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NO. 52393-1-II

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

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

Appellants,

v.

DEPARTMENT OF HEALTH, and 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,

Respondents.

**RESPONSE BRIEF OF RESPONDENT
DEPARTMENT OF HEALTH**

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I. INTRODUCTION

The Department of Health (Department) denied the application filed by Heritage Grove, Prestige Care, Inc., Care Center (Yakima), Inc., and Yakima Valley Ventures, LLC (collectively “Heritage”) to obtain a Certificate of Need (CN) to build a new 97-bed nursing home. Heritage’s proposal failed to meet two required criteria: financial feasibility and cost containment.

In its application, Heritage claimed a unique right afforded by RCW 70.38.115(13)(b) to obtain a CN without showing that the community needed the proposed number of nursing home beds. Upon petition for judicial review under the Administrative Procedures Act, the superior court found Heritage’s petition was moot because the right under RCW 70.38.115(13)(b) had expired. The superior court dismissed the case, but before doing so, the court also affirmed the Department’s final order.

The superior court properly concluded the matter is moot and did not abuse its discretion in dismissing it. Heritage Grove’s eight-year right under RCW 70.38.115(13)(b) expired on October 15, 2017, after the Department denied Heritage’s application and Heritage failed to stay the effectiveness of the Department’s final order. When the right expired, Heritage’s application based on the right became void. Heritage must now

file a new CN application and show that Yakima County has need for the beds. Accordingly, this Court should affirm the superior court and dismiss this appeal as moot.

If it does not dismiss for mootness, the Court should affirm the Department's final order. Heritage failed to meet financial feasibility criteria because its revenue projections used an unrealistic Medicaid occupancy rate of 25 percent in a planning area with an actual Medicaid occupancy rate of 69 percent. This appeal hinges on this key fact. The Medicaid reimbursement rate is substantially less than provided by other health care payers such as Medicare and private pay. Therefore, an unrealistic Medicaid occupancy rate inflates revenue projections and the Department cannot determine if the proposed project is financially feasible. Because Heritage failed to show it was financially feasible, Heritage also cannot show that it would help contain the costs of health care in Yakima County. Substantial evidence supports the Department's final order, which is consistent with applicable law and is reasonable, given the facts and circumstances. This Court should affirm.

II. COUNTERSTATEMENT OF THE CASE

A. Certificate of Need Law

Washington state law requires health care providers to apply for and receive a CN from the Department before constructing a new nursing home.

RCW 70.38.105(4); RCW 70.38.025(6). The Department evaluates a CN application against certain criteria, including, but not limited to, whether:

- The population to be served has a need for such services (“need criteria”), RCW 70.38.115(2)(a), WAC 246-310-210;
- The proposal is financially feasible, (“financial feasibility criteria”), RCW 70.38.115(2)(c), WAC 246-310-220; and
- The impact of the project will help contain the cost of health care services in the community (“cost containment criteria”), RCW 70.38.115(2)(c), WAC 246-310-240. One cost containment criterion is a determination that the proposal is the “superior” alternative in terms of cost, efficiency, or effectiveness. WAC 246-310-240(1). Another is that an applicant’s construction costs and energy conservation must be reasonable and will not have an unreasonable public impact. WAC 246-310-240(2).

Following full closure of an existing nursing home, CN law allows a nursing home licensee meeting certain criteria to reserve its number of beds for a time. RCW 70.38.115(13)(b). The licensee then may replace the same number of beds in the same planning area without meeting need criteria—without have to show that the population to be served has need for the beds. RCW 70.38.115(13)(b). The reservation is effective for eight years or until the Department issues a CN for the replacement.

RCW 70.38.115(13)(b) does not exempt the former licensee from any CN criteria other than the need criteria concerning the number of beds.

The Department initially screens an application for completeness and may ask “screening” questions if the analyst finds the application is incomplete. WAC 246-310-090(2)(a). After receiving the first set of screening responses, the Department may continue asking questions unless the applicant exercises its option to end screening with a request to begin formal review. WAC 246-310-090(2)(a)(c)(ii).

During the 90-day formal review period, the Department first accepts public comment on the original application, which the applicant may rebut. WAC 246-310-160. Then the Department completes its evaluation in a 45-day ex parte period. WAC 246-310-160 and WAC 246-310-190.

B. CN Applications

1. Heritage Grove Banked Beds on October 15, 2009

Heritage Grove, a non-profit organization, was the licensee of a nursing home facility in Yakima County. Administrative Record (AR) 2491, 2562–63. The Department granted the nursing home’s request pursuant to RCW 70.38.115(13)(b) to reserve its 97 nursing home beds upon full facility closure on October 15, 2009. AR 2462. The Department refers to the reservation of beds as “banking” beds; “unbanking” means to

replace the beds. The Department's approval letter stated the "eight-year bed banking of the 97 beds will expire on October 15, 2017." AR 2562.

