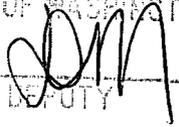


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DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

No. 50109-1-II

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

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SIGNATURE HEALTHCARE SERVICES, LLC,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent,

SPRINGSTONE, LLC,

Intervenor.

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

This case arises from the dire need for an inpatient acute care behavioral health hospital in Clark County. The citizens of Clark County deserve to have their choice of provider determined on the merits, not upon an unprincipled and misguided legal decision that fails to address what is best for the residents of the County. The lynchpin of the Department's case rests upon a wildly flawed interpretation of the statutory and regulatory language. The Department must "prescribe and publish" in the CN application all information necessary for a CN:

**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.**

WAC 246-310-090(1)(a) (bold added); *see also* RCW 70.38.115(6) ("The department shall specify information to be required for certificate of need applications.") (bold added).<sup>1</sup>

The prescribed and published operative language in the CN application plainly states, "Provide documentation that the applicant has

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<sup>1</sup> The Department and Springstone both agreed below that the CN application must prescribe and publish all the information required for obtaining a CN. The final order states, "[t]he department shall specify information to be required for certificate of need applications. The department's application form 'prescribes and publishes' the information the application must submit to obtain a certificate of need." AR 1672 (internal citations omitted); *see also* AR 1388 (same). Springstone likewise stated "[a]s a matter of law, CN applicants 'shall submit a certificate of need application in such a form and manner and containing such information as the department has prescribed and published as necessary to such a certificate of need application.'" AR 320.

sufficient interest in the site or facility proposed. Sufficient interest shall mean one of the following . . . 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.”<sup>2</sup> AR 1821 (Underline added). This language is clear and unambiguous, not subject to construction, and the plain language should control. Applying well-accepted canons of statutory interpretation, Signature established site control by submitting a valid real estate purchase and sale agreement (“REPSA”) in strict compliance with the statutorily prescribed and published requirements in the CN application.

The Department must “prescribe and publish” in the CN application all information necessary for obtaining a CN. RCW 70.38.115(6) and WAC 246-310-090(1)(a). Both the Department and Springstone argue the CN application need not contain the prescribed and published information required to obtain a CN; rather, the Department has discretionary authority to create additional requirements, at any point in time, of what is required from an applicant (without prescribing and publishing the new requirement in the CN application and without rulemaking). The Court should not accept the Department’s and Springstone’s invitation to disregard well-established canons of statutory construction and longstanding legal principles governing Washington’s administrative law.

The Department and Springstone both argue the requirements for

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<sup>2</sup> The Department’s analyst testified that the term “site” for both Signature and Springstone’s project generally meant the “physical ground parcel of land”; and the term “facility” referred to the building for a project. AR 1018-19.

CN site control are whatever the Department says at any given time (which depends upon subjective preferences of the Department analysts conducting the evaluations) and whenever they think the requirements may apply. This flawed interpretation has, and will continue to, create an unpredictable, arbitrary and unfair administrative procedure. It also leads to unlawful rulemaking. It is time for this Court to correct the Department's improper interpretation of the law. "It is emphatically the province of and duty of [this court] to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 177-178 (1803).

This Court should reject the Department and Springstone's legally unprincipled argument that the Department has unbridled discretionary authority to make additional requests outside of and contrary to their published form, which is a creature of statute, for determining site control. Such *post hoc* justification is unfair, outside the scope of statutory authority provided to the Department, and arbitrary and capricious.

As a matter of law based upon the CN application's plain language, Signature was not required to submit a draft lease for a period of five years, with options to renew for at least 20 years, to establish site control. Signature satisfied the Department's express requirements for proving site control by submitting a valid REPSA in full compliance with the CN application. The Department's published form unequivocally stated that a valid real estate purchase and sale agreement was sufficient to establish site control. The Department cannot be allowed to engage in a *post hoc*

justification for creating new grounds for denial when it contradicts information in their own published form.

As discussed further below, Signature also raised several genuine issues of material fact to defeat summary judgment on its claim that Springstone failed to meet all relevant CN criteria. Springstone's application was incomplete and riddled with inaccuracies. There was no way for the Department to determine financial feasibility, structure and process of care, and cost containment criteria based upon Springstone's misleading and error filled application. Because genuine disputed issues of material fact exist, a hearing is required. The Department made a clear error of law, which warrants reversal.

