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No. 52393-1-II

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

HERITAGE GROVE, PRESTIGE CARE, INC., CARE CENTER (YAKIMA), INC. AND YAKIMA VALLEY VENTURES, LLC,

Appellants,

v.

DEPARTMENT OF HEALTH, STATE OF WASHINGTON, SELAH CARE AND REHABILITATION, LANDMARK CARE AND REHABILITATION, EMERALD CARE, GOOD SAMARITAN HEALTH CARE CENTER, WILLOW SPRINGS CARE AND REHABILITATION, CRESCENT HEALTH CARE, INC., AND SUMMITVIEW HEALTHCARE CENTER,

Appellees.

OPENING BRIEF OF APPELLANT

RYAN, SWANSON & CLEVELAND, PLLC
Thomas H. Grimm, WSBA #3853
Attorneys for Appellants
1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
Telephone: (206) 464-4224
Facsimile: (206) 583-0359
grimm@ryanlaw.com

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I. INTRODUCTION

This case requires the Court to apply RCW 70.38.115(13)(b) to two of the four criteria used by the Department of Health to review applications for new nursing homes. Ordinarily the review would include WAC 246-310-210 (Need), WAC 246-310-220 (Financial Feasibility) WAC 246-310-230 (Structure and Process of Care) and WAC 246-310-240 (Cost Containment. However, Appellant qualified as a former nursing home that "banked" its bed rights upon closure of the facility, and the review of its application was limited to the last three criteria, because in such a review RCW 70.38.115(13)(b) requires that: "…need shall be deemed met."

Nursing home care in Yakima County is presently provided by 11 nursing homes that are over 40 years old and consequently are of a design that was meant to serve residents who are long term care and mostly Medicaid. However, today's medicine and payment systems for hospitals are geared to discharging patients to less acute settings that provide for rehabilitation and early discharge to home or assisted living facilities.

Appellant Heritage Grove ("Appellant") is a non-profit corporation based in Yakima that proposed to build a new nursing home designed specifically to serve rehabilitation patients. It differs from the older, long-term care nursing homes of Yakima County, because of the proposed higher intensity of care to rehabilitation patients and lack of financial dependence upon Medicaid for the bulk of its patients and the fact that it will new and designed to current standards. It is intended to serve

primarily the short-term, rehabilitation patients that are mostly supported by Medicare and managed care organizations, and less so the long-term residents supported by Medicaid.

This case involves two of the criteria used by the Department of Health to review proposed new health care facilities. Chapter 246-310 "establishes four criteria for evaluating CON applications: (1) (1) need, WAC 246–310–210; (2) financial feasibility, WAC 246–310–220; (3) structure and process of care, WAC 246–310–230; and (4) cost containment, WAC 246–310–240. *DaVita, Inc. v. Department of Health*, 137 Wash.App. 174, 178, 151 P.3d 1095 (2007). Because Heritage Grove reserved its rights to obtain a CN based upon its nursing home beds when it "banked" them upon closing its facility in Yakima, this new project seeks to replace the same number of beds in Yakima County.

On August 3, 2015 the Department issued a Certificate of Need ("CN") to Appellant, based upon its July 15, 2015 Evaluation and Decision finding that the Appellant's application met all the applicable criteria. And acceptance by Appellant of conditions that will have to be met.

The CN was opposed by Appellee Nursing Homes ("Nursing Homes") which appealed the grant, mostly on issues related to need, to a three-day hearing before a Health Law Judge (Presiding Officer), who confirmed in an Initial Decision that all of the applicable CN criteria were met.

The Nursing Homes appealed again for review by a Department

Review Officer. Her Findings of Fact, Conclusions of Law and Final Order ("Final Order") reversed the Department's issuance of the CN but rejected all of the challenges of the Nursing Homes to the CN grant, except for one, "that the payor mix proposed by Heritage Grove is unrealistic and not supported by evidence in the record relevant to Yakima County." (Final Order, AR 2448 – 2449) This statement is based upon the assumption in Finding of Fact (FF) 2.20 that Appellant's project will in fact have a Medicaid census equal to the 2013 county-wide average Medicaid census in the Nursing Homes, conclusions about Heritage Grove' financial feasibility using the high average Medicaid census as a new review criterion, and assumption that the county-wide average Medicaid census will affect the numbers of residents that the Appellant's rehabilitation facility will have.

There is no evidence in the record that Appellant's new rehabilitation facility will have non-rehabilitation residents (Medicaid) in the kind of numbers that the existing, old Yakima county facilities do. The record supports that the more rehabilitation residents a facility has, the fewer Medicaid residents it will attract, rehabilitation facilities have a low Medicaid census, and that there is no review standard that requires that a certain number of Medicaid residents must be incorporated into the applicant's financial projections. Nevertheless, the Final Order rejected the financial feasibility of the Appellant's project based upon a conclusion of law in FF 2.20, that the project was not financially feasible in light of the countywide Medicaid census at the existing Yakima County nursing

homes, which was 69% in 2013.

Appellant projected that its Medicaid census would be 25% of its residents, based upon the type of facility that was proposed and DSHS data on two similar facilities built within three years of the application. Evidence from the Nursing Homes is that they expected the Appellant's project to earn every dollar that it projected in its application financials, which show that the project will be profitable by the end of the second year of operation. Appellant projected that number would be $671,632.00 by the second year of operation and, therefore, financially feasible under WAC 246-310-220.

While there are many issues that are discussed below, the two most basic questions are: (1) whether substantial evidence establishes that the Heritage Grove payor mix projections are "realistic" and (2) whether the financial projections are supported by substantial evidence in the record.

The Final Order is not based upon substantial evidence in the record, the DOH CN review standards in chapter 246-310, WAC, the Administrative Procedure Act (chapter 34.05, RCW) and the past interpretations by the DOH of the statute and regulations in this special kind of review.

II. ASSIGNMENTS OF ERROR

A. RAP 10.3 (a)(4) – Assignments of Trial Court Error[1]

[1] Assignments of Error 1 through 5 in this section are also discussed in connection with the assignments of error in the Final Order, listed below. Assignment No. 6 is a new issue raised by the Department before the Superior Court.

1. The Court erred in upholding the Findings of Fact, Conclusions of Law and Final Order ("Final Order").

   Issue: Does the Superior Court's Order dismissing Appellant's Petition for Judicial Review meet the review requirements of RCW 34.05.574(1)?

2. The Superior Court erred in upholding the Final Order because substantial evidence in the Administrative Record does not support the Final Order finding (actually, conclusion of law) in FF 2.20 that the applicant did not meet the financial feasibility criteria in WAC 246-310-220 (CP 1046, ll. 3-14).

   Issue: Is there substantial evidence to support a finding that all of the review criteria in WAC 246-310-220(1), (2) and (3) were met?

3. The Court erred in rejecting (*Id.*) that the Final Order established and applied a new legal standard, in addition to the three sub-criteria in WAC 246-310-220, for review of financial feasibility.

   Issue: Did the Final Order create a new criterion and rule for determining whether the Appellant's proposed new nursing home is financially feasible?

   Issue: Does use of the new criterion violate the Administrative Procedure Act because it was not adopted pursuant to the WAPA's rule-making procedures?

4. The Court erred by upholding FF 2.20 and 2.23, because they are arbitrary and capricious, contrary to law and ignore the Program's normal review methodology in favor of the new legal standard challenged in Assignment No. 4 above.

   Issue: Are FF 2.20 and 2.23 unlawful conclusions of law that deviate from the Department's methodology for determining the financial feasibility of a project?

5. The Court failed to hold that FF Nos. 2.20, 2.23, 2.41 and 2.43 contain legal conclusions that are erroneous under WAC 246-310-220 and 246-310-240, and are contrary to uncontroverted substantial evidence in the record.

