Hudson, Rainer & Dobbs, Tallahassee, for petitioner.

Harold F.X. Purnell, of Oertel & Hoffman, Tallahassee, for respondent South Broward Hosp. Dist., Inc.

ON PETITION TO REVIEW NON-FINAL AGENCY ACTION

BOOTH, Chief Judge.

Petitioner seeks to invoke the jurisdiction of this court pursuant to Fla.Stat. section 120.68(1) (1985) to review an order of a hearing officer which granted a motion to compel discovery of documents. By a prior unpublished order of this court, we denied the petition for review and allowed the order of the hearing officer to stand. We now set forth our reasons for doing so in this opinion.

Petitioner Medivision of East Broward County, Inc. is an applicant for a Certificate of Need to construct and operate an ophthalmic ambulatory surgical center in Broward County. When the Department of Health and Rehabilitative Services announced its intention to deny the application, Medivision requested a formal administrative *887 hearing pursuant to Fla.Stat. section 120.57(1). South Broward Hospital District, Inc., an intervenor in the administrative proceeding, served a request for production of documents upon petitioner pursuant to Fla.R.Civ.P. 1.350. The request defined petitioner to include "the applicant ..., its parent company, subsidiaries, affiliates, and all of its respective agents, servants, associates, employees, representatives, attorneys, and other persons acting on its behalf..." Medivision of East Broward County, Inc., objected to the discovery request on grounds that it is not in possession and control of documents owned by Medivision, Inc., or its various subsidiaries. South Broward then sought the motion to compel which was granted by the hearing officer.

[1] Initially, we note that the jurisdiction of this court has properly been invoked. Section 120.68(1) of the Florida Statutes provides that “[a] preliminary, procedural, or intermediate agency action or ruling, including any order of a hearing officer, is immediately reviewable if review of the final agency decision would not provide an adequate remedy.” In considering a petition for writ of certiorari to the circuit court, where the petitioner must show an injury for which the remedy by appeal will be inadequate, an order compelling discovery has been held to be one which satisfies the standard. *See Ormond Beach First National Bank v. J.M. Montgomery Roofing Co.*, 189 So.2d 239 (Fla.1st DCA 1966), *cert. denied*, 200 So.2d 813 (Fla.1967). We find that reasoning applicable in the administrative context. We therefore turn to the merits of the petition.

The hearing officer relied on the case of *American Honda Motor Co. v. Votour*, 435 So.2d 368 (Fla.4th DCA 1983) in reaching his ruling. Petitioner argues that *American Honda* is distinguishable in that it dealt with facts that are the converse of those presented in this controversy. That is, there the parent corporation was the party to the litigation and the records sought were those of a subsidiary; here, the subsidiary party objects to the production of documents of the parent corporation. Assuming that the typical corporate lines of control are “one way”, we agree that the *American Honda* decision is distinguishable and not controlling. Nevertheless, our examination of the record persuades us that the hearing officer reached the correct result.

[2] By appendix to its response to the petition, South Broward has provided us with petitioner's Certificate of Need application filed with the department. That application makes clear that the petitioner relied heavily on the expertise and funding resources of the parent corporation, Medivision, Inc., and includes a statement by Medivision, Inc.'s directors that the parent corporation would provide the required capital and operating funds for the subsidiary's proposed facility. Simply put, the record indicates that Medivision of East Broward County, Inc., is a corporate entity created by Medivision, Inc., solely for the purpose of applying for, constructing, and operating a single surgical center.¹ The parties have not cited us to a case with facts which are similar to those presented here, nor has our own independent research revealed any. We are persuaded of the correctness of our view, however, by the opinion in *Alimenta (U.S.A.), Inc. v. Anheuser-Busch Cos.*, 99 F.R.D. 309 (N.D.Ga.1983), where the court construed rule 34(a) of the Federal Rules of Civil Procedure, the controlling terms of which are virtually identical to Florida's Rule 1.350(a). At issue in *Alimenta* was a document discovery request directed to documents of Alimenta B.V. That corporation and Alimenta (U.S.A.) were subsidiaries of the same parent corporation. The court did not look to the formal relationship of the corporations in reaching its conclusion. Rather, it examined the transaction which *888 gave rise to the litigation and found that the two corporations had “acted as one” therein. 99 F.R.D. at 313. Under the circumstances, the court agreed with the party seeking discovery that Alimenta improperly was asking for “the advantages of a single entity without assuming the responsibilities...”, *id.* at 312, and ordered that the documents be produced. We believe that the facts presented by the record before us are analogous and dictate a like result; that is, Medivision, Inc. and Medivision of East Broward County, Inc. acted “as one” in applying for a Certificate of Need and the documents of the parent corporation are therefore subject to discovery. It should be noted that our holding is expressly limited to the facts described herein, and this opinion is not intended to announce a rule of law that permits discovery of documents of parent corporations in all cases where their subsidiaries are parties to the litigation.

The petition for review of non-final agency action is denied.

SHIVERS and WIGGINTON, JJ., concur.

All Citations

488 So.2d 886, 11 Fla. L. Weekly 1151

Footnotes

- 1 The record is less clear concerning any affiliated subsidiaries and, in fact, the record and the pleadings in this cause suggest that Medivision of East Broward is the first proposed project of Medivision, Inc. Since petitioner has not argued that such affiliates exist, much less that they would be prejudiced by the discovery order, we find no error there.

End of Document

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CERTIFICATE OF SERVICE OF WASHINGTON

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I filed and served the foregoing as follows:

Division II Court of Appeals 950 Broadway, Suite 300 Tacoma, WA 98402 Phone: (253) 593-2970	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/>
Jack E. Bucknell Counsel for Respondent 7141 Cleanwater Dr SW Olympia, WA 98504-0109 Phone: (360) 586-2303 JackB@atg.wa.gov	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/>
Brad Fisher Davis Wright Tremaine, LLP 1201 3rd Ave. Ste 2200 Seattle, WA 98101 (206) 757-0842 BradFisher@dwt.com	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/>

DATED: August 18, 2017, at Federal Way, Washington.

s/ Aaron Paker
Aaron D. Paker