2. Heritage Applied for a CN Relying on Use of the Banked Beds on January 8, 2015

Five years after banking the beds, on January 8, 2015, Heritage filed an application for construction of a nursing home using the previously banked beds. AR 2491 (excerpt of application), 2487-595 (entire application). The application identified Heritage Grove as the applicant. AR 2487. Heritage Grove had no offices, no employees, no assets, and no operations at the time. AR 4432 (Tr. 349:8-15). Prestige Care, Inc. (Prestige) would open and initially manage the nursing home. AR 2496. Heritage then would apply to change ownership and management; the physical facility would transfer to Yakima Valley Ventures, LLC and operations would transfer to Care Center (Yakima), Inc. AR 2488. Both companies are affiliates of Prestige. Owners of Prestige also own Yakima Valley Ventures and Care Center (Yakima) is Prestige's wholly owned subsidiary. AR 2488.

a. Heritage's Proposed Facility Would Have a Medicaid Occupancy Rate Less Than Existing Nursing Homes in Yakima County.

At the time of the application, Yakima County had a surplus of 182 nursing home beds. AR 897. Eleven nursing homes, originally constructed

from 15 to 55 years ago, operated in the county. AR 2498. Persons depending on Medicaid reimbursement occupied 69 percent of all nursing home beds. AR 2568. Two of the Yakima County facilities, Landmark and Good Samaritan, had the lowest Medicaid occupancy rate of no less than 50 percent. AR 4495 (Tr. 412:25); 4496 (Tr. 413:6). Both facilities provide rehabilitation services for post-acute care. AR 3134; 4495 (Tr. 412:25); 4496 (Tr. 413:6). Acute care facilities means hospitals and surgical facilities. WAC 246-310-010(1). Post-acute care means care following a stay in an acute care facility such as a hospital.

Heritage proposed to build a 97-bed facility focused on post-acute care. AR 2491. Heritage calculated its revenue based on a 25 percent Medicaid occupancy rate by the second year of operations. See AR 2512 (percentage of resident revenue); AR 2553 (projection of patient days by payer type). Heritage did not use the Yakima County data to estimate its Medicaid occupancy rate. AR 4638 (Tr. 554:10-25) (testimony of the expert who prepared Heritage's financial projections). To support its proposal, Heritage provided the examples of Manor Care Salmon Creek, with a 30 percent Medicare occupancy rate, and Manor Care Lacey, with a 27 percent rate. AR 2571. The Manor Care facilities are located in western Washington near Vancouver and in Lacey. AR 2464 n.51. The application assumed reimbursement rates per patient day of about \$167 for Medicaid

patients. AR 2512. The prorated average rate for all payers *other than Medicaid* would be \$426 per patient day.¹ See AR 2512, 2755. Heritage reviewed “facilities in Yakima County that have similar Medicare resident admissions” to establish the highest rate of reimbursement, which is for Medicare at \$504 per patient day. AR 2512.

b. The Program Asked Screening Questions About Medicaid Occupancy Rate.

The Department’s CN Program (Program) issued initial screening questions that probed Heritage’s underlying assumptions about Medicaid occupancy. Relative to financial feasibility, the Program asked:

Please clarify the impact on the financial proformas if Heritage Grove would experience at [a] Medicaid occupancy rate of approximately 60% experienced by the existing nursing homes in Yakima County.

AR 2569.

Heritage responded:

We do not believe Heritage Grove will experience 60% Medicaid occupancy. If Heritage were to experience 60% Medicaid occupancy, its net income would be reduced.

AR 2572.

Heritage invoked its right under WAC 246-310-090(2)(c)(ii) to end the screening process with the initial set of questions. AR 2570. The

¹ Medicare: 33 percent occupancy at \$504 per patient day; private payer: 17 percent occupancy at \$235 per patient day; managed care: 24 percent occupancy at \$454 per patient day.

Program analyst subsequently testified that “it would have been helpful for [Heritage] to respond...with some indication of a break-even point of Medicaid.” AR 4858 (Tr. 774:2–6). He stated he would have followed up with second screening questions on this point but could not because Heritage requested that review begin. AR 4858 (Tr. 774:13–17); 4880 (Tr. 796:25); 4881 (Tr. 797:1–13). The analyst also testified that in most applications, the Department evaluates the pro forma financials by looking at need—the number of patient days and rate per day—then the Program has “a reasonable evaluation of whether [the applicant’s] revenue projections are accurate.” AR 4860 (Tr. 776:22–25); AR 4861 (Tr. 777:1–3). Here, the analyst stated he did not look at need, “therefore, [he] did not have any kind of analysis [he] could use to evaluate those revenue projections.” AR 4861 (Tr. 777:6–8).