   Issue: Does the record establish that the Appellant's assumptions of the numbers of residents of each payor type were reasonable based upon the type of Appellant's facility, experience at other facilities of the same type, and the concession by the Appellee Nursing Homes that the facility would achieve its forecasted financial performance?

6. The Court erred in holding that RCW 70.38.115(13)(b) renders the right of Appellant to its issued CN was barred by the doctrine of mootness.

   Issue: Does the reviewing Court have the authority to grant relief under RCW 34.05.575(1) and RCW 34.05.575 (4)?

B. RAP 10.3 (h) – Assignment of Errors in the Agency Final Order

1. **Findings Challenged under RCW 34.05.570(3)(e) and (i):**

a. The following statement at AR 2449 is without basis in and contrary to substantial evidence in the Record:

> "the payor mix proposed by Heritage Grove is unrealistic and not supported by evidence in the record relevant to Yakima County:"

Issue: Is the payor mix used in the Appellant's financial projections in its application supported by substantial evidence in the record?

b. Final Order in FF 2.20 (AR 2465-66) errs in finding

> "Thus, the record contains no evidence of whether Heritage grove could satisfy the financial feasibility criteria in light of the historic (69 percent) Medicaid occupancy rate in Yakima County, or even the reduced number (60 percent) as asked by Program in the screening questions." (emphasis added; AR 2465 – 2466)

Issue: Does substantial evidence support the Program's evaluation that Heritage Grove is financially feasible under the established criteria of WAC 246-310-220?

c. FF 2.20 also errs by deviating from the applicable review criteria for financial feasibility in favor of a new standard not adopted in accord with the rule-making procedures of the WAPA.

Issue: Has the Final Order adopted a new rule for financial feasibility in addition to the Department's sole criterion for meeting the requirement of WAC 246-310-220(1) that the project must be profitable by the end of the third year of operation, as shown in the applicant's financial projections?

d. The Final Order errs in FF 2.23, both legally and factually. The bulk of FF 2.23 (AR 2466) is actually a conclusion of law and erroneous as to its interpretation of WAC 246-310-090(1)(c). The Application Record has no substantial evidence to support the finding.

Issue: Are the screening questions upon which this finding is based and Appellant's answers outside the legally permissible scope of inquiry because they relate to the need for the project?

e. The following portion of FF 2.23 is an erroneous conclusion of law and unsupported by substantial evidence:

> "Based upon the Application Record and the testimony at hearing, the Review Officer finds that there is insufficient evidence to determine whether Heritage Grove's projected revenues and expenses are reasonable, the costs of the project will have an unreasonable impact on the costs and charges for health services, and the project can be appropriately financed. As such, Heritage Grove has failed to meet the financial feasibility criteria In WAC 246-310-220."
>
> This finding is also arbitrary and capricious.

Issue: Does the Final Order refuse to consider the substantial evidence in the record of projected financial performance that Heritage Grove is expected to achieve?

f. FF 2.41 errs because it is not a finding of fact but an erroneous conclusion of law of the requirements of the cost containment criteria, WAC 246-310-240.

Issue: Does FF 2.41 rely upon the erroneous conclusions of law as to financial feasibility in FF

2.20 and 2.23 and fail to analyze the sub-criterion of WAC 246-310-240(1)?

g. FF 2.42 errs by arbitrarily and capriciously ignoring substantial evidence of the costs, scope, methods of construction and energy conservation are reasonable.

Issue: Does FF 2.42's total reliance on the Final Order's conclusions as to financial feasibility in FF 2.20 and 2.23 and refusal to find facts related to WAC 246-310-240(2), constitute error of law and arbitrary and capricious fact finding?

C. Final Order Conclusions of Law Challenged under RCW 34.05.570(3)(b), RCW 34.05.570(3)(d), RCW 34.05.570(3)(f), RCW 34.05.570(3)(g) and RCW 34.05.570(3)(i).

Conclusion of Law No. 3.12 (AR 2480). Conclusion 3.12 errs in concluding that WAC 246-310-220 was not met, because the findings in FF 2.20 and 2.23 challenged by this appeal are unlawful as conclusions of law, speculative and unsupported by substantial evidence in the record.

Issue: Are the payor mix projections included in the Heritage Grove pro forma financials reasonable based upon substantial evidence in the record because the project is a designed to serve short-term, post-acute rehabilitation residents, primarily supported by Medicare?

Issue: Is the conclusion in CL 3.12 also arbitrary and capricious, because it fails to consider the evidence of financial feasibility under the methods used by the Program to evaluate whether the project will be financially feasible?

Conclusion of Law No. 3.16 (AR 2482). Conclusion 3.16 errs

in concluding that WAC 246-310-240 was not met by the Heritage Grove application.

Issue: Did Conclusion 3.16 fail to analyze and apply the sub-criteria of WAC 246-310-240 when it used the Final Order's findings as to WAC 246-310-220 as determinative of the Cost Containment criterion?

Issue: Does Conclusion 3.16 arbitrarily refuse to consider the substantial evidence established in the Application Record and testimony at the hearing, that Heritage Grove met all three of the sub-criteria of WAC 246-310-240?

The Review Decision and Final Order (AR 2482) errs in reversing the grant of CN #1557 to Heritage Grove.

Issue: Is the Final Order contrary to law and enabling regulations, unsupported by substantial evidence and an unlawful reversal of the grant of CN #1557 to Appellant in violation of RCW 34.05.570(3).

Issue: Must the Final Order be reversed because it violates RCW 34.05.570(3)?

Issue: Is Appellant entitled to have CN #1557 reinstated pursuant to RCW 34.05.574(1) and (4)?

III. STATEMENT OF THE CASE

A. Heritage Grove's CN application is treated differently under the law from usual nursing home applications.

The Heritage Grove CN review is unlike normal nursing home CN reviews because of RCW 70.38.115(13)(b), which "obligates the department to consider the need criteria as met when considering Heritage

Grove's application…." (AR 2448) The need criteria are contained in WAC 246-310-210. Heritage Grove qualified for consideration of its application only under the remaining three criteria, financial feasibility (WAC 246-310-220), structure and process of care (WAC 246-310-230) and cost containment (WAC 246-310-240). Heritage Grove validly reserved its rights to bring back the licensed beds when it closed its prior nursing home. RCW 70.38.115(13)(b); Final Order, AR 2448; (RCW 70.38.115(13)(b) "is clear and unambiguous on its face.")[2] Need is not at issue, nor is structure and process of care, the findings and conclusions as to which are unchallenged.

Heritage Grove gave the requisite notice when it closed its prior facility in 2010. Like the Certificate of Need Program of DOH ("Program") and the Final Order challenged in this case, this Court must consider that the "need for the new facility is deemed met."

B. Chronology of this Appeal

On January 8, 2015, Heritage Grove filed an application with the Certificate of Need Program, Department of Health ("Program") to construct a new 97-bed facility, using the bed rights that it had reserved in 2010. (FF 2.4; AR 2457) On January 30, 2015, the Program sent a letter (AR 2567 -2568) which requested further information before it could

[2] In 2009 Appellant decided to close its nursing home in Yakima but preserved its right to re-establish its operation through the statutory process in RCW 70.38.115(13)(b). Its "bed banking" rights were approved by the DOH on February 16, 2010. FF 2.2 and 2.3 (AR 2457)

declare the Heritage Grove application complete for commencement of formal review. The letter gave the applicant three options: (1) submit supplemental information with request to continue to screen until the information is complete; (2) submit supplemental information with a request to begin review; or (3) submit a written request to review the original application without supplemental information. (AR 2567; FF 2.6, fn. 29, AR 2459) The letter warned that the Program could reserve the right to screen further if the application still was "lacking significant information relating to the review criteria," pursuant to WAC 246-310-090(2)(a). (*Id.*) Heritage Grove chose option No. 2, to submit supplemental information, including responses questions Nos. 9 and 10 as to project rationale. (AR 2569), which it did on February 13, 2015. (receipt date at Program; AR 2570 – 2595).