## II. AUTHORITY

### A. Signature established site control by submitting a valid real estate purchase and sale agreement.

The narrow issue of site control is a simple matter of statutory construction.<sup>3</sup> It is an issue the Department and Springstone go to great lengths to convolute and avoid in their responses. The Department argues "substantial deference is accorded to the agency's interpretation, particularly regarding the law involving the agency's special knowledge

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<sup>3</sup> The narrow issue here is whether site control has been established. The Department concluded Signature met the CN criteria for financial feasibility. The Department's analyst for financial feasibility, Ric Ordos, stated, "I conclude that 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 2388 (underline added). This unrefuted conclusion by the Department's financial feasibility expert dispels any new insinuation that Signature has not satisfied financial feasibility under WAC 246-310-220(2). Dept. Response at 12.

and expertise.” Dept. Response at 10. While that may be true for an ambiguous statute or rule, it does not apply when the language is clear and unambiguous. *Dot Foods, Inc. v. Washington Dep’t of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009) (“While we give great deference to how an agency interprets an ambiguous statute within its area of special expertise, such deference is not afforded when the statute in question is unambiguous.”). Deference to an agency’s interpretation is also never appropriate when the agency’s interpretation conflicts with a statutory mandate. *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007). Washington’s Supreme Court has held it is “emphatically the province and duty of the judicial branch to say what the law is[,] and determine the purpose and meaning of statutes.” *Overton v. Washington State Economic Assistance Authority*, 142 Wn.2d 801, 812, 16 P.3d 583 (2001). Legislative acquiescence can never be interpreted as permission to ignore or violate statutory or regulatory mandates. *Id.*

This is not a case of an agency applying its special knowledge and expertise in interpreting the law. It is a case of an agency attempting to expand, *post hoc*, items sufficient to prove site control in its own published form. AR 1821. Here, the law is clear. The Legislature has mandated the Department prescribe and publish in the CN application what information is required for a CN. RCW 70.38.115(6). Required information “shall include what is necessary to determine whether the proposed project meets applicable criteria and standards.” WAC 246-310-090(1)(a)(i). Under statutory authorization from the Legislature, the Department publishes a

form (the CN application) that only requires applicants meet one of four methods for establishing site control:

8. Provide documentation that the 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 faculties; 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) Legal 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 (underline added).

The facts are undisputed. Signature submitted a valid REPSA. CP 1882-1894. From the outset, Signature informed the Department it was submitting the REPSA for establishing site control.<sup>4</sup> AR 1822 & 1881-1906 (REPSA). The Department's executive director testified the REPSA satisfies section d) above. AR 970-71. The Department's executive director

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<sup>4</sup> Prior to submitting the CN application, Signature had no less than four in-person meetings with the Department's personnel and at none of the meetings did the Department ever indicate anything more than the REPSA would be required for establishing site control. AR 453. Signature was as transparent as one could be in describing the organizational structure for the hospital. *Id.* The Department never objected.

also testified the CN application provides several alternative methods for satisfying “sufficient interest” or site control. AR 507; 509-10. If the Department wants applicants to provide more than what is prescribed and published in the CN application (a statutorily mandated obligation upon the Department), as a matter of law, the form must be revised.

The Department and Springstone both argue more was required of Signature, *post hoc*, to establish site control, even though Signature already proved site control under the Department’s published form. Dept. Response at 14. The Department and Springstone argue the plain language of the CN application should be disregarded, and this Court should blindly “accord substantial deference to Department’s interpretation of what information is required for CN applications.” *Id.* This is erroneous as a matter of law and begs these questions: (1) why does the Department bother publishing a form that alleges to list alternative ways sufficient to establish site control; (2) how can any applicant be on notice regarding what will establish site control; (3) what stops the Department from arbitrarily and capriciously deciding, *sua sponte*, what constitutes site control, and most concerning, (4) how can any applicant evaluate its application with any predictability regarding what constitutes site control?

Taken these questions into account, the Department’s interpretation conflicts with its statutory mandate, and well-accepted canons of statutory interpretation. *Department of Labor & Industries v. Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991). The primary statutory mandate of the Department is to ‘promote, maintain, and assure the health of all citizens in

the state, provide accessible health services, health manpower, health facilities.” *Overlake Hospital Association v. Washington State Department of Health*, 170 Wn.2d 43, 51-52, 239 P.3d 1095 (2010). The Department’s administrative mandate is not so broad that it is given deference to create an arbitrary process that keeps applicants guessing regarding what establishes site control. The administrative order should be reversed if the Court finds the Department exceeded its statutory authority, or made an error in interpreting or applying the law. RCW 34.05.570(3)(a)-(b), (d).