The Program completed its evaluation and approved a CN for Heritage on July 15, 2015. AR 2743—2769.

C. Procedural History

1. The Department Reverses the Initial Order and Denies Heritage’s Application

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 (collectively, “Nursing Homes”) applied for an adjudicative proceeding to challenge Heritage’s CN on August 24, 2015. AR 1–6. The Health Law Judge issued an Initial Order on May 9, 2017, upholding the Program’s decision to approve Heritage’s CN application. AR 2140–75. The Nursing Homes filed a petition for administrative review with the Department on May 30, 2017. AR 2177–2286.

On August 25, 2017, the Department issued a final order denying Heritage’s CN application (Final Order). AR 2442–84 (excluding appendices). In the Final Order, the Review Officer observed, “the payor mix proposed by Heritage is unrealistic and not supported by evidence in the record relevant to Yakima County.” AR 2449. Accordingly, the Department ultimately found that Heritage failed the financial feasibility criteria under WAC 246-310-220 and, by extension, the cost containment criteria under WAC 246-310-240. AR 2463–2467 (Finding of Fact (FF) 2.18-2.23); AR 2475–2476 (FF 2.41, 2.42); AR 2480 (Conclusion of Law (CL) 3.12); AR 2482 (CL 3.16). Heritage did not petition the Review Officer for a stay of the Final Order.

2. On Judicial Review, the Court Upheld the Final Order, Concluded the Petition Was Moot and Dismissed the Case

Heritage petitioned for judicial review of the Final Order on September 20, 2017. CP 1–14. At the time, Heritage did not petition the

Court for a stay of the Final Order. On December 28, 2017, the Department filed a motion to dismiss the petition for judicial review as moot, arguing that Heritage's right to unbank beds under RCW 70.38.115(13)(b) expired on October 15, 2017. CP 103–115. The Court denied the motion because, without reviewing the record, the Court would “have to deny any possible hypothetical remedy that I don't even know about if [Heritage] were potentially successful.” CP 419; 417–422. The Court gave leave to raise the issue again at the hearing on the petition for judicial review. CP 419. After the Department moved to dismiss for mootness, Heritage moved to stay effectiveness of the final order. CP 316–17. The superior court denied the stay for the lack of a compelling reason that a stay was equitably appropriate at the time. CP 419–20.

The Court issued its order on judicial review on August 16, 2018, in which the Court upheld the final order and then, upon the Department's renewed motion, concluded the matter was moot and dismissed the case. CP 1024–1033.

III. COUNTERSTATEMENT OF THE ISSUES

1. Whether dismissing this case for mootness is proper where (1) Heritage's right to unbank nursing home beds without showing need under RCW 70.130.115(13)(b) expired on October 15, 2017, voiding the underlying application, (2) the Court cannot grant relief based on an extinguished right, and (3) there is other no other effective relief.

2. Whether Heritage met its burden under RCW 34.05.570(3) to show the Final Order denying Heritage's CN application for failure to meet financial feasibility and cost containment criteria is invalid when Heritage used an unrealistic payer mix to project revenues and the record has no evidence to show Heritage's proposal would be financially feasible if it had a realistic payer mix.

IV. STANDARD OF REVIEW

A. Superior Court Dismissal for Mootness

The motion to dismiss Heritage's appeal as moot depends on statutory interpretation of RCW 70.38.115(13)(b). An appellate court reviews issues of law de novo; if the trial court correctly interprets the law, the appellate court reviews the trial court's decision to grant or deny a motion to dismiss for abuse of discretion. *See Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016, 1020 (2007). The Court's "fundamental objective" in statutory interpretation "is to ascertain and carry out the Legislature's intent." *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–10, 43 P.3d 4, 9 (2002). If a statute's meaning is plain on its face, a court gives effect to that meaning as an expression of legislative intent. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wash. 2d 421, 435, 395 P.3d 1031, 1038 (2017). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Dix*, 160 Wn.2d at 833.

B. Petition for Judicial Review

The Administrative Procedure Act (APA) governs this matter to the extent it concerns a petition for judicial review of an agency decision. RCW 34.05.570. The Court sits in the same position as the superior court and applies the APA standards directly to the agency's final order. *Providence Physician Servs. Co. v. Washington State Dep't of Health*, 196 Wn. App. 709, 716, 384 P.3d 658, 662 (2016). An agency's decision "is presumed correct and the challenger bears the burden of proof." *King Cty. Pub. Hosp. Dist. No. 2 v. Wash. State Dep't of Health*, 178 Wn.2d 363, 372, 309 P.3d 416 (2013).