Program did not find the application, as supplemented by the February 13, 2015 responses, to the screening questions to be incomplete, nor return the application, as required by WAC 246-310-090(2)(b) if the application was incomplete.

On February 19, 2015 Program responded to the February 13 letter and supplemental information from Heritage Grove with a letter to the applicant, stating that the Heritage Grove application had been placed under the regular review schedule beginning on Monday, February 23, 2015, and included a copy of a beginning of review notice of the as required by WAC 246-310-090(2)(f) and 170. AR 2596 - 2599.

The Department requested no further information from Heritage

Grove prior to beginning the formal review process. It then began taking public comment, including comments and letters from the Nursing Home respondents to this appeal before and at the public hearing on April 2, 2015 (AR 2600 - 2725, as well as rebuttal comments from Heritage Grove (AR 3109 – 3122). On July 15, 2015, the Department issued its evaluation of the Heritage Grove application ("Evaluation") and approved it with conditions, which Heritage Grove later accepted. AR 2745 – 2769. CN #1557 was issued on August 3, 2015. (FF 2.8, AR 2460)

On August 24, 2015, the Nursing Home Appellees appealed the grant of a Certificate of Need to Appellant Heritage Grove to build and put into service a new 97-bed skilled nursing facility in Yakima, Washington. FF 2.9. This matter was decided first by a Health Law Judge, or Presiding Officer (the "Initial Decision"), who on May 9, 2017 ruled in favor of the Appellants. (AR 2138 – 2175) The Nursing Homes appealed this ruling to a Review Officer, who as the designate of the Secretary of the Department of Health on August 25, 2017 issued the Final Order (AR 2442 – 2484). The Final Order reverses the Initial Decision based solely upon its findings/conclusion on Financial Feasibility,[3] and denied the Certificate of Need to Appellant Heritage Grove.

The Final Order rejected seven of the eight Appellee Nursing Homes challenges to the Initial Decision. AR 2448. This left only one basic issue, <u>whether the record contains substantial evidence to support the</u>

[3] These findings/conclusions are also the Final Order's basis for the findings and conclusions as to Cost Containment, WAC 246-310-240.

Heritage Grove financial projections, particularly as to the types of residents the new facility is expected to have. See, AR 2448-49.

Moreover, the Final Order based all of its conclusions of law upon the erroneous FF 2.20, 2.23, 2.41 and, 2.42, which then led to conclusions that the Heritage Grove application did not meet the criteria of WAC 246-310-220 and WAC 246-310-240. (CL 3.12, AR 2480; CL 3.16, AR 2482)

Heritage Grove challenges the Final Order, to the extent that its primary basis for reversing the grant of the CN to Heritage Grove is based upon (1) assumption that the Medicaid census of Heritage Grove would approximate the historical county-wide Medicaid census data and have an impact on the financial results of Heritage Grove's project, i.e., that there was not a need for the rehabilitation facility that is proposed by Heritage Grove; (2) RCW 70.38.115(13)(b) prohibits considering need in this review; and (3) the Appellant's project satisfies the criteria by which Program determines financial feasibility (that Heritage Grove would be profitable before the end of the third year of operation), (FF 2.20, fn. 55; AR 2465) and the criteria for containment.

Its conclusion that the financial feasibility criteria of WAC 246-310-220 were not met is erroneous because of (a) the county-wide historical Medicaid average census in all nursing homes is not part of the Program's review standards for financial feasibility, (b) there is no evidence in the Record to support any relationship of the county-average Medicaid occupancy to Heritage Grove's project or its expected financial performance, (c) Appellee Nursing Homes admitted that Heritage Grove

will have revenues as projected in its pro formas, and (d) the pro formas have a reasonable basis in the data found in the DSHS cost reports for similar facilities.

The Final Order based its findings and conclusions about the cost containment criteria of WAC 246-310-240 solely upon its financial feasibility findings FF 2.20 and FF 2.23, challenged below.

Heritage Grove does not contest the Final Order's rejection of all other objections to the grant of the CN by the Program raised by Appellee Nursing Homes in the administrative proceedings.

Finally, Appellant contends that the Superior Court erred in ruling that this appeal is moot, because RCW 34.05.574 (1) and (4) provide great discretion to the Court to fashion a remedy to preserve Appellant's CN rights.

IV. ARGUMENT

A. Principles Applicable to Reviews of CN Decisions.

1. Standard of Review.

Providence Physician Services Co. v. Washington State Department of Health, 196 Wn. 2d 709, 716, 384 P. 3d 658 (2016), summarizes the review standard applied to this case:

> In reviewing an administrative action, we sit in the same position as the superior court and apply the Administrative Procedure Act (APA), chapter 34.05 RCW, standards directly to the agency's administrative record. *Shaw v. Dep't of Ret. Sys*., 193 Wn. App. 122, 128, 371 P.3d 106 (2016). Thus, we do not review the superior court's decision; rather, we examine the agency's final

> order, except to the extent that the review officer adopts the hearing officer's initial order. *See Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015); RCW 34.05.570(3). The Department's decision in a CN case is presumed correct, and the challenger has the burden to overcome that presumption. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 49–50, 239 P.3d 1095 (2010).

The Washington Administrative Procedure Act standards are in RCW 34.05.570(3)

The errors that require a reviewing court to overturn the Agency's Final Order include error of law (.570(3)(b) and (d), findings that are not supported by substantial evidence in light of the whole record (.570(3)(e) and the decision is inconsistent with agency rule or arbitrary and capricious (.570 (g) and (h)).

This court's review is de novo, as held in *Washington State Hosp. Assn.*, 183 Wn.2d 590. 595, 353 P.3d 1285 (2015):

> Our review is de novo because "[i]n reviewing administrative action, this court sits in the same position as the superior court." *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993) (citing *Macey v. Dep't of Emp't Sec.*, 110 Wn.2d 308, 312, 752 P.2d 372 (1988)). We also review questions of statutory interpretation de novo. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003) (citing *City of Pasco v. Pub. Emp't Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992)).

Overlake Hosp. Ass'n v. Depart. Of Health of State of Washington, 170 Wn.2d 43, 49-50, 239 P.3d 1095 (2010) elaborates:

> 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.

The Court reviews factual findings to determine if they are based upon substantial evidence, which is evidence that is sufficient to persuade a rational, fair-minded person that the finding is true. *Karanjah v. Dept. of Social and Health Services*, 199 Wn.App. 903, 914, 401 P.3d 381 (2017).

"A decision is arbitrary and capricious if it is willful and unreasoning and disregards or does not consider the facts and circumstances underlying the decision." *Stewart v. Dep't of Soc. & Health Servs.*, 162 Wn. App. 266, 273, 252 P.3d 920 (2011); *Karanjah*, 199 Wn. App at 925.

2. Applicable Certificate of Need Principles

As held in *Overlake Hospital v. Department of Health*., 148 *supra*, *at* 3-4:

> The Washington Legislature enacted the State Health Planning and Resources Development Act in 1979, creating the certificate of need (CN) program to oversee health care development. The CN program is an office within the Department of Health (Department) designed to effectuate the goals and principles of the Act. In order to establish or expand health care facilities, a provider must obtain a CN."

