

NO. 50109-1-II

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

SIGNATURE HEALTHCARE SERVICES, LLC, a Michigan limited
liability company,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH, a Washington
governmental agency,

Petitioner, and

SPRINGSTONE, LLC, a Delaware limited liability company,

Respondent Intervenor.

BRIEF OF RESPONDENT INTERVENOR SPRINGSTONE, LLC

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I. INTRODUCTION

The parties are in agreement on one thing: Washington—and specifically Clark County—has a “dire unmet need for inpatient acute care behavioral health services.” Sig. Brf. at 1. On October 6, 2015, Springstone, LLC (“Springstone”) was notified of the Department of Health’s (the “Department”) intent to issue it a certificate of need (a “CN”) to build and operate a 72-bed psychiatric hospital that would provide such services, CP¹ 3716, and since the date of the Department’s final order on the matter, Springstone has moved forward with its much needed project notwithstanding the misguided appeal of Signature Healthcare Services, LLC (“Signature”). This Court should affirm the well-reasoned decision of the Department and rule that a certificate of need was properly awarded to Springstone rather than Signature so that services can be made available at the earliest possible date.

There was and is no genuine dispute that Springstone’s application to build and operate a new psychiatric hospital in Clark County met the requirements for a CN while Signature’s competing application did not:

- As a matter of law, CN applicants “shall submit a certificate of need application in such form and manner and containing such

¹ To avoid confusion, Springstone cites to the administrative record using the convention for clerk’s papers, “CP,” rather than “AR.” During the agency appeal process, certain materials in the record were marked as “AR Page __,” but have been renumbered as part of the appeal to the courts. *See e.g.*, CP 1812 (also marked as “AR Page 2”).

information as the department has prescribed and published as necessary to such a certificate of need application.” WAC 246-310-090(1) (emphasis added); RCW 70.38.115(6) (“The department shall specify information to be required for certificate of need applications. . . . ***Applications may be denied or limited because of failure to submit required and necessary information.***”) (emphasis added). As explained in the Review Officer’s Findings of Fact, Conclusions of Law, and Final Order on Motions for Summary Judgment (the order under review), Signature failed to submit such an application. CP 1643-1683.

- Having elected to lease (rather than own) its proposed hospital, Signature was required to provide proof of a “[l]ease 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 . . .” CP 1821 (emphasis added). Signature did not provide such a lease, and thus failed to demonstrate sufficient control over its proposed facility.
- In screening, Signature was asked directly to provide a “copy” of its proposed lease that “***identifies all costs associated with the agreement.***” AR 2196 (emphasis added). Signature did not provide such a lease, submitting a blank lease with no identifiable costs, thereby depriving the Department the ability to evaluate the financial feasibility of its proposed project.

In contrast, Signature's attacks on Springstone's application are based on base speculation and argument of counsel rather than evidence, and, in some instances, a misunderstanding of the law. Signature utterly fails to meet its burden of proving that the Department of Health erred in awarding a CN to Springstone, and the agency's order should be affirmed.

**II. ISSUES RELATED TO SIGNATURE'S
ASSIGNMENTS OF ERROR**

A. Did the Department err in rejecting Signature's CN application where Signature failed to provide information requested in the application form prescribed by the Department?

B. Did the Department err in rejecting Signature's CN application for want of site control where Signature failed to provide a draft lease for at least five years with options to renew for no less than a total of 20 years?

C. Did the Department err in rejecting Signature's CN application for failure to demonstrate financial feasibility and cost containment where Signature failed to provide a lease that identifies all costs associated with the agreement in response to a direct request from the Department during screening of its application?