As the challenger, Heritage bears the burden of demonstrating the invalidity of the Department's Final Order for one of the reasons in RCW 34.05.570(3). Heritage contends the Final Order is (1) not supported by substantial evidence, (2) has errors of law, and (3) is inconsistent with agency rule or arbitrary and capricious. Op.Br. 16.

An "agency order is supported by substantial evidence if there is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Hardee v. State, Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 7, 256 P.3d 339 (2011) (internal citations removed). The presence of different or contradictory evidence in the record does not render an agency's final decision as unsupported by substantial evidence.

PacifiCorp v. Washington Utilities & Transp. Comm'n, 194 Wn. App. 571, 598, 376 P.3d 389, 403 (2016).

The court conducts de novo review of alleged errors of law. *Kittitas Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193, (2011). However, the court “accord[s] substantial weight to an agency’s interpretation of a statute within its expertise and to an agency’s interpretation of rules that the agency promulgated.” *Verizon Nw., Inc. v. Emp’t Sec. Dep’t*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008) (internal citations omitted). For a mixed question of law and fact, a court reviews de novo the questions of law, including the process of applying the law to facts, but applies the substantial evidence test to the agency’s findings of fact, if challenged. *See Tapper v. State Emp’t Sec. Dep’t*, 122 Wn.2d 397, 402-403, 858 P.2d 494 (1993); *Franklin Cty. Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 329–30, 646 P.2d 113 (1982).

Agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. “Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.” *Hillis v. State, Dep’t of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139, 144 (1997). This test is highly deferential to the agency and a court “will not set aside a discretionary decision of an

agency absent a clear showing of abuse.” *ARCO Prod. Co. v. Washington Utilities and Transp. Com’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995).

V. ARGUMENT ON MOOTNESS

The time limit of RCW 70.38.115(13)(b) has run and the right to unbank beds without showing numeric need is no longer available to Heritage Grove. Heritage’s application based on that right is void. Heritage must now reapply and show Yakima County needs 97 additional nursing home beds. Thus, this matter is moot and the superior court was correct to dismiss Heritage’s petition. The “central question” in mootness is whether changes in circumstances since the beginning of litigation “have forestalled any occasion for meaningful relief.” *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 602, 229 P.3d 774, 779 (2010) (citing to *City of Sequim v. Malkasian*, 157 Wn.2d 251, 259, 138 P.3d 943 (2006), which quoted 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3533.3 at 261 (1984).

A. RCW 70.38.115(13)(b) Provides A Unique Time-Limited Right

The Legislature created an exceptional right in RCW 70.38.115(13)(b). To obtain a CN, anyone seeking to build a new nursing home ordinarily must meet all CN criteria, including the requirement to show that the community has need for the proposed number of beds. RCW 70.38.105(4), .025(6), .115(2)(a). RCW 70.38.115(13)(b), however, allows

the unique privilege of a CN for construction of a new nursing home *without* showing the number of beds are needed, though an applicant must meet all other CN criteria. RCW 70.38.115(13)(b) fixes a time within which the right must be asserted. The right to unbank beds without showing need is available “for eight years or until a certificate of need to replace them is issued, whichever occurs first.” If the right holder does not exercise the right by obtaining a CN before the elapse of eight years, the right itself extinguishes. *Cf. Lane v. Dep’t of Labor & Indus.*, 21 Wn.2d 420, 425-26, 151 P.2d 440, 443 (1944) (the time limit of a statute creating a special right cannot be enlarged). Thus, the Legislature mandated a jurisdictional limitation to the right afforded by RCW 70.38.115(13)(b).

Accordingly, a right-holder under RCW 70.38.115(13)(b) must complete every action necessary to exercise the right to unbank beds before the statutory eight-year period expires. *Cf. Hazel v. Van Beek*, 135 Wn.2d 45, 954 P.2d 1301 (1998) at 55–59 (all procedural steps to execute upon a right available under a statutory lien must occur in within its statutory life). The necessary action is to obtain a valid Certificate of Need. This is apparent from the plain language of the statute stating that the right exists for eight years or “until a certificate of need to replace them *is issued*, whichever occurs first.” RCW 70.38.115(13)(b) (emphasis added). In other words, a CN must be secured, not merely “applied for” as Heritage asserts.

Therefore, if the Department *has not issued a CN* before the end of eight years, the right expires and no longer exists, regardless of whether the right holder had taken some steps toward securing a CN.