To obtain a CN, usually the applicant must establish conformity with the criteria found in WAC 246-310-210 (Need), 246-310-220 (Financial Feasibility), 246-310-230 (Structure and Process of Care) and 246-310-240 (Cost Containment). However, unlike every other case that

has reached the appellate courts, this case legally cannot involve the Need criteria, because of RCW 70.38.115(13)(b), which, as noted in the Statement of the Case, deems that the Need criteria "are deemed met" and provides a special review limited to the last three criteria where the applicant for a CN is a former nursing home operator that wishes to establish a new nursing home on the basis of beds that it banked when it shut down its previous operation.

The Final Order ruled that RCW 70.38.115(13)(b) applied to Appellant's application and that the need criteria are deemed met. (Final Order, AR 2446-48; Pre-Hearing Order No. 6, AR 1614-25) WAC 246-31-230 is not at issue in this case, as the Final Order found and held that it was met. (AR 2475) Thus, this case turns on errors of the Final Order as to WAC 246-310-220, financial feasibility, and the application of those errors to the cost containment analysis under WAC 246-310-240.

B. Analysis of Errors in the Final Order

1. <u>The Final Order's un-numbered statement that "the payor mix proposed by Heritage Grove is unrealistic and not supported by evidence in the record relevant to Yakima County" (AR 2449) is refuted by substantial evidence in the Record.</u>[4]

This statement is the basis for the Final Order's decisions on the financial feasibility criterion found in FF 2.20 and 2.23, which also are cited as the basis for the findings and conclusions on cost containment in

[4] Discussion of this issue and the issues related to WAC 246-310-220, financially feasibility, covers the same legal errors in the Final Order and the Superior Court ruling. Accordingly, we will combine them into this section.

FF 2.41 and 2.42.

FF 2.20's statement (AR 2465 – 2466) that:

> "the record contains no evidence of whether Heritage Grove could satisfy the financial feasibility criteria in light of the historic (69 percent) Medicaid occupancy rate in Yakima County, or even the reduced number (60 percent) as asked by the Program in the screening questions."

is unsupported by and is refuted by substantial evidence in the record discussed above and below. (Emphasis added.) If there is any substantial evidence of Heritage Grove's satisfaction of the financial feasibility criteria, the underpinning for all of the Final Order's conclusions evaporates.

WAC 246-310-220 sets forth three criteria for financial feasibility, all three of which were found by Program to have been met by the Appellant's application:[5]

> 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.

FF 2.18 finds that:

> In evaluating this criterion [WAC 246-310-220], Program acknowledged that there are no known recognized standards directing what operating revenues and expenses should be for a

[5] (AR 2754–58)

> project like Heritage Grove. As such, the Program used its experience and expertise to evaluate Heritage Grove's pro forma income statements. Based upon its review, the Program determined, based primarily on information provided by Heritage Grove, that projected revenues and expenses were reasonable, the costs of the project (including any construction costs) would not result in unreasonable impact on the costs and charges for health services, and the project could be reasonably financed.
> (AR 2463-64)

The standard used by Program to determine whether an application meets WAC 246-310-220(1) is whether the projections show that the project is profitable by the third year of operations. (FF 2.20, fn. 55; AR 2465)

This evidence and the findings are just the beginning of the substantial evidence in the record of the financial feasibility of the Heritage Grove new facility.

2. <u>FF 2.20 (AR 2465-66) errs in finding:</u>

> Thus, t<u>he record contains no evidence</u> of whether Heritage Grove could satisfy the financial feasibility criteria in light of the historic (69 percent) Medicaid occupancy rate in Yakima County, or even the reduced number (60 percent) as asked by Program in the screening questions."

This statement contains several errors and ignores the following evidence and that discussed in subsection 3 below:

(a) There is no evidence in the record of a relationship between the type of care and the Medicaid census percentages at the very old, long-term care facilities serving long-term residents and care at Appellant's

new facility that will concentrate on short-term rehabilitation residents;

(b) The statement assumes that the county-wide Medicaid census average for the existing eleven facilities is a standard that applies in CN reviews, but there is no evidence that it is such a standard or that Program uses it to assess the application's financial feasibility. The statement ignores the testimony of Program's analyst that no such standard is used in the Department's reviews. (Bob Russell, TR 775:15 – 783:4; AR 4859 – 60). The only evidence is that an applicant does not have to pledge to take any particular number of Medicaid or other payor resident. Conspicuously absent is any evidence that the Department has an established standard requiring financial projections to be based upon county-wide average Medicaid census.

FF 2.16 finds that "there are no [CN review] criteria regarding an applicant's fair share of Medicaid days and the criterion does not require an applicant to project a particular Medicare-Medicaid patient ratios in order to meet the criterion for adequate access [in WAC 246-310-210(2)]." This means that an applicant can structure its project to the type of facility it wants and the types of residents that it chooses to serve.

(c) The statement ignores the evidence that the two other facilities of the same kind and built in the last three years have experienced low percentages of Medicaid census, 27% and 30% respectively (AR 2754; FF 2.19, AR 2464); and

(d) The type of facility that Heritage Grove proposes and how it differs from the older to very old facilities in Yakima County now is

found in the application, AR 2497–2498, and the testimony of David Henderson, the President and chief operating Officer of Prestige Care, Inc. and Prestige Senior Living. (AR 2541). The unique characteristics of the proposed facility include: (1) architecture designed to fit into the style of the Yakima community; (2) fifty-five private rooms attractive to baby boomers; (3) forty two-bedroom suites, with each suite having its own window; (4) two specialty rooms with bariatric lift equipment for movement of residents from the bed to the bathroom or a wheelchair; and (5) piped in oxygen and a safe storage area for the oxygen supply. (Henderson, AR 4744 – 4745; Application AR 2499-2500).

3. Substantial evidence supports the Program's Evaluation that all three of the sub-criteria of WAC 246-310-220 were met.

Contrary to FF 2.20's statement (AR 2465) that there is "no evidence" of financial feasibility of the Heritage Grove project, the only substantial evidence in the record on financial feasibility mandates that compliance with the regulation be determined:

(1) the new facility was not going to be an ordinary nursing home but a rehabilitation center for post-acute (post-hospital) residents that would primarily have shorter stays, AR 2710; AR 2497-98,

(2) the location is 1.7 miles from Yakima Memorial Hospital and 3.3 miles from Yakima Regional Hospital, and will be an attractive, state-of-the-art facility in demand by the hospitals for rehabilitating their discharges. (AR 2497 – 98).

(3) Medicare would be the primary payor source for the new facility's residents. (FF 2.5, AR 2458) Almost all of the facility's revenues would be from Medicare, Managed care and private pay; (AR 2512)

(4) Medicare and other government and managed care payment rates are much higher than Medicaid. (FF 2.7; AR 2458 – 59) Consequently, the new project is expected to have revenues as projected;

(5) In preparing the application's financial projections Mr. Ulrich drew upon data from his "dozens and dozens of databases on everything from Medicaid cost report data in Washington going back to the 90's to Medicare cost report databases." (TR 537-38; AR 4621-22) Schedule G of the Medicaid cost reports is the equivalent of profit and loss statement. (TR 538: ll. 14-25; AR 4622);

(6) The Program's Evaluation of the financial application relies upon the projections in the application because (1) the requirement of RCW 70.38.115(13)(b) that need was deemed met prohibited Mr. Russell from using the normal analytical tool for financial feasibility based upon the need data; and (2) Mr. Russell accepted the assumptions for the projections based upon the applicant's "reasonably good response" to Screening Question No. 5 and the attestation of the applicant that the data was "reasonably accurate" and "could be used for the purpose of the application" in the review. (TR 776: ll. 14-20; AR 4860);

(7) Appellant did not expect Medicaid occupancy greater than 25% (FF 2.7; AR 2460), based upon Mr. Ulrich's expertise and

experience, the nature of the facility serving primarily short-term Medicare resident, and the actual experience of the two similar facilities Heritage Grove is modeled after,