D. Did the Department err in determining that Springstone's application met the criteria for issuance of a CN?

III. STATEMENT OF THE CASE

On November 10, 2014, Signature submitted an application for a CN to build and operate a new 100-bed psychiatric hospital in Vancouver, Washington at capital cost of \$32,541,994. CP 1812-2104. Four days later, Springstone submitted several letters of intent to establish and operate a 72-bed psychiatric hospital in the Salmon Creek area of Clark County, and on December 23, 2014, Springstone submitted an application for the project at a projected capital cost of \$26,843,706. AR 2459-2641.²

The Department's Certificate of Need Program (the "Program") sent screening questions to both applicants. CP 2106-2112, 2115, 2644-2651. Based on Signature's suggestion that the necessary fixed assets would be "leased back" to the hospital at "fair market rates," CP 2121, the Program sent Signature a second screening request in which it asked for the lease, advising Signature that "draft agreements are acceptable if the draft: a) identifies all entities referenced in the agreement, b) outlines all roles and responsibilities of all entities, c) identifies all costs associated with the agreement, and d) includes all exhibits that are referenced in the agreement." CP 2196.

² Signature identified itself as the applicant, "d/b/a Vancouver Behavioral Healthcare Hospital." CP 1812. In fact, the hospital was to be operated by a subsidiary of Signature, Vancouver Behavioral Healthcare Hospital, LLC. CP 1816, 1865. Springstone identified the applicant for its project as an operational subsidiary known as Rainier Springs, LLC, CP 2459, although the Department treated Springstone as the applicant.

In response, Signature submitted an unsigned “Facility Lease and Security Agreement.” CP 2202-2247. Signature was not identified as the landlord, nor even an affiliate or owner of the landlord; the facility was instead to be owned by Vancouver Life Properties, LLC, an entity owned by a Dr. Soon Kim who was also a part-owner of Signature. *See* CP 1865. The lease was riddled with blanks. Notably, the lease had only a five year term with no options, CP 2209 (§ 2.1.1), and could be terminated by the Landlord if the Landlord did not complete construction by a specified date, or if there was a change in control of the Landlord. *Id.*, §§ 2.1.2, 2.2. The lease did not set the rent, or even a methodology for calculation of the rent, CP 2212 (§3.2.1), and provided that the Tenant would have to pay all expenses of operation—including “repayments of principal indebtedness and interest required to be paid to any Landlord’s Lender . . . as a result of any borrowings secured by the accounts receivable of the Facility . . .” *Id.*, § 3.2.2.

After a thorough review of the applications, the Program concluded that Springstone’s project met the criteria for issuance of a CN while Signature’s did not. CP 3655-3708. Specifically, the Program concluded that Signature had failed to satisfy the financial feasibility and cost containment criteria. Noting that “the Certificate of Need application form” (which *was quoted by Signature in its application*, CP 1821)

provides that “[p]sychiatric hospital lease agreements must be for at least five years, with options to renew for no less than a total of 20 years,” CP 3690, and that Signature had been directly asked to provide a lease containing all costs associated with the lease, *id.*, the Program concluded that in light of the deficiencies in the draft lease submitted by Signature, the costs of the project could not be substantiated, precluding an assessment of the project’s expected impact on the costs and charges for healthcare. *Id.* Despite being advised that reconsideration was not a proper mechanism to correct its deficient application, CP 2448, Signature requested reconsideration of the decision, which was denied. CP 3745.

Signature requested an adjudicative proceeding to contest the Program’s evaluation.³ Springstone filed a timely motion for summary judgment seeking a ruling that there were no genuine issues of material fact, and that Springstone—not Signature—was entitled to the CN to construct and operate a new psychiatric hospital. CP 316-326. The Program joined in the motion. CP 443-448. Signature was given additional time to respond to the motion during which it took a series of depositions. *See* CP 340. Signature eventually opposed the motion and

³ Signature actually filed papers for two adjudicative proceedings; one to contest the CN granted to Springstone, and one to contest denial of its CN. CP 1-186 and 191-281. The Presiding Officer consolidated the two matters. CP 339-41.

filed a cross-motion for summary judgment, CP 450-917; Springstone filed a reply. CP 1439-1466.