B. Heritage Did Not Act To Preserve Its Right Under RCW 70.38.115(13)(b) Before It Expired On October 17, 2017

The period in which Heritage Grove had the right to unbank beds under RCW 70.38.115(13)(b) started on October 15, 2009. AR 2462. Heritage Grove sat on its right for five years before initiating the administrative process necessary to make good on it. AR 2487 (date of application). The Legislature allowed ample time in the statute for a nursing home with banked beds to secure a CN—including any appeals that others might file—yet Heritage Grove did not seek a CN until over half way through the eight-year term.

The Department issued its Final Order denying Heritage's application on August 25, 2017. Heritage did not attempt to salvage the right by filing a stay of the Final Order's effectiveness under the APA. RCW 34.05.467, WAC 246-10-703. Thus, Heritage did not have a CN when Heritage Grove's right under RCW 70.38.115(13)(b) expired on October 15, 2017, eight years after the right commenced and fifty-one days after issuance of the Final Order. AR 2562–63. Heritage's prior CN application, which is based on exercising the right granted by RCW 70.38.115(13)(b),

is void. Heritage Grove must now submit a new application demonstrating that Yakima County needs new nursing home beds.

C. Neither the Program's Preliminary Decision nor the APA Preserved Heritage Grove's Right Under 70.38.115(B)(13) Once Time Has Run

Heritage asserts that both APA procedures and the Program's decision to issue a CN prior to the Final Order preserve Heritage Grove's right to unbank beds without showing need. See Op.Br. 43. The Program's approval of the application was not the final agency decision. Further, the filing of an APA appeal does not automatically stay the running of the time limit in RCW 70.38.115(13)(b) and the relief available under RCW 34.05.574 does not imply a stay.

1. Only the Department's Final Order Establishes Whether a CN Issued to Heritage Grove by October 15, 2017.

Heritage Grove asserts that the Program's determination to issue a CN is sufficient to meet the requirements of RCW 70.38.115(13)(b). Op.Br. 42-43. Heritage Grove is wrong because neither the Program's determination nor the Initial Order affirming it were the consummation of the administrative process. "An administrative determination is not a final order where it is a mere preliminary step in the administrative process." *Lewis Cty. v. Pub. Employment Relations Comm'n*, 31 Wn. App. 853, 862, 644 P.2d 1231, 1237 (1982). The "consummation" of the administrative

process is an order that imposes an obligation, denies a right, or fixes some legal relationship. *Id.*, *State Dep't of Ecology v. City of Kirkland*, 84 Wn.2d 25, 30, 523 P.2d 1181 (1974). The decision of an agency's *final* decision maker is the only decision that has relevancy. *Verizon Nw., Inc.*, 164 Wn.2d at 915 (a court reviews the decision of the final decision maker, not the underlying initial decision by an administrative law judge).

The Program's determination to issue a CN and the Initial Order were mere waypoints in an administrative process culminating in the Final Order. The Final Order superseded the Program's decision, voiding the CN based on the Program's decision. Accordingly, only the Department's Final Order denying Heritage's application is relevant to the question of whether Heritage Grove had CN as of October 15, 2017, when the eight-year term allowed in RCW 70.38.115(13)(b) expired.

2. Petitioning for Judicial Review Did Not Stay the Running of RCW 70.38.115(13)(b)'s Time Limit

Heritage also argues that RCW 70.38.115(13)(b)'s time limit became meaningless once Heritage Grove filed an APA appeal. Op.Br. 43–44. This argument has two flaws. It assumes that the Program's decision to issue a CN is relevant. It is not because only the agency's final order is relevant on appeal as discussed in the preceding section. Secondly,

Heritage's argument also fails on the proposition that the APA provides Heritage with an automatic stay of another statute.

The APA has no automatic provision that tolls the time limitations of other statutes. The APA does allow a party to petition for stay of effectiveness of a final order within 10 days of its service "unless otherwise provided by statute or stated in the final order." RCW 34.05.467. Further, a party may seek a stay from the Court after filing a petition for judicial review. RCW 34.05.550. The Department's rules provide that "[n]o final order will be stayed except by its own terms or by order of a court of competent jurisdiction." WAC 246-10-703. In this matter, the Final Order did not provide for a stay of its effectiveness. AR 2442-84. Heritage did not seek or obtain a stay of the Final Order's effectiveness before October 15, 2017.

3. The Relief Available Under RCW 34.05.574 Does Not Automatically Stay the Time Limit in RCW 70.38.115(13)(b)

Heritage's final argument against the mootness is that RCW 34.05.574, which sets forth relief available under the APA, preserves "the benefits of appeal." Op.Br. 44. Heritage Grove insists this is so because the Court could order relief that, directly or under remand, reinstates the CN the Program had issued before the Department's Final Order denying the application. Op.Br. 44-45. This argument is wrong because it asks the Court

to imply an automatic stay under RCW 34.05.574 even though the Legislature expressly provided for a stay under RCW 34.05.467 upon affirmative motion of a party. Courts do not presume that the Legislature has implied something if the Legislature has otherwise expressly provide for it. See *ATU Legislative Council of Washington State v. State*, 145 Wn.2d 544, 552, 40 P.3d 656, 659–60 (2002) (A court will not presume the Legislature intended to repeal a statute if the Legislature provided an express list of statutes to be repealed).