(8) Heritage Grove's financial projections were conservative because the census projection (AR 2742) shows that the numbers of patients that Heritage Grove will serve (Medicare and Medicare Advantage) grow steadily, increasing the profitability already projected to be $670, showed profitability by the end of the second year of operation;

(9) Mr. David Henderson, who was involved with Mr. Ulrich to prepare the financial projections, testified that if the project were to experience higher Medicaid census that expected, the additional patient days in the Medicaid payer source would increase the total number Medicaid patient days. "It would increase [the project's] occupancy rate from 85 [percent] to some number above that and it would actually make the facility more profitable." (TR 696; AR 4780)

(10) *the Nursing Home Appellees' main representative and expert, Norman Hyatt, conceded that Heritage Grove would have $11,052,000 in revenues annually, the same number (rounded) found in Heritage Grove's projections* (TR 453: ll. 3 – 8; AR 3532), which results in $671,632 in net profit in the second year of operation (AR 3543)[6], and

(11) the Program's expert accepted as reasonable the projections

[6] At the public hearing on the Heritage Grove application, another party among the Nursing Home Appellees opposing the application, Chris Bosworth (Willow Springs), also conceded that Heritage Grove would have $11,051,901 in revenue annually. (AR 2676 -2680) See Appendix A.

and financial results. The Application met the financial feasibility standard of being profitable by the end of the third year of operation.

4. The average Medicaid occupancy percentage at the existing facilities is irrelevant to review of Appellant's application.

The new facility is designed to be state-of-the art and to serve the increasing numbers of post-hospital residents, who require short-term rehabilitation services, often supported by Medicare. (Application, AR 2491–92) The Medicaid average census at existing facilities that bear no resemblance to the proposed facility in terms of age, structure, specialty care to be provided and length of stay of rehabilitation patients sheds no "light" on what is to be expected at the new facility. Heritage Grove's new facility will serve short-term, rehabilitation patients, while the existing facilities long term residents, many supported by Medicaid.

The project rationale is further elaborated in Appellant's answer No. 5 to the Program's screening questions, that it was "designed to focus on the emergent post-acute, shorter stay market" and that it would differ from most of the other facilities in Yakima County, because of their advanced age[7] and that they were built upon the old "long term model." (AR 2571). This description was uncontested but ignored in the Final Order, describing the Application and the answers to the screening questions as "assertions." This arbitrarily ignores the finding of FF 2.19

[7]"The newest facility is more than 15 years old; the oldest facility is 55.7 years old [as of 2015]. Of the 11 operating nursing homes, all but one is more than 30 years of age, with 8 of those more than 40 years old. (AR 2498)

that the two most similar facilities built in the last three years, Manor Care Lacey and Manor Care Salmon Creek had Medicaid occupancy percentages of 27% and 30% respectively (AR 2464).

5. The Heritage Grove Application met the Department's sole criterion for meeting the requirement of WAC 246-310-220(1), that the project must be profitable by the end of the third year of operation, as shown in the applicant's financial projections.

The Department's review standard for cost and revenue projections is whether the applicant's pro forma projections demonstrate profitability by the end of the third year of operation. (TR 777: ll. 13-20; AR 4861) Program found that the Financial Feasibility criteria were all met, and specifically, that "Heritage Grove's revenue and expenses financial pro forma shows the project is financially feasible. Based upon the source information reviewed, the projected revenue and expenses expected for Heritage Grove are reasonable." (Bob Russell; AR 2757; TR 775:15 – 783:4; AR 4859 – 60) FF 2.20 states that this evidence does not exist when it says there is no evidence of financial feasibility.

Mr. Russell further testified that he relied upon the financial information[8] submitted by Heritage Grove and did not do independent analysis of occupancy as part of his review because (1) there are no

[8]We have filed separately an Appendix containing excerpts from the voluminous record, for the convenience of the Court. See Excerpt from the record, Appendix Section A, containing Projections of Days by year and payer type (AR 2553); profit and loss projections by year (AR 3531 – 3543)); loan information (AR 3544 – 3546); and financial ratios (AR 3547).

criteria that the Department uses "that would relate to a fair share[9] Medicare – Medicaid days." (TR 770:23-25, 771:1-2 (AR 4854-55); FF 2.16 (AR 2463; "…the criterion [WAC 246-310-220] does not require an applicant to project a particular Medicare-Medicaid patient ratio in order to meet the requirement for adequate access."); and (2) he was prohibited from analyzing need in this review and "had no kind of analysis I could use to evaluate these revenue projections." (TR 776: l. 14 – 777:l. 8; AR 4860-61). In other words, Heritage Grove was *not* required to use any particular number of Medicaid days in its application, including financial projections.

6. The Final Order, FF 2.20, errs and violates the Administrative Procedure Act's requirement that the agency must engage in rule-making in order to add criteria to qualifications or a license or permit, such as a CN.

Failor's Pharmacy v. Department of Social and Health Services, 125 Wn.2d 488, 886 P.2d 147 (1994) involved a challenge by three pharmacies to the addition of a new requirement in the DSHS pharmacy payment schedules for prescription drugs for failure to comply with rule-making procedures of the Administrative Procedure Act.

RCW 34.05.328[10] defines what is a "rule" that must go through rule-making, specifically the definition of a "significant legislative rule" in

[9] Mr. Russell testified that this term came from Norm Hyatt, an owner of some of the Appellee Nursing Homes. (TR 770: ll. 21-22;AR 4854) It is not a financial feasibility review standard. (TR 770: ll. 23-25 – 771: ll. 1-2)
[10] 2011 version.

RCW 34.05.328(5)(c)(iii):

> "A "significant legislative rule" is a rule other than a procedural or interpretive rule that . . . (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes significant amendments to, a policy or regulatory program." See also the definition of "rule" in RCW 34.05.010(16).
> [emphasis added]

The Final Order's Medicaid census ruling in this case is a "rule" subject to rule-making because it is an order of general applicability that "establishes, alters or revokes any qualifications or standards for the issuance, suspension or revocations of licenses to pursue any commercial activity, trade or profession." RCW 34.05.010(16). As was held in *Providence Physician's Services Co. v. Washington State Department of Health*, 196 Wn.App. 709, 384 P.3d 658 (2016), relying upon *Failor's Pharmacy*, addition of a qualification to a licensing standard is not an "interpretation" of a statute exempt from rule-making:

> "If, however, an agency adds a new requirement to an already well defined regulation, that requirement will be deemed a rule subject to the formal rule-making procedures." 196 Wn.App at 726.

In *Failor's Pharmacy*, the court held that the added third criterion to the two payment criteria in WAC was an unlawful rule.

Like the DSHS in *Failor's Pharmacy*, the Department of Health in the Final Order has established a new standard for compliance with WAC 246-310-220(1), that the applicant has the burden to show that its project is financially feasible if it remains profitable even if its pro forma financials include Medicaid resident occupancy between sixty and sixty-

nine percent or any other set percentage of Medicaid residents. There is no such existing requirement in any statute or regulation before the Final Order.

Further, the Final Order has mixed need analysis into the WAC 246-310-220(1) financial feasibility criteria, contrary to the mandate of RCW 70.38.115(13)(b) that need be deemed met. Bob Russell explained that because need analysis was barred in this special kind of review, he had no numbers to test the applicant's financial projections and rejected the occupancy numbers submitted by the Selah Respondents and the applicant rebuttal as beyond the permitted inquiries, because need was deemed met in RCW 70.38.115(13)(b) and looking at occupancy figures involves looking at need.[11] See, excerpt of Bob Russell testimony discussed above, **Appendix A, AR 4860 – 4863.**

By requiring a burden of proof on a factor that was not permissible in this review governed by RCW 70.38.115(13)(b), the Final Order has violated both the APA and the statute. There is no question that the Department did not file the rule-making procedures in Part 3 of the APA (RCW 34.05.310 - .395).