Signature met requirement d) in the Department’s published CN application by submitting valid and binding REPSA. CP 1882-1894. Using the Department’s own argument, the Legislature mandated the Department prescribe and publish in the application the information required to obtain a CN. RCW 70.38.115(6); WAC 246-310-090(1)(a). The Department prescribed and published its CN application providing four separate ways to establish site control. AR 1821. Signature met the Department’s requirement for establishing site control by producing a valid REPSA. AR 1882-1894. Regardless of how Signature structured its project, which is largely misconstrued by the Department, the fact remains Signature established site control by explicitly meeting the requirement specified in the Department’s published CN application form. *Id.*

Allowing the Department to engage in a *post hoc* justification for broadening their requirements for establishing site control, as defined by their own published form, will create an arbitrary and inconsistent procedure void of predictability. “[The Court] has the ‘ultimate

responsibility to see the rules are applied consistently with the policy underlying the statute.” *Nielsen v. Employment Security Department*, 93 Wn. App. 21, 29, 966 P.2d 399 (1998) (Internal citations omitted).

The Department publishes a form establishing the requirements for meeting site control; however, the Department falls back on language stating that “required information shall include what is necessary to determine whether the proposed project meets applicable criteria and standards.” WAC 246-310-090(1)(a)(i). This inconsistency creates unpredictable and arbitrary policy, and the Court should invoke its inherent authority to see the Department’s rules are applied in a fashion consistent with the policy underlying the statute. *Nielsen*, 93 Wn. App. at 29. Here, this Court should reverse the final order because Signature has established site control under the Department’s own publish form.

**B. The Department cannot change the published and prescribed information necessary for obtaining a CN through screening.**

The Department cannot change the prescribed and published CN application statutory requirements through screening. The whole purpose of screening is to “request additional information considered necessary to the application.” RCW 70.38.115(6); *see also* WAC 246-310-090(2)(a) (“the department shall...screen the application to determine whether the information provided is complete and explicit as necessary for certificate of need review.”) (underlines added). Screening applies to situations where the Department determines information provided is “incomplete.” WAC 246-310-090(2)(c)(i) & (ii). But nothing in the certificate of need statute (RCW

70.38.115) or regulations (Ch. 246-310 WAC) permit the Department to prescribe and publish new additional requirements for obtaining a CN through the screening process. Creating new requirements constitutes improper rulemaking. *Budget Rent A Car Corp. v. Dep't of Licensing*, 144 Wn.2d 889, 895, 31 P.3d 1174 (2001) (“Under the APA, an agency must comply with certain procedures when promulgating a new rule.”). As a result, the Department’s decision should be reversed.

**C. Dr. Kim’s legal equivalency to the businesses he wholly owns is a red herring—irrelevant for proving site control.**

The Department argues Dr. Kim cannot show site control because “Dr. Kim is not synonymous with his business.” Dept. Response at 16. This is a red herring because Signature produced a valid RESPA meeting the Department’s requirements under its own published form. The operative language in the form plainly states sufficient site control “shall mean one of the following... d) Legally enforceable agreement to give such title ... in the event that a Certificate of Need is issued for the proposed project.” AR 1821 (underline added). Signature provided a legally enforceable REPSA providing title when the CN issued. CP 1882-1894.

Even if the plain language of the CN application could be disregarded and a lease was also required (which it was not), Signature’s lease shows Dr. Kim owns (a) Signature, (b) Vancouver Life Properties, LLC, (the company that would own the hospital), and (c) Vancouver Behavioral Healthcare Hospital, LLC (the company that would operate the

hospital).<sup>5</sup> The Department and Springstone argue this is insufficient because Dr. Kim must be distinguished from the corporate fiction of his businesses. Dept. Response at 16-17.