Further, Heritage's argument ignores that the Court is sitting in the review of agency's Final Order, not examining the initial Program decision or Initial Order.

Issuing a CN is within the Department's *discretion*. See RCW 70.38.105, .115. RCW 34.05.574 provides:

In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.

If finding fault with the Department's Final Order, the Court could declare the agency decision is invalid or set aside the agency decision to deny the application. Under legislative directive in RCW 34.05.574, however, the Court would not undertake to exercise the Department's

discretion by issuing a CN to Heritage. Instead, the Court should remand to the agency for reconsideration consistent with the Court's decision.

D. This Court Cannot Provide Effective Relief Because Heritage Must Now Reapply and Show Need

This case is moot as a matter of law. Even if the superior court had not heard the motion to dismiss, this court should dismiss a moot case. *Westerman v. Cary*, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994). Heritage's CN application based on Heritage Grove's now expired right to unbank beds without showing numeric need is void. Heritage must now reapply and show Yakima County needs the proposed beds. Therefore, this court cannot provide effective relief. See *Westerman*, 125 Wn. 2d at 286.

The superior court did not abuse its discretion in concluding it was moot and dismissing the petition. This Court should affirm the superior court to dismiss this case as moot.

VI. ARGUMENT ON PETITION FOR JUDICIAL REVIEW

As discussed above, this case should be dismissed as moot. In the alternative, the Court should affirm the Department's Final Order. The Final Order's findings and conclusions are supported by substantial evidence, consistent with the law, and are reasonable in light of the facts and circumstances.

A. Heritage Failed To Meet Financial Feasible Criteria Because Its Revenue Projections Used an Unrealistic Medicaid Occupancy Rate

This APA review primarily concerns the question of whether Heritage has shown its proposed project is financially feasible as required by WAC 246-310-220. All else is secondary because Heritage's failure to meet cost containment criteria is a direct consequence of its failure to meet financial feasibility criteria, as further explained below.

When conducting CN review, the Department must consider the "financial feasibility and the probable impact of the proposal on the cost of and charges for providing health services in the community to be served." RCW 70.38.115(2)(c). Generally, the Department must consider the effect of the proposal on the community or planning area in which it will be located. RCW 70.38.115(2)(c), RCW 70.38.115(13)(b). WAC 246-310-220 states the Department must determine the financial feasibility of a project 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.

The Department evaluates whether a proposal's financial projections are reasonable by examining the number of likely patients (numeric need) and the mix of likely patients by payer type (payer mix) in the planning area. AR 4860 (Tr. 776:22-25); AR 4861 (Tr. 777:1-3), *King*

Cty. Pub. Hosp. Dist. No. 2 v. Washington State Dep't of Health, 178 Wn.2d 363, 377–78, 309 P.3d 416, 424 (2013) (acknowledging the Department's use of average daily census to determine if a proposal will meet capital and operating costs). Relative to payer mix, a large proportion of Medicaid occupancy has a significant impact on revenue because other payers—Medicare, private pay, and managed care—reimburse at rates over *two and half times greater* than Medicaid. AR. 2512, 2755. Heritage concedes that it relies in its financial projections on payers that reimburse at a much higher rate than Medicaid. Op.Br. 23, 25, 32. The Department's practice of comparing an applicant's projected payer mix with the existing payer mix in the planning area is consistent with its statutory authority because it considers the effect in the planning area, provides appropriate data to determine if an applicant's revenue projections are reasonable, and leads to a supportable determination that a project is financially feasible.

Based on payer mix, the Department had good reason to question Heritage's estimates of revenue. Heritage estimated a 25 percent Medicaid occupancy rate in a planning area with a 69 percent Medicaid occupancy rate in its nursing homes. AR 2512; 2568. When the Department asked Heritage about the extreme difference, Heritage responded that "its net income would be reduced" and cut off additional screening by requesting that the Department begin review. AR 2569, 2570, 2572. Because of this,

the record did not illustrate how Heritage would remain financially feasible if the reality of the Yakima County market resulted in fewer Medicare and more Medicaid patients occupying its beds.