As was said in *Failor's Pharmacy*, 125 Wn.2d at 497:

> The remedy for failure to comply with applicable APA rule-making procedures is invalidation of the action.

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[11] The Presiding Officer agreed and refused to allow inquiries by either side as to occupancy and relation to projections. AR 4633

Accordingly, the Final Order is also procedurally invalid and must be reversed.

7. Substantial evidence supports the Program's Evaluation that all three of the sub-criteria of WAC 246-310-220 were met.

FF 2.20's conclusion is also arbitrary and capricious in ignoring the evidence in the record and fails to apply the legal standard of the Department to satisfy the Financial Feasibility criteria. Contrary to FF.2.20's statement (AR 2465) that there is "no evidence" of financial feasibility of the Heritage Grove project, an abundance of substantial evidence in the record, in addition to that cited above, mandates a conclusion of compliance with the regulation.

Bill Ulrich, the C.P.A. and cost-reimbursement expert who prepared the financial projections in the Application, testified that he used data in the Medicaid cost-reporting database for the Medicaid census projections in the Application's financials. That database is a "summation of the submissions of all the Medicaid cost reports by the providers in the State of Washington. (TR 598: ll. 18-20; AR 4682). Mr. Ulrich described how the projections in the application were compiled from data in his databases and the experience of the management company, Prestige Care, at other facilities they managed. They made the best estimates that they could of the projected census to use in the calculations, including the percentages from each payor type, to determine the best revenue estimate

possible.[12] (TR 551: 16 – 555: 18; (AR 4635 – 4639). There is nothing in the Final Order that mentions this careful process in the preparation of the financial projections in the Application.

The statements that Mr. Russell accepted, (1) that the applicant intends for the new facility to serve the post-acute care, shorter stay market, and (2) that the facility will be modeled on two other facilities that have had 27% and 30% Medicaid resident occupancy[13], are not just "assertions" as stated in FF 2.20, but uncontested statements of fact based upon the data reported in Medicaid cost reports by Washington state nursing homes and the analysis by Bill Ulrich, found at TR 554 -55; AR 4638 – 39; AR 2951

FF 2.20 asserts that the evidence of payor mix at the two Manor Care facilities is not relevant to Yakima County. It cites no basis in the record for this statement except the location in different counties. There is no evidence that Yakima County is any different from Clark County (Manor Care Salmon Creek) and Thurston County (Manor Care Lacey) as to the types of patients those facilities have and those Heritage Grove will have. They are the same type of facility and the best available evidence to predict the Heritage Grove expected revenues in the application's financial forecasts, because they serve the same type of residents that Heritage

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[12] These include the "entire Medicaid cost report database," "Medicare databases," and "every facility" in the state of Washington and comprised "a wide variety of data."." TR 552:25 – 553:1-10; AR 4636 37.

[13] Program accepted the payor mix and did not base the Evaluation of the Heritage Grove financial projections upon the county-average Medicaid occupancy numbers.

Grove proposes to serve. There is no review criterion relating to location of comparable facilities to support the Final Order's refusal to consider the Salmon Creek and Lacey evidence, which is arbitrary and capricious.

Other evidence ignored by the Final Order includes:

(1) the new facility was not going to be an ordinary nursing home but a rehabilitation center for post-acute (post-hospital) residents that would primarily have shorter stays, AR 2710; AR 2497-98,

(2) the location of the Heritage Grove project is 1.7 miles from Yakima Memorial Hospital and 3.3 miles from Yakima Regional Hospital, and will be an attractive, state-of-the-art facility in demand by the hospitals for rehabilitating their discharges. (AR 2497 – 98).

(3) Medicare would be the primary payor source for the new facility's residents, (FF 2.5, AR 2458)

(4) Medicare and other government and managed care payment rates are much higher than Medicaid; (FF 2.5; (AR 2458 – 59)

(5) In preparing the application's financial projections Mr. Ulrich drew upon data from his "dozens and dozens of databases on everything from Medicaid cost report data in Washington going back to the 90's to Medicare cost report databases." (TR 537-38; AR 4621-22) Schedule G of the Medicaid cost reports is the equivalent of profit and loss statement. (TR 538: ll. 14-25; AR 4622);

(6) The Program's Evaluation of the financial application relies upon the projections in the application because (1) the requirement of RCW 70.38.115(13)(b) that need was deemed met prohibited Mr. Russell

from using the normal analytical tool for financial feasibility based upon the need data; and (2) Mr. Russell accepted the assumptions for the projections based upon the applicant's "reasonably good response" to Screening Question No. 5 and the attestation of the applicant that the data was "reasonably accurate" and "could be used for the purpose of the application" in the review. (TR 776: ll. 14-20; AR 4860);

(7) Appellant did not expect Medicaid occupancy greater than 25% (FF 2.7; AR 2460), based upon Mr. Ulrich's expertise and experience, the nature of the facility serving primarily short-term Medicare resident, and the actual experience of the two similar facilities Heritage Grove is modeled after,

(8) Heritage Grove's financial projections were conservative because the census projection (AR 2742) shows that the numbers of patients that Heritage Grove will serve (Medicare and Medicare Advantage) grow steadily, increasing the profitability already projected to be $67, showed profitability by the end of the second year of operation;

(9) Mr. David Henderson, who was involved with Mr. Ulrich to prepare the financial projections testified that if the project were to experience higher Medicaid census that expected, the additional patient days in the Medicaid payer source would increase the total number Medicaid patient days. It would increase [the project's] occupancy rate from 85 [percent] to some number above that and it would actually make the facility more profitable." (TR 696; AR 4780)

(10) the Program's expert accepted the projections and financial

results. The Application met the financial feasibility standard of being profitable by the end of the third year of operation. (Evaluation, AR 2756)

8. Reliance on the Screening Question Answer was contrary to WAC 246-310-190(1)(d).

FF 2.20 states that Heritage Grove in answer to No. 7 of the screening questions[14]:

> …did not provide any information tending to show this reduction in net income would still allow the project to be successful.

As a matter of law, *there was no requirement* that Heritage Grove do so, and the question did not ask for revised financial pro formas.

FF 2.6 (AR 2459) quotes two of the screening questions (Nos. 7 and 9) asked in Mr. Russell's January 30, 2015 letter to Heritage Grove. (AR 2567-69) Screening questions are part of the pre-review activities and are to determine if the application is sufficiently complete to begin review. WAC 246-310-190(1)(c). No. 7 is listed under questions related to the Need criteria (AR 2568) and is prohibited by WAC 246-310-190(d), because it is "not prescribed and published as being necessary to a certificate of need application" and prohibited by WAC 246-310-090(1)(d). Information regarding need is prohibited in this application, because "need is deemed met." RCW 70.38.115(13)(b). The question

[14] Question No. 9: "On page 18 of the application, the request to question 6 states that Heritage Grove assumes $0 dollars for capital in the Medicaid rate. Please clarify the impact on the financial pro formas if Heritage Grove would experience Medicaid Occupancy of approximately 60% experienced by the existing nursing homes in Yakima County?" The question was under the category of questions relating to WAC 246-310-210 (Need). AR 2568 – 69.

should not have been asked, and the answer shows up nowhere in Program's Evaluation of the application.

The same principle applies to Question No. 9, the answer to which is central to the FF 2.20 on financial feasibility. The question is found in FF 2.6, AR 2459, and asks the applicant to "clarify the impact of the financial pro formas if Heritage Grove would experience Medicaid occupancy of approximately 60 percent experienced by the existing nursing homes in Yakima County." The question is essentially meaningless, because it asks for speculation that a new facility specially designed for the needs of short-term residents and rehabilitation patients would attract residents identically to the average of facilities that are over 40 years old.[15] That strains credulity.