The Department cites to *State Department of Revenue v. Nord Northwest Corporation* for the proposition “it is a well-established legal principle that a business entity is a distance, separate ‘person’ from its owners.” *State Department of Revenue v. Nord Northwest Corporation*, 183 Wn. App. 769, 779, 334 P.3d 1182 (2014). It is not on point. The appellant there asked the court to disregard its parent-subsidary corporate form to gain a financial tax advantage. *Id.* at 230. The court held the entity that did not perform construction work cannot be treated as the entity that performed the work, for taxation, simply because both entities were in a parent-subsidary relationship. *Id.* The court correctly held Washington law treats a member of an LLC as a separate person from the entity itself. *Id.*

The Department’s analogy does not relate to the facts here: proving a member of an LLC has control of that entity. Dr. Kim wholly owns and controls all the entities. Dr. Kim will have complete ownership and control over the land and the hospital building. This is allowed and accepted as

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<sup>5</sup> The Department in response states, “Signature, through Vancouver Behavioral Healthcare Hospital, LLC, proposed leasing. . . .” Dept. Response at 14. In other words, the Department deems Signature and Vancouver Behavioral Healthcare Hospital, LLC as one in the same likely because both are wholly owned by Dr. Kim. The Department, however, fails to explain why Vancouver Life Properties, LLC should be treated any differently since it also is an entity wholly owned by Dr. Kim. These types of inconsistent positions are commonplace throughout the Department’s arguments. In reality, the ownership and control of the land and the facility rests upon Dr. Kim through his affiliated entities.

control under Washington's Limited Liability Act.<sup>6</sup> Dr. Kim is not asking this Court to disregard the separate existence of his businesses for financial advantage, as in the case cited by the Department *State Department of Revenue*, 183 Wn. App. at 179. Dr. Kim has proven site control far beyond what is required according to Department's published form.

Furthermore, Signature was under no obligation to submit a lease for five years with the option to renew for 20 years. The Department's executive director testified that for pure lease hospital projects (the applicant has a leasehold interest for control and use of the building and there is no REPSA or owned land), the 20-year time is not even a rule and the Department would not object to shorter periods like 15-years. AR 519. But besides Signature providing a valid RESPA to the Department, Signature, through Dr. Kim, provided a lease agreement that proved he would also be in complete control of all entities, even though the Department's form does not require as much. Signature went above and beyond what was required to prove site control as dictated by Department's own form they publish. The distinction between Dr. Kim, personally, and his businesses, which are legal fictions, is only a red herring.

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<sup>6</sup> RCW 25.15.161 states that: "A person who is both a manager and a member has the rights and powers, and is subject to the restrictions and liabilities, of a manager and also has the rights and powers, and is subject to the restrictions and liabilities, of a member to the extent of such person's participation in the limited liability company as a member." Dr. Kim is the sole owner/manager and sole member of every entity involved. This goes well beyond the requirements of establishing site control according to Department's own published form. This is not a question of distinguishing the individual from the corporate entity, this is about establishing who controls the entities in question. That is why they call it "site control," and not "site ownership."

**D. The Department concluded Signature met financial feasibility with strong financials and provided a valid REPSA.**

**1. Signature did not have to establish site control with a lease for a specific period.**

Signature was never required to submit a lease as a condition for establishing site control. AR 1821. Signature met the requirement for establishing site control by providing a valid REPSA. AR 45-46. The Department has regularly accepted REPSAs 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 2009. The language in the Department's published form lays out, in the disjunctive, what is required for establishing site control. AR 1821. The Department states providing a legally enforceable agreement will establish site control. *Id.* Again, it does not state a legally enforceable agreement, and production of a lease for five years, to be renewable for no less than 20 years is required. *Id.* (Emphasis added). Therefore, Signature established site control through its REPSA.

**2. Even though Signature did not have to provide a draft lease, Signature provided one to demonstrate even more control. Signature explicitly identified the rent amount for the lease in response to screening.**

The Department and Springstone contend Signature failed to submit a lease that included all necessary information to allow the Department to "determine whether the proposed project met applicable criteria." Dept. Response at 20. This is inaccurate. In screening, the Department asked Signature to identify its lease/rent costs in the pro forma. AR 3728. Signature did so explicitly by identifying its rent expense of \$2,113,980 per

year. AR 3683. This was annotated as “Rental Expenses.” AR 145. The Department was explicitly informed of the monthly rent amount. Signature also showed the Department that its project was much less expensive on a cost per bed basis than Springstone’s. AR 2136-37.