On April 22, 2016, the Presiding Officer issued Prehearing Order No. 5 granting Springstone's motion. CP 1514-1552. After a careful review of the evidence and argument of the parties, Health Law Judge John Kuntz ruled in favor of Springstone and the Program. Like the Program, the Presiding Officer concluded that there was no genuine dispute that Signature had failed to submit a compliant application, and that the application, screening responses and attachments failed to show sufficient site control or "a complete lease as required under WAC 246-310-220(2) to enable a determination of the reasonableness of the project cost." CP 1543-1545 (¶¶ 2.8, 2.10). After methodically debunking Signature's critique of Springstone's application, Judge Kuntz held "[t]here is no genuine issue of material fact regarding Springstone meeting all of the criteria for its psychiatric bed CN." CP 1550 (¶2.20).

Signature pressed on. On May 13, 2016, Signature filed a Petition for Administrative Review, and on October 24, 2016, the Review Officer, acting as the designee of the Secretary of Health, issued Findings of Fact, Conclusions of Law, and Final Order on Motions for Summary Judgment. CP 1643-1683 (the "Final Order"). Like the Program and the Presiding Officer, the Review Officer concluded that Signature had failed to "show

it has site control over the proposed hospital building for 20 years as required in the application form,” and had failed to provide a complete lease that would enable to the Department to determine the reasonableness of the project’s costs. *See* CP 1660, 1676 (¶¶ 2.28, 3.16). The Review Officer rejected Signature’s challenge to Springstone’s application, finding that there were no genuine issues of material fact regarding Springstone meeting all of the criteria for issuance of a CN. CP 1681 (¶ 3.26). Signature again moved for reconsideration, CP 1684-1692, and its motion was again denied. CP 1806-1808.

Signature appealed to Thurston County Superior Court, and, given the critical need for psychiatric beds in Clark County, this Court granted direct review.

IV. ARGUMENT

A. The Standard of Review for Agency Action

Signature brings this appeal as a challenge to an order of the Department of Health under the Administrative Procedure Act, RCW Ch. 34.05, which means that Signature bears “[t]he burden of demonstrating the invalidity of agency action” as “the party asserting invalidity.” RCW 34.05.570(1)(a). Relevant to this appeal, Signature must show that the Department “erroneously interpreted and applied the law,” that its order was not supported by substantial evidence, or that the order was somehow

arbitrary and capricious. RCW 34.05.570(3)(d),(e) and (i). Signature fails to show any of these things.

As summarized by the Washington Supreme Court:

The standard of review in CN cases is that the agency decision is presumed correct and that the challengers have the burden of overcoming that presumption. *Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wash.2d 95, 102, 187 P.3d 243 (2008). Insofar as questions of law are concerned, we may substitute our interpretation of the law for that of the agency. We do, however, accord substantial deference to the agency's interpretation of law in matters involving the agency's special knowledge and expertise. An agency's decision is arbitrary and capricious if the decision is the result of willful and unreasoning disregard of the facts and circumstances.

Overlake Hospital Ass'n v. Dept. of Health, 170 Wn.2d 43, 49-50 (2010).

Administrative tribunals are vested with the authority to decide matters by summary judgment when the record reflects that there are no genuine issues of material fact, and the moving party is entitled to a judgment as a matter of law. *ASARCO v. Air Quality Coalition*, 92 Wn.2d 685 (1979). Critical to the decision-maker's analysis, a party facing summary judgment "must respond with more than conclusory allegations, speculation or argumentative assertions of the existence of unresolved factual issues." *Baldwin v. Sisters of Providence in Wash., Inc.*, 112

Wn.2d 127, 132, (1989). Summary judgment is properly entered when there are no *material facts* in dispute. “[A] ‘material fact’ is one upon which the outcome of the litigation depends.” *Jacobsen v. State*, 89 Wn.2d 104, 108 (1977). If there are no material facts in dispute, a hearing is not necessary. In such a case, “[t]he summary judgment procedure amounts to a trial of the legal issues: each side has the opportunity to argue his view of how the law applies to the undisputed facts, and the [tribunal] renders a decision on the legal issues presented.” *Federal Land Bank of Spokane v. Redwine*, 51 Wn. App. 766, 768 (1988).