Nevertheless, after the Department started review, the Program made an error—later corrected by the Final Order—that explains why the Program initially and improperly approved Heritage’s application. AR 2464 (FF 2.19), 2465 (FF 2.20). The analyst incorrectly concluded that RCW 70.38.115(13)(b) implicates both numeric need and payer mix. AR 4861 (Tr. 777:1–8). Operating on this mistaken belief, he did not compare the applicant’s proposed payer mix against the average payer mix in the planning area. AR 4861 (Tr. 777:1–8). The analyst took Heritage’s assumption at face value that a 25 percent Medicaid occupancy rate would show profitability within three years. AR 2464 (FF 2.19).

On subsequent administrative review, however, the Department’s Review Officer did not take Heritage’s assumptions at face value. AR 2465 (FF 2.20). The Review Officer instead applied the Department’s established practice of examining payer mix and observed that Heritage’s proposed payer mix was unrealistic in Yakima County. AR 2449, 2465 (FF 2.20).

Heritage’s attacks on the Department’s ultimate findings and conclusions set forth in FF 2.20, FF 2.23, and COL 3.12 are without merit.

1. Substantial Evidence Supports FF 2.20 and 2.24 Because the Record Has No Revenue Projections with a Medicaid Occupancy Rate More Aligned with the Yakima County Average

FF 2.20 and 2.23 of the Final Order found no evidence in the record to show Heritage could meet the financial feasibility criteria if Heritage's proposed payer mix reflected the average in the planning area. AR 2465, 2466–67. Heritage challenges the findings as unsupported by substantial evidence. Op.Br. 18–22. For the most part, Heritage directs its substantial evidence challenge to the weight the Review Officer gave to the assumptions Heritage used to support its Medicaid occupancy rate. Op.Br. 14–15, 19, 20–26, 30–36. This is a misplaced. Different or contradictory evidence in the record, if any, does not make an agency's decision unsupported by substantial evidence. *PacifiCorp*, 194 Wn. App. at 598. In any event, Heritage is wrong because the only revenue calculation in the record uses a 25 percent Medicaid occupancy rate, not the planning area average of 69 percent nor any other percentage between 25 and 69. AR 2512, 2553. Though acknowledging, "its net income would be reduced" under higher Medicaid occupancy, Heritage did not provide any evidence to show its proposal would still be financially feasible with this reduced income. AR 2572.

2. Concluding That Heritage Failed Financial Feasibility Because Heritage Based Its Revenue Projections on an

**Unreasonable Medicaid Occupancy Rate Is Consistent
with the Law**

Heritage includes FF 2.20, FF 2.23, and COL 3.12 within the scope of its errors in law challenges. *See* Op.Br. 7–8, 9. Heritage’s arguments are also without merit because the Final Order complies with the law. Further, the Final Order, which is consistent with established agency practice, does not create any new CN rule.

**a. Questioning the Medicaid Occupancy Rate Used
to Project a Proposal’s Revenue Does Not Conflict
With RCW 70.38.115(13)(b)**

Heritage argues that the Department’s inquiry into a higher Medicaid occupancy rate is an error of law on a theory that RCW 70.38.115(13)(b) prohibits consideration of “need”. Op.Br. 23, 29, 32-39. This theory is wrong because RCW 70.38.115(13)(b) concerns the number of beds in a facility and not the occupants of the beds nor the revenue generated from the occupants.

When an entire nursing home closes under RCW 70.38.115(13)(b), the “licensee...may reserve his or her interest in the *beds*” and later “replace them.” Specifically,

[a]ny party who has reserved the nursing home *beds* except that the need criteria shall be deemed met when the applicant is the licensee who had operated the beds for at least one year, who has operated the *beds* for at least one year immediately preceding the reservation of the *beds*, and who is replacing the *beds* in the same planning area.

RCW 70.38.115(13)(b) (emphasis added).

Accordingly, RCW 70.38.115(13)(b) deems need to be met only with regard to the *number of beds* or “numeric need.” An applicant must meet all other CN requirements, including financial feasibility and cost containment. RCW 70.38.115(13)(b); *See* AR 2461 (FF 2.12 discussing numeric need).

Considering the payer mix of patients who could be occupying the beds is not a question of numeric need, but a question of whether the facility will generate sufficient revenue to meet its immediate and long-range capital and operating costs. WAC 246-310-220(1). Because this is not counting beds but counting revenue from the beds, Heritage fails to show that consideration of the potential Medicaid occupancy rate is an error of law in violation of RCW 70.38.115(13)(b). For the same reason, Heritage’s claim that RCW 70.38.115(13)(b) prohibits screening questions about Medicaid occupancy rate fails to show an error of law. Op.Br. 36–37, 38–39.

b. The Department Usually Considers a Planning Area’s Average Medicaid Occupancy Rate in Evaluating Revenue Projections Under the Financial Feasibility Criteria

Heritage asserts that the Final Order was inconsistent with the agency rule because financial projections showing profitability within three

years is “the sole criterion”. Op.Br. 20–21, 26–27. Heritage further argues the Department has created a new rule by considering Medicaid occupancy in connection with financial feasibility. Op.Br. 27–30. Heritage is wrong on both counts.