The Department claims this does not suffice. Dept. Response at 20. It again falls back on the false concept that RCW 70.38.115(6) and WAC 246-310-090(1)(a)(i) entitles them to *post hoc* revise the prescribed and published information requested in the CN application. *Id.*

The Department’s review process results in inconsistent treatment of applicants and contravenes the underlying policy of the CN program. For example, as stated in the opening brief, the Department has engaged in highly arbitrary decision-making regarding site control and financial feasibility in other applications in other counties. *See* Brief of Appellant at 16-17. Also, Signature’s project is much less expensive on a cost per bed basis than Springstone’s. AR 2136-37. The overriding policy of the CN program is to “promote, maintain, and assure the health of all citizens in the state, provide accessible health services, health manpower, health facilities.” *Overlake Hospital. Association v. Department of Health*, 170 Wn.2d 43, 51-52, 55, 239 P.3d 1095 (2010). The Department’s interpretation does not promote the legislature’s intent.

**3. The Department seeks to prevent a comparative review of similar psychiatric hospital evaluations from the other two counties because it demonstrates the arbitrary and capricious decision-making.**

Signature has shown throughout this case that the conduct of the

Department has been arbitrary and capricious. The Department has refused to use well-accepted canons of statutory interpretation regarding the interpretation of its own forms it publishes. *See supra*. The Department has created an inconsistent, unpredictable and highly arbitrary review procedure. *See* Brief of Appellant at 16-17.

The Department even asks the Court to summarily reject Signature's evidence of disparate treatment in contemporaneous psychiatric hospital CN reviews occurring in other counties because "those cases involve different facts and circumstances and their correctness is not directly relevant to deciding if Department's decision about Signature's Clark County application was the result of 'willful and unreasoning disregard of the facts and circumstances.'" Dept. Response at 22. The Department, however, identifies no factual differences because the reviews are nearly identical. They involve contemporaneous site control evaluations of psychiatric hospital projects with an arrangement similar to Clark County. CP 134. This cannot be summarily disregarded. Although the Department may not like the inconsistent treatment being applied by the varying CN analysts, the arbitrary and capricious decision making is clear.

In Pierce County, the Department accepted an "undefined" airspace condominium arrangement that allowed any of the two members of the LLC to withdraw after a period of only 15 years (not 20 years). AR 763. Yet, the Department found this to be acceptable. Also in the Pierce County review, the Department went into a third round of screening (phrased as a Pivotal Unresolved Issue) because both applicants had submitted site control

information not comporting with what the reviewing analyst thought should be provided. The Department never provided this same opportunity to Signature in Clark County even though it had expressly requested “to continue screening until the information is complete.” AR 2198.

In addition, the same lease Signature submitted for Clark County was approved in the later reviewed Spokane and Pierce County applications submitted by Signature, the only difference being that Signature changed the lease period to twenty-years based upon the Department’s summary decision in Clark County and inserted the rent amount explicitly identified in the pro forma. Nothing else was different. These changes were made because of the Department’s summary decision in Clark County.

In Clark County, the Department said nothing about a lease in the first screening. AR 2108. Even in the second screening, the Department never said anything about a 20-year requirement. AR 2196. Had Signature known there was a 20-year requirement, it simply would have amended the lease as it did for the accepted CN applications in Pierce and Spokane. The whole point of site control is to establish the applicant is committed to the project for the long term, which Signature overly satisfied.

The Department also claims Signature simply restated its argument and provided no basis for the Court not to compare the three-similar psychiatric hospital CN evaluations. Dept. Response at 22-23. This again is not true. The Department not only disregards Signature’s argument, it does not even try to refute the facts well briefed by Signature: (a) The Alliance submitted an airspace condominium wholly without a 20-year commitment

to establish site control (any member could withdraw after 15 years); (b) in the Pierce County concurrent review, the Department declared an pivotal unresolved issue because the forms submitted by the applicants were insufficient for satisfying site control, which it did not do in the Clark County review, and (c) in the Spokane review, Department did not require Signature to submit a lease to establish site control during the initial review. Brief of Appellant at 28-30.