Evidentiary rulings or rulings on the proper scope of the record are left to the discretion of the Department, though as a general rule, the evidence at adjudicative hearings on CN applications is limited to a “snapshot” of the record at the time of the Program’s original decision. *University of Washington Medical Center v. Dept. of Health*, 164 Wn.2d 95, 103-104 (2008); *King County Public Hospital District No. 2 v. Dept. of Health*, 178 Wn.2d 373-376 (2013). A party challenging such a ruling must show an abuse of discretion. *University of Washington*, 164 Wn.2d at 104.

B. The Relevant Laws on Certificate of Need

Persons wishing to provide certain types of healthcare services or operate certain types of healthcare facilities in the State of Washington

must apply to the Department of Health for a certificate of need or CN. RCW 70.38.105(4). Before a CN will issue, an applicant bears the burden of proving that its proposed project satisfies the criteria of (i) need, (ii) financial feasibility, (iii) structure and process of care, and (iv) cost containment. WAC 246-310-200, -210, -220, -230, -240; WAC 246-10-606(2) (“In all cases involving an application for license the burden shall be on the applicant to establish that the application meets all applicable criteria.”). When two or more applicants seek to fulfill the same “need,” the Department reviews and compares the applications under what is known as “concurrent review,” a process which must be completed in 150 days. RCW 70.38.115(7); WAC 246-310-120.

All CN applicants “*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) (emphasis added); RCW 70.38.115(6). “Applications may be denied or limited because of failure to submit required and necessary information.” RCW 70.38.115(6). In the case of new psychiatric hospitals, the application form published by the Department requires that applicants demonstrate that they either own their facility, or have rights to occupy it by way of a lease that includes options for a 20-year term. CP 1489-1490,

1672-1673, 1865. As part of the Department’s feasibility analysis, applicants bear the burden of showing that their proposed projects will cover their costs by the third full year of operation. CP 1657-1659.

C. The Department Properly Concluded That Signature’s Application Failed to Meet the Criteria for Issuance of a Certificate of Need

There is no dispute as to the dispositive or “material” facts that resulted in the denial of Signature’s application: Signature proposed to lease its new psychiatric hospital facility, but failed to submit a lease with a 20-year term, and did not submit a lease that identified all costs associated with the lease agreement. Even though Signature quoted the long-standing application form describing what constitutes sufficient site control for a leased property, and was asked for a lease showing all costs directly during screening, Signature did not 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). Signature’s application (as supplemented by two screening responses) was patently deficient, and the Department properly rejected the Signature project for this reason. RCW 70.38.115(6).

1. Signature did not have sufficient site control over its leased facility, and would have no enforceable right to occupy the facility after the initial five-year lease term.

Signature once again effectively concedes that the term of its proposed lease is not compliant with the Department's published requirements, but argues that the lease is a mere formality that is unimportant because (a) a different company owned by Dr. Kim would be the hospital's counter-party landlord, and (b) site control for a leased hospital can be shown by a 20-year lease *or*, if there is an indirect affiliation between the landlord and tenant, that it is sufficient if an affiliate owns the property where the leased hospital will be built. Neither is a sufficient response, and Department properly rejected Signature's application for want of site control.

According to Signature, the proposed Vancouver Behavioral Healthcare Hospital would be owned by Vancouver Life Properties, LLC, a company owned by Dr. Kim (*not* Signature Healthcare Services, LLC), AR 55, and the cost of the hospital facility and property would be funded principally by a bank loan from a third-party lender. CP 1847-1849, 1908. The applicant, Signature Healthcare Services, LLC, would not have any control over the site, and its subsidiary-hospital's rights to use the facility were defined by its lease, as well as whatever covenants would be held by

the bank that finances the project. These facts were not in dispute. Neither Signature nor Vancouver Behavioral Healthcare Hospital, LLC had “clear legal title” to the facility, and Signature offers no authority that would have allowed the Department to treat Dr. Kim as the “applicant” or to ignore the lease structure for its convenience. Such a ruling would improperly blur the distinction between companies and the persons who own them, a legal construct that is the very reason such companies exist. *See Grayson v. Nordic Construction Co.*, 92 Wn.2d 548, 552-553 (1979) (“A corporation exists as an organization distinct from the personality of its shareholders. . . . [A] corporation's separate legal identity is not lost merely because all of its stock is held by members of a single family or by one person.”).