Because this review could not and did not involve the need criteria, other than Program's expertise and experience there is nothing that Program could use to evaluate the application's financial projections. (TR 776: 22 – 777:8; AR 4860 – 4861; FF 2.18, AR 2463) The Final Order commits the very legal error that Program's Evaluation refused to make – considering need as part of the Financial Feasibility analysis

Program did not speculate as to a higher Medicaid occupancy than what the applicant projected. Instead, it reviewed the record to verify that the projections showed that the facility would be profitable by the end of the third year. Mr. Russell determined that the facility would be profitable

[15] Program did not use this information in the formal review and Evaluation.

before the end of the third year of operation (TR 777: 13 – 20; AR 4861). Footnote 56 in Final Order, to FF 2.20 (AR 2465), acknowledges that, "Generally the applicant needs to show it will generate a profit within the first three years of operation." However, FF 2.20 ignores this evidence and profit of the facility in years 2 and 3 of operation following startup.

As stated in *University of Washington Medical Center v. Wash. State Dep't of Health*, 164 Wn.2d 95, 102, 187 P.3d 243 (2008), "To find an agency's decision to be arbitrary and capricious we [the reviewing court] must conclude that the decision is the result of willful and unreasoning disregard of the facts and circumstances."

The refusal to find and consider uncontested facts is arbitrary and capricious. *Id.*

9. The Final Order errs in FF 2.23, both legally and factually.

FF 2.23 is actually a conclusion of law. It states that indefinite screening questions "were asked but not adequately answered." AR 2466. If we assume that FF 2.23 is referring to the answers to screening questions 7 and 9 in FF 2.6 and the answers partially quoted in FF 2.7, it is incontrovertible that:

(1) The screening questions seek information related to the need criteria that is prohibited by RCW 70.38.115(13)(b) and WAC 246-310-090(1)(d), quoted above. Because the question about effect of an assumed Medicaid occupancy of

60% relates to need and there is no criterion requiring a specific percentage of Medicaid residents to be provided as part of the financial projections, any request for such information at the screening stage is contrary to WAC 246-310-090(1)(d), irrelevant speculation and outside the scope of permissible inquiry;

(2) FF 2.18 finds that "there are no known recognized standards directing what operating revenues and expenses should be for a project like Heritage Grove," so the question regarding "fair share[16]" of Medicaid residents is not a standard for analyzing the applicant's application.

(3) The questions are irrelevant because they relate to the Need criterion and are not within the permissible range of questions that may be asked;

(4) Even if the questions were relevant, the Program analyst accepted the answers as sufficient to begin review (AR 2976) and did the formal review process (AR 2976 - 2979), and the Program has supported his decision. The answers cannot be "inadequate" since the person who posed the questions was satisfied. The Reviewing Officer has demonstrated no expertise or experience on financial

[16] Mr. Russell testified that this term came from one of the letters submitted by the facilities opposing the application at the public hearing and that there are no criteria used by Program relating to it. (TR 770-71; AR 4854-55)

feasibility and has cited no material topic or set of facts in the record to support FF 2.23.

(5) The Reviewing Officer arbitrarily refused to consider the record and testimony, which was based upon actual data reported by nursing homes on their cost reports.

10. FF 2.23 also errs as a conclusion of law as to its interpretation of WAC 246-310-090(1)(c).

WAC 246-310-090(1)(c) requires the Program to screen an application within 15 working days of receipt, to determine whether it is complete. If it is incomplete, the Program must send a notice to the applicant so stating, and "specifically identify the portions of the application where the application has been found to be insufficient and request supplemental information needed to complete the application." The evidence in the record, AR 2947 – 2949 (Request for Supplemental Information) and AR 2976 – 2980 (Notice of Beginning of Review) establishes, and the Finding fails to find, that: (1) the Department did not declare the application incomplete, so the application was deemed complete; and (2) the Program reviewed the application and found that it met all applicable criteria. (AR 2745 - 2769). Further, FF 2.23 ignores the next subsection, WAC 246-310-090(1)(d), which prohibits the department from asking screening questions for supplemental information "of a type not prescribed and published as being necessary to a certificate of need application for the type of project being proposed." Therefore, the finding/conclusion is contrary to law, because WAC 246-310-090(1) does

not support the finding, which is arbitrary and capricious in refusing to consider and incorporate the substantial evidence cited above.

11. FF 2.41 errs because it is not a finding of fact but an erroneous conclusion as to the cost containment criteria in WAC 246-310-240, based upon its reliance upon the erroneous Findings in FF 2.19 – 2.23.

FF 2.41 (AR 2475) states that it is based upon the conclusion of law in FF 2.20 that "Heritage Grove has failed to meet the financial feasibility criteria of WAC 246-310-220." WAC 246-310-240(1) requires the Department to determine if there is a "superior alternative" to the proposed facility in terms of cost, efficiency or effectiveness. FF 2.41 does not do this analysis.

The comment at the end of FF 2.41 that the project "cannot be a viable, let alone best, alternative" completely fails the analysis under the first sub-criterion of WAC 246-310-240 and fails to analyze whether there are:

> "Superior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable."

The Final Order does not mention any alternative, much less any "superior alternative" to the Heritage Grove project. Instead, it applies an entirely different and new standard, that the project must be the "best" alternative. (AR 2475) This standard is not in the regulation and must be considered an unlawful attempt to modify or add to the regulation. *State, Department of Licensing v. Cannon,* 147 Wn.2d 41, 56, 50 P. 3d 627

(2002); *State v. Theissen*, 88 Wn. App. 827, 829, 946 P.2d 1207 (1997).

FF 2.41 fails to find that Heritage Grove has only one alternative to going forward with its project – the do nothing alternative – which would result in the loss of its rights under RCW 70.38.115(13)(b),and the community would not get a new rehab facility close to the Yakima hospitals. (AR 2769) Program found the applicant's reasoning for rejecting the "do nothing" alternative was reasonable and that the first sub-criterion under WAC 246-310-240 was met. (*Id.;* TR 790:1, 9-791: 1.12, AR 4874-5) There is no reasonable alternative to proceeding with the project as proposed.

Consequently, where the applicant is a former licensee that is using its own banked beds, and the only "alternative" for Heritage Grove to bringing the beds out of the banked status through this new facility is to allow the bed banking and use rights to expire, which is no alternative at all.

Program agreed. Mr. Russell could not find any other alternative than to do nothing and rejected the proposal by the Nursing Homes that the Parkview facility could be remodeled. (TR 790-91; AR 4874 – 75) Heritage Grove did not own the facility, and he rejected as unreasonable the idea of remodeling a 40 to 50-year-old building and spending several million dollars when the building was in bad shape, especially since the Parkview facility was further away from the hospitals from whence the expected residents would be admitted. (TR 790 -791; AR 4874-4875).

(2) WAC 246-310-240(2) Construction costs are reasonable.

WAC 246-310-240(2) requires the Department to find that:

> (a) The costs, scope, and methods of construction and energy conservation are reasonable; and
> (b) The project will not have an unreasonable impact on the costs and charges to the public of providing health services by other persons.

The Final Order does not address the facts under either section (a) or (b) of this sub-criterion, finding that there was insufficient evidence because of the findings under WAC 246-310-220, financial feasibility. FF 2.42 (AR 2475). However, that criterion has nothing to do the requirements of WAC 246-310-240 and FF 2.20 made no findings related to construction cost,

Program verified the construction and development cost of $18,665,494[17] and concluded, based upon its experience and expertise, that those costs would not have an unreasonable impact on health services costs. (AR 2757 - 58) FF 2.42 errs because it fails to consider any aspect of construction costs, instead referring to its findings under the financial feasibility criteria of WAC 246-310-220.