The Department's claim that it "carefully examined what was required to establish site control in Pierce and Spokane Counties[]" is confusing as it seems the Department argues that it can determine what establishes site control based on its *post hoc* analysis of applications, disregarding the statutory mandate for the Department to provide prescribed and published information necessary for obtaining a CN.<sup>7</sup>

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<sup>7</sup> Throughout its response, the Department has erroneously indicated that RCW 70.38.115(6) and WAC 246-310-090(1)(a)(i) entitles it to deny or limit CN applications based on failure to submit information requested, but never before prescribed and published. The Washington State Constitution vests superior courts with inherent authority to review administrative decisions for illegal or manifestly arbitrary and capricious acts. Wash. Const. art. IV, § 6; *Pierce County Sheriff v. Civil Serv. Comm'n of Pierce County*, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983). *Gehr v. S. Puget Sound Cmty. Coll.*, 155 Wn. App. 527, 533, 228 P.3d 823 (2010). "Arbitrary and capricious means 'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.'" *Foster v. King County*, 83 Wn. App. 339, 347, 921 P.2d 552 (1996) (quoting *Kerr-Belmark Constr. Co. v. City Council*, 36 Wn. App. 370, 373, 674 P.2d 684 (1984)).

The Pierce, Clark, and Spokane reviews prove the "required or necessary information" is a changing term that Department applies arbitrarily. In Clark County, a 20-year lease was required. In Pierce County, allowing the parties to withdraw from the project after 15-years was acceptable. In Pierce County, the Department went into a third round of screening (Pivotal Unresolved Issue) because the parties had submitted incomplete information that would have led to denial of both parties' applications. In Clark County, a third round of screening was prohibited even though Signature had requested it. The only difference between these cases is that different Department analysts were involved, which

**E. Under the summary judgment standard of review, Springstone failed to meet all relevant CN criteria to establish a 72-bed psychiatric hospital.**

**1. Springstone has not established need for its 24-bed chemical dependency unit.**

As discussed in the Brief of the Appellant, 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 CN is proper. RCW 70.38.115. The financial feasibility of Springstone 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, the Department looks at organizations

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created different requests for information and different requirements. The Department's executive director testified there is nothing that limits the Department to just two rounds of screening, AR 523, even though that is the position the Department took in Clark County with Signature (but not in Pierce County for whatever reason).

The Department throws out a red herring about timing, claiming there was no time to do a third screening. This is false as proven by a simple review of the timeline for Pierce County, which included a third set of screening (Pivotal Unresolved Issue). AR 1433. The timeline in Pierce County was nearly identical to Clark County through the first two screening periods, yet the Department allowed the third screening in Pierce County. *Cf.* AR 26 (Clark County chronology) with AR 1433 (Pierce County chronology).

with ten percent (10%) or more ownership interest in the proposed hospital. AR 517-518. In this review, the financial feasibility was determined based only upon 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 in identifying the legal applicant as defined under WAC 246-310-010(6).**

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 deference is provided in certain situations involving 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 Ranier 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 246-310-010(6). The program reviewed the financials for Springstone, LLC for 2013 indirectly, and it failed; however, Mr. Richard J. Ordos of Department testified that the results were disregarded since he was only looking at Rainier Springs and the associated pro forma. AR 655.

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

**c. Springstone is not financially feasible and cannot establish site control. This detrimentally affects the behavioral health crisis in Clark County.**

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 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 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 expects 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 signed a management agreement with WCAS. *Id.* To Signature's knowledge, no operating or management agreement was ever provided to or reviewed by Department

For Springstone to establish its proposed project and maintain site control, it must be financially feasible, but the audited financials and Department's testimony both demonstrate that at the very least, additional diligence must be conducted by Department to satisfy financial feasibility criterion. The Department admitted it did not review the audited financials for Springstone 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. AR 51, footnote 21.

Even a cursory review of the audited financials should lead to more

questions, which must be answered by the 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 assure 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. as defined by WAC 246-310-010(6).

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 had the analysis 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 is heavily distressed financially, perhaps more than anyone knows. The resolution of the disputed facts requires a hearing. At a minimum, the Department should act responsibly and evaluate the red flags.

## 2. 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.

Finally, if the Department's decision on site control were to be 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. 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 "defective" as claimed by Department, AR 1880, then Springstone's CN application should also be denied.

### III. CONCLUSION

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

Dated this 15th day of November, 2017.

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**CERTIFICATE OF SERVICE**

STATE OF WASHINGTON

BY



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:

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DATED: November 15, 2017, at Federal Way, Washington.

s/ Aaron Paker  
Aaron D. Paker