The Department—consistent with its own long-standing application form⁴—determined that as the lessee of a proposed hospital facility, it was necessary for Signature to show that it had a lease with options to renew for a total of twenty years. Signature argues that even though it was leasing the psychiatric hospital where it proposed to provide services (which is the *exact* scenario described in Section 8(b) of the Department’s application form), it was not required to procure a lease with

⁴ Signature erroneously argues that the application form is interpreted *de novo* under an error of law standard. App. Brf at 21. The application form is not a law, but even if it were, the Department’s interpretation would be entitled to deference.

a 20-year term, and that it instead had the option to show title to the *site* (*i.e.*, the dirt on which the facility would be built). Signature’s nonsensical reading of the form was properly rejected by the Program, the Presiding Officer and the Review Officer: As explained by the Review Officer, while Signature may have had a right to purchase the land, “the only way that Signature Health Services, LLC (the applicant) can exercise site control is by leasing the facility from Vancouver Life Properties, LLC.” CP 1673 (¶ 3.13).

Applicants either own or rent their proposed facilities, which is the determining factor in which of the “disjunctive” provisions in the published application form applies to a particular project. A common sense reading of the Department’s published application form is that an applicant can either submit proof that it will own its proposed facility, or will have the right to lease the facility for a sufficient period—20 years in the case of a new psychiatric hospital. Program Analyst Karen Nidermayer testified at length at deposition how site control applies to different types of projects. CP 1460-1462 (Nidermayer Dep. at 33-38). The Department applied the requirements in precisely the manner described by Ms. Nidermayer at her deposition—an analysis which ultimately turns on whether the applicant has sufficient control over “the building . . . with the beds in it . . . [in which it’s] going to be providing

the services.” CP 1462. Site control *can* be shown by clear legal title—*if* the applicant will own and operate the facility. In the event the applicant is constructing a facility on purchased land, the applicant is required to show clear legal title to the property on which it will build. In the event the facility will be leased, the landlord, of course, needs the title required to convey rights in the property, but the applicant is further required to show that it has rights to the property for a 20-year term.⁵ The Department properly treated Signature’s Vancouver Behavioral Healthcare Hospital facility as leased (which it indisputably was), and applied the requirements in precisely this manner to assess (a) whether the landlord would have title, and (b) whether the lease ran for a sufficient term, commensurate with the applicable planning horizon. Signature failed to meet its burden. While five years is sufficient for a dialysis facility, a five-year lease does not establish sufficient control in favor of a hospital applicant, and Signature’s application was properly rejected for this reason. There is no dispute as to the dispositive facts and there was no error.

⁵ Signature cites to the deposition of Bart Eggen as supporting its argument that a compliant lease was unnecessary. Mr. Eggen was not asked about the facts of this case, but whether in the abstract site control can be satisfied by an applicant in different ways. Ms. Nidermayer *was* asked about the application of the requirements to different scenarios and explained what would be required in the case of a leased facility.

2. Signature did not submit a lease showing all costs.

Even if the Court were to disregard the form of the various legal entities involved and instead treat Signature’s project as one giant undertaking by “Dr. Kim” for purposes of site control, this fiction would not save the application. In the evaluation, the Program explained that “[b]ased on the omission of the costs identified in the lease agreement, the department concludes that the agreement is not an acceptable draft agreement.” CP 3690. The Program specifically noted that without a rent term, the lease costs “cannot be substantiated in the lease agreement.” *Id.* The Presiding Officer likewise concluded that Signature did not provide a compliant lease or otherwise account for adjustments described in the lease. CP 1545 (¶ 2.10). The Review Officer reached the same conclusion: “[T]here is no genuine issue of material fact regarding Signature’s failure to provide a complete lease as required under WAC 246-310-220(2) to enable a determination of the reasonableness of the project’s costs.” CP 1676.⁶

Again, there is no dispute: Signature submitted an unsigned, blank “Facility Lease and Security Agreement” with no financial terms. CP

⁶ The form of the lease is critical, because approval of a CN is typically conditioned upon execution of the form of lease provided to the Department (as the award to Springstone was so conditioned in this case). CP 3653 (conditioning Springstone’s CN on execution of agreement “consistent with the draft agreement provided in the application”).