C. Analysis of Superior Court Ruling as to Mootness

Appellant's rights to a Certificate of Need and to pursue this appeal are not "moot."

Although the basis for the Superior Court's ruling that the present

[17] The cost estimates were certified by the project contractor and Architect (AR 442-46). Banner Bank committed to financing. (AR 448-56)

appeal is moot is unclear, what is clear is that it is an erroneous conclusions of law. This Court reviews the Final Order, not the Superior Court decision that his appeal is moot. We address it as an issue that RAP 10.3(a)(4) mandates must be specified.

The Department moved the Superior Court for dismissal of this appeal based upon a new interpretation of RCW 70.38.115(13)(b) and that the statute made this case moot. The Superior Court initially denied the motion but included in its Order denying the Appellant's appeal that the appeal had become moot. (CP 1035 - 1050)

"A case is moot if a court can no longer provide effective relief." *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984).

The gist of the Department's motion to dismiss Appellant's Petition for Judicial Review was that the eight-year period for banking beds (bed rights reserved when a nursing home shuts down and closes) has expired and that affects Appellant's appeal rights. Both the interpretation of RCW 70.38.115(13)(b) and the mootness argument are incorrect.

Appellant seeks in this appeal to overturn the Final Order because of its legal errors and to obtain the CN that was granted by the Department on August 3, 2015. The Superior Court's ruling is the Department's claim on p. 7 of its motion, that "no CN to replace Heritage Grove's banked beds has been issued ...." This is wrong factually and does not conform to the Final Order FF 2.8.

FF 2.8 in the Final Order (AR 2771-2774) states as follows:

On August 3, 2015, the Program issued CN #1557 to

> Heritage Grove to construct a 97-bed Skilled Nursing Facility in Yakima County.
>
> [AR 2460; see also AR 2152, FF 1.5 to the same effect]

This finding is fatal to the Department's argument that the eight-year period of bed banking found in RCW 70.38.115(13)(b) prevents relief in this case to Appellant. Appellant received a CN within the eight-year period.

Moreover, RCW 70.38.115(13)(b) has no language that could be construed as saying that all appeals must be exhausted before the end of the bed banking period:

> When an entire nursing home ceases operation, the licensee or any other party who has secured an interest in the beds may reserve his or her interest in the beds for eight years <u>or until a Certificate of Need to replace them is issued, whichever comes first</u>.
> [Emphasis added]

The plain meaning of the statute[18] is that when a Certificate of Need to replace the beds that were banked is issued, bed banking ceases, the eight-year maximum time of bed banking becomes irrelevant, and the rights of the party that banked the beds are governed by the CN and the Administrative Procedure Act.

There cannot be an "expiration" of the right to a CN that has already been granted by the Department because it is in the appeal

[18] The Final Order finds RCW 70.38.115(13)(b) to be "clear and unambiguous on its face." (AR 2448)

process.[19] The appeal process is governed by the WAPA. The Final Order did not deny the CN to Appellant Heritage Grove, it reversed the decision of the presiding officer and took away the certificate of need rights previously granted.

The Superior Court cited no authority that holds that a party that has obtained a CN within the eight years in the statute can lose its CN because the CN was in the WAPA appeals process, nor that the passage of time in appeals affects substantive rights of a party.

The remedies sections of the WAPA preserve the benefits of an appeal to a successful prevailing Appellant. RCW 34.05.574(1) and (4) provide ample authority for correction of the Final Order's errors:

> (1) In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order.
>
> (4) If the court sets aside or modifies agency action or remands the matter to the agency for further proceedings, the court may make any interlocutory order it finds necessary to preserve the interests of the parties and the public, pending further proceedings or agency action. [Emphasis added]

Accordingly, this Court has the authority to reverse the Final Order and order relief that will reinstate Appellant's CN. It can also order the agency to make the reinstatement effective as of the remand of this matter to the

[19] In this case, the period of time in the initial appeal of the grant of the CN was over a year from the time that the record closed. Appellant had no control over the Initial Decision taking that long.

agency, which will give the Appellant a full two years to commence its project and avoid another issue related to the passage of time since August 3, 2015, the original CN issuance date. See, validity period dates in, WAC 246-310-580(1 and (3).

D. Request for Attorney's Fees on Appeal

Appellant requests attorney fees and costs on appeal pursuant to RCW 4.84.350. Appellant believes it is entitled under the EAJA to attorney fees for bringing this appeal because it is a qualified party, it should prevail on appeal, and the Department of Health was not substantially justified in its actions, i.e. the Final Order.

RAP 18.1(a) provides that if "applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses." This is such a request.

This section of the Appellant's brief fulfills the requirements of RAP 18.1(b). The "applicable law" is the Equal Access to Justice Act, RCW 4.84.340 and. 350. Heritage Grove is a not-for profit organization and therefore a "qualified party" as defined in RCW 4.84.340(5).

Because the Court should reverse the decision of the Final Order, the EAJA will make Appellant the prevailing party and the Department

liable to Appellant for payment of the attorney's fees, up to a maximum of $25,000. RCW 4.84.350(1); *Karanjah*, supra, 199 Wn. App. at 197

V. CONCLUSION

For the reasons stated above, the Final Order and the Superior Court ruling that the Appellant's rights are moot are contrary to law in RCW 70.38.115(13)(b), RCW 34.05.375, RCW 34.05.570, RCW 34.05.571 and RCW 34.05.574, WAC 246-310-220 and WAC 246-310-240, and the law related to the doctrine of mootness, unsupported by substantial evidence and an unlawful reversal of the grant of CN #1557 to Appellant in violation of RCW 34.05.570(3). The Final Order must be reversed and CN #1557 reinstated pursuant to RCW 34.05.574(1) and (4), with attorney's fees and costs under the EAJA.

Respectfully submitted this 18th day of January, 2019.

RYAN, SWANSON & CLEVELAND, PLLC

By _____

Thomas H. Grimm, WSBA #3853
Attorneys for Appellants
1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
Telephone: (206) 464-4224
Facsimile: (206) 583-0359
grimm@ryanlaw.com

DECLARATION OF SERVICE

I declare that on this 18th day of January, 2019 I caused to be served the foregoing document on counsel for Respondents, and the named court reporters, as noted, at the following addresses:

Washington State Court of Appeals Division II 950 Broadway, Suite 300 Tacoma, WA. 98402-4454 Fax: 253-593-2806	☐ U.S. Mail ☐ Hand Delivery ☒ E-File [Washington State Appellate Courts' Portal] Facsimile ☐ Federal Express ☐
<u>Attorney for Washington State Program of Health</u> Janis Snoey Office of the Attorney General PO Box 40109 Olympia, WA. 98504-0109 JanisS@atg.wa.gov; AHDOlyEF@atg.wa.gov; brendac1@atg.wa.gov	☐ U.S. Mail ☐ Hand Delivery ☒ E-mail [Per Agreement] Facsimile ☐ Federal Express ☐
<u>Attorneys for Selah Care and Rehabilitation et. al</u> Brian Grimm Luke Rona Perkins Coie LLP 1201 3rd Ave Ste 4900 Seattle, WA 98101-3099 Fax: (206) 359-7785 BGrimm@perkinscoie.com; LRona@perkinscoie.com	☐ U.S. Mail ☐ Hand Delivery ☒ E-mail [Per Agreement] Facsimile ☐ Federal Express ☐

Robert Walker
Dated this 18th day of January, 2019.
Place: Seattle, Washington.

RYAN SWANSON & CLEVELAND PLLC

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Sender Name: THOMAS GRIMM - Email: GRIMM@RYANLAW.COM
Address:
1201 3RD AVE STE 3400
SEATTLE, WA, 98101-3034
Phone: 206-654-2244

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