2202-2247. The lease does not set the rent, or even a methodology for calculation the rent, CP 2212 (§3.2.1), and provides that the Tenant must pay all expenses of operation—including “repayments of *principal indebtedness and interest required to be paid to any Landlord’s Lender* . . . as a result of any borrowings secured by the accounts receivable of the Facility . . .” *Id.*, § 3.2.2 (emphasis added). The evidence in the record is that the Landlord will be paying more than \$1.4 million dollars a year in principal and interest to its lender each year for 25 years, CP 2120 (amortization table), a significant expense that will apparently be added onto the unknown rent that would be set at some point in the future—part of an unknown “rental amount [that would] fluctuate monthly and/or annually.” CP 1676 (§ 3.16).

Signature was asked directly to provide a “copy” of its lease that “identifies all costs associated with the agreement.” CP 2196. It did not do so during the application process. The facts were undisputed. The Department was unable to evaluate financial feasibility, WAC 246-310-220, and the application failed as a result. Summary judgment was properly entered on the issue, which is a separate and independent grounds for denial of Signature’s application.

D. Signature, Not the Department, is Responsible for the Failings In Its Application

Given the deficiencies in its application and its failure to respond to direct screening questions, Signature attempts to shift blame to the Program, suggesting that the Program was required to give it a third or fourth chance to submit a compliant application. Signature argues that enforcing the well-known site control and feasibility requirements in Clark County was “arbitrary and capricious,” and claims that the Final Order was somehow inconsistent with subsequent actions on applications in Pierce and Spokane counties. Signature’s argument fails as both a matter of procedure and substance.

In entering the Final Order, the Department ruled that the events in other counties cited by Signature took place *after* the September 23, 2015 date of the Program’s evaluation in this case, and that all are outside of the relevant “snapshot” in time, making them inadmissible. CP 1675 (¶ 3.14 at n.20). The ruling was proper and well within the Department’s discretion. *University of Washington*, 164 Wn.2d at 104 (“Requiring the health law judge to admit evidence created long after this period of time would undermine the statutory objective of expeditious decision making and prevent meaningful public input on that evidence.”). Signature offers

no evidence of abuse, and does not even acknowledge the appropriate standard of review for the Department's ruling on the scope of the record.

Beyond the fact that the evidence was correctly excluded, the claim that the Department acted "arbitrarily and capriciously," or that it awarded hospital CNs to others who submitted blank five-year leases is patently untrue.⁷ The site control requirements in the published hospital application form have not changed. The requirement that applicants supply a draft lease that identifies all tenancy costs is not new, and was *explicitly* requested of Signature in screening. There is no proof that any decision of the Department was "unreasoning action, without consideration and in disregard of facts or circumstances," *State ex rel. Lopez-Pacheco v. Jones*, 66 Wn.2d 199, 201 (1965), and certainly no such evidence related to the case on appeal. Signature's suggestions that the Program must make screening requests in perpetuity, and that it must declare a pivotal unresolved issue in order to correct errors in an application, are both nonsensical and antithetical to the timelines for review. There is no legal support for these arguments, and adopting them would have catastrophic consequences for the timely and orderly

⁷ In support of its arguments, Signature cites to its *own argument* below (CP 176-177, 530-532), which proves nothing. Signature mischaracterizes the Pierce decision, a case in which the applicant Alliance *owned* the space in which the hospital was to operate and it *owned* the hospital itself. CP 1719. Signature's discussion of proceedings in Spokane is simply off point.

disposition of CN applications, effectively placing the burden on the Department to craft compliant applications. Signature—not the Department—failed to comply with the CN laws, and its application was denied as a result.

E. The Department Properly Concluded That Springstone’s Project Met the Criteria for Issuance of a Certificate of Need

In support of its motion for summary judgment, Springstone submitted sworn testimony that its submissions to the Program accurately described its Clark County project. The testimony of Jill Force, Springstone’s General Counsel and Chief Administrative Officer, was that the application materials fairly and accurately described its proposed project, including the expected operation and performance of the facility, as well the financial performance of Springstone and the availability of capital sufficient to fund the project. *See* CP 324-325, CP 1464-1465. The Department concluded that the Springstone submissions authenticated by Ms. Force presented a project that met all of the criteria for issuance of a CN. Signature—which elected not to depose any Springstone witnesses—presented no contrary evidence, but instead attacked (and attacks) Springstone’s application based on speculation and argument of counsel, a stratagem that was properly rejected by the Department. *Seven*

Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13 (1986)

(speculation is not sufficient to resist summary judgment).

1. Signature’s new assertion that Springstone made “misrepresentations” concerning the applicant is baseless.

At pages 30-33 of its brief, Signature makes a rambling argument that “WCAS, Springstone, LLC and Springstone, Inc. should have been considered applicants under WAC 25[sic]-310-010(6),” and that “[a]nother review by the Department of *all* applicants as defined by agency rule is required.” (Emphasis in original.) Signature suggests that it has a hunch that such a review would turn up something concerning the “parent financials” and “onerous terms being imposed by the venture capital giant, WCAS.” App Brf. at 32. There is no evidence or law cited in support of the argument, because none exists.

Section 246-310-010(6) of the Washington Administrative Code defines an applicant as “(a) Any person proposing to engage in any undertaking subject to review under chapter 70.38 RCW; or (b) Any person or individual with a ten percent or greater financial interest in a partnership or corporation or other comparable legal entity engaging in any undertaking subject to review under chapter 70.38 RCW.” In the case of Springstone, the party engaging in the undertaking is Rainier Springs, LLC, and the owner of Rainier Springs, LLC is Springstone, LLC.

There were no other “applicants,” but expanding the definition as proposed by Signature would make no difference in any event.

Signature’s argument is unsubstantiated speculation, and does not provide a basis to change the Department’s conclusion that the project presented by Springstone met the criteria for issuance of a CN.

2. Springstone did not apply for “chemical dependency” beds.

Springstone applied for and was granted a certificate of need to build and operate a behavioral health hospital with 72 beds, not a facility with some specific complement of sub-categories of beds. Springstone’s intentions were verified by sworn testimony in the evidentiary record. CP 1465. The Department found that “[a]ll the beds would be licensed as psychiatric beds and treat patients with dual diagnoses or co-occurring disorders,” and that “[a] complete review of Springstone’s project shows the application was for 72 psychiatric beds and not a 48-bed psychiatric hospital with a 24-bed chemical dependency facility.” CP 1653 (§ 2.12) and 1655 (§ 2.16). Signature’s argument to the contrary is unsubstantiated and was properly rejected by the Department.

3. Springstone’s project is financially feasible.

a. The Department correctly assessed the financial feasibility of Springstone’s proposed project.

In another odd challenge to Springstone’s application, Signature suggests that Department should have evaluated the “feasibility” of “Springstone, LLC” rather than *the project*—a new psychiatric hospital—for which a certificate of need was being sought. Sig. Brf at 35-40. The argument is flatly contrary to the law. Section 246-310-220 of Washington Administrative Code provides:

The determination of *financial feasibility* of a *project* shall be based on 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.

(3) The *project* can be appropriately financed.

(Emphasis added.) Just as with Signature’s application, the Program properly evaluated the feasibility of *the project*, not the “feasibility” of Springstone, LLC, Signature Healthcare Services, LLC or, for that matter, Dr. Kim or the bank that was loaning money for construction of the

hospital. There is no dispute that the Rainier Springs hospital (whose projections were far more conservative than those of Signature) is feasible in every sense of the word, and the Department so found. CP 1680 (¶ 3.25). Signature cites no authority for the proposition that the Department is required to delve into the “feasibility” of every entity that funds or is affiliated with a project, or what that even means. There was ample, uncontradicted evidence that Springstone’s project would be well-funded and financially successful once it opened, CP 2490-2491, 2583-2587, 2748, and there is no basis upon which the Court can or should substitute its judgment for that of the agency.

b. Signature’s wild speculation about the intentions of Welsh, Carson is irrelevant.

Signature also devotes several pages of its brief to a free-ranging, hypothetical discussion about why the Department should have explored the ways in which future decisions by one of Springstone’s investors, Welsh, Carson, could result in the “destabilization of Springstone . . . and a breakdown in the proposed Springstone project.” Sig. Brf at 37. The argument is apparently that because “Springstone is strongly dependent on WCAS for most its equity and capital,” Springstone’s very existence may be imperiled by a capricious decision by one of its owners, which it disparagingly refers to as “a venture capital firm.” *Id.*

This is yet another hypocritical argument that is constructed out of whole cloth: According to Signature, Dr. Kim is the *only* person with an interest in Signature, and Signature is *entirely dependent* on Dr. Kim (and the money he borrows from banks) *for all of its equity and capital*. The “terms” on which Dr. Kim invests in Signature were never disclosed, and unlike Welsh, Carson, Dr. Kim can implement a “liquidation or exit event” whenever he wants. *Signature literally exists at the pleasure of Dr. Kim*, an individual who is now in his seventies or eighties. Signature, not Springstone, is the party that should be worried about an abrupt and unexpected “exit event.”

Ultimately, however, it is simply beyond the purview of the Department (or this Court) to predict what decisions will be made by Dr. Kim (or the beneficiaries of his estate), Welsh, Carson, or anyone else in the future. The record contains uncontradicted proof that Welsh, Carson, a company with more than \$3 billion in assets, is committed to funding Springstone’s project. CP 2744, 2748. Signature’s wild speculation that an investor in the Rainier Springs project would self-destructively turn on the project makes no sense, and is not the basis for a challenge to a CN in any event.

4. Springstone demonstrated site control.

Lastly, at pages 40 and 41 of its brief, Signature makes a truncated argument that Springstone failed to demonstrate site control because its lease included renewals at “fair market value,” arguing a false equivalence to its own failure to provide a lease with financial terms. Once again, Signature fails to understand the deficits in its application, and the distinction between site control and feasibility.

The reason that a known and enforceable rent term is required at the outset (and the reason the Program specifically asked Signature for a lease that included “all costs associated with the agreement”) is to evaluate the *financial feasibility* of the project, not site control. The Department’s standard metric of feasibility is an analysis of whether the project will cover its costs by its third full year of operation. *See* CP 1679 (¶ 3.23). Without knowing that the landlord of a substantial hospital facility has committed to the rent, it is impossible to assess feasibility. The Department clearly explained the distinction in the Final Order. *Id.*

As long as an applicant has contractual rights to the hospital facility for a 20-year term (which is what the two five-year extension options assure to Rainier Springs), neither the landlord nor the tenant have to commit to specific financial terms ten or twenty years out. An agreement to reset rent at a date in the future is a binding lease term. *See*

U.S. v. 300 Units of Rentable Housing, Located on Approximately 57.81 Acres of Eielson Air Force Base, 668 F.3d 1119, 1123 (9th Cir. 2012) (“Where a contract provides a practicable method for establishing the amount of rent in the event the parties cannot themselves agree, the option is enforceable.”); CP 3392-3393 (detailed methodology in Springstone lease for setting rent). An agreement that includes no rent term at inception (or, in the case of Signature, the failure to agree to anything at all) precludes a meaningful evaluation of feasibility. Springstone’s lease demonstrates both control for 20 years and the feasibility of its project. Signature’s shows neither.

V. CONCLUSION

Signature fails to meet its burden of showing an error of law or a lack of evidence supporting the Department’s Final Order. The Department’s decision to award a certificate of need to Springstone was both thoughtful and well-supported by the evidence in the administrative record. The deficiencies in Signature’s application were manifest and indisputable, and Signature failed to come forward with any evidence that Springstone’s project was not feasible or otherwise failed to meet the four criteria for issuance of CN. The 72 psychiatric beds that Springstone will provide to the Clark County community are desperately needed, and it is long past time to put Signature’s objections to rest.

RESPECTFULLY SUBMITTED this 16th day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2017, I caused the foregoing to be delivered to the following as indicated:

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