There is no “sole criterion” to determine that an applicant has met the financial feasibility requirement. As stated in the Department’s evaluation of Heritage, the CN rules do not have specific financial feasibility criteria and “no known recognized standards...direct what the operating revenues and expenses should be for a project of this type and size.” AR 2754. WAC 246-310-220(1) requires only that an applicant show it will meet immediate and long-range capital and operating costs. To evaluate this sub-criterion, the Department reviews “the assumptions used to project revenue, expenses, and net income.” AR 2755. Revenue arises from the percentage of revenue by payer type. AR 2755. Thus, analysis of payer mix—which necessarily includes the Medicaid occupancy rate—is a standard element of the Department’s financial feasibility evaluation. This is borne out by the fact that the Program analyst asked Heritage to clarify the impact of a higher Medicaid occupancy rate in screening.

The Department’s consideration of the local planning area Medicaid occupancy rate is not new to Heritage’s application and was not an error of law. As discussed above, comparing projected payer mix with the planning

area payer mix is consistent with the Department's statutory authority. In contrast, Heritage's assertion to examine financial projections in a vacuum does not consider the planning area, does not provide data to determine if revenue projections are reasonable, and does not lead to a supportable determination that a project is financial feasible.

c. Reliance on Heritage's Answers to Screening Questions Is Proper Because Screening Allows an Applicant to Explain Its Proposal

In FF 2.23, the Review Officer relied on Heritage's answers to screening questions to find insufficient evidence to determine whether Heritage's revenue projections were reasonable. AR 2466-67. Heritage contends this is an error of law. Op.Br. 34-39. Heritage's first contention is that the screening process in WAC 246-310-090 is solely to determine whether an application is complete and once review begins, the Department cannot consider the answers as inadequate. Op.Br. 37-38. This is a mistake because it conflates (1) adequacy of an application as complete for review with (2) adequacy of an application in meeting all CN criteria. It is also absurd because it would make the Department—instead of the applicant—responsible for the quality of the application.

Heritage's contention also misrepresents the screening process. The answers that an applicant gives to screening questions are as much a part of the application as the original application. *See* WAC 246-310-090(1)(c),

(2)(a), (2)(c). In the screening process, the Department and the applicant exchange questions and answers. WAC 246-310-090(2)(a). If allowed to continue, the Department may continue to narrow its questions in response to the applicant's prior answers until gaps in the application are resolved. This usually benefits the applicant by allowing additional information before formal review begins. Here, Heritage submitted responses to the first set of questions and then exercised its right to initiate review under WAC 246-310-090(2)(c)(ii). AR 2596-97. Heritage is fully responsible for the quality of its application and there was no error of law in placing the burden on Heritage to provide answers adequate to show its proposal is financially feasible.

3. A Conclusion That Heritage Failed Financial Feasibility Because Its Revenue Projections Were Based on Unreasonable Medicaid Occupancy Rates Is Reasonable and Reflects the Attending Facts and Circumstances

Heritage spends a generous proportion of its Opening Brief arguing that the Review Officer ignored the "substantial evidence" about the intended use of Heritage's facility and the financial projections based on this use. Op.Br. 14-15, 19, 20-26, 30-36. Heritage is wrong. FF 2.19 acknowledges that Heritage (1) intended its facility to serve primarily post-acute care patients reimbursed at a higher rate than Medicaid and (2) based its assumption about Medicaid occupancy rate on two facilities that serve

post-acute care patients. AR 2464. Heritage, however, fails to show that the Department was arbitrary or capricious in not giving weight to Heritage's assumptions.

a. Heritage Ignored the Attending Facts and Circumstances in Its Medicaid Occupancy Assumption

A vast discrepancy exists between the reality of Yakima County's average 69 percent Medicaid occupancy rate and Heritage's assumption of a 25 percent rate. Heritage in fact disregarded the discrepancy, as the expert who prepared Heritage's financial projections testified he did not use Yakima County data to project Heritage's patient mix. AR 4638 (Tr. 554:10-25).

Heritage claims that the existing Yakima County facilities are old, long-term care facilities and cannot be compared to Heritage's post-acute care facility. Op.Br. 20-21, 22, 25, 32. The record, however, shows that at least two of the existing facilities in Yakima County are similar to Heritage's proposal. AR 3134 (program evaluation noting Landmark Care Center as similar to Heritage); AR 4495 (Tr. 412:25); AR 4496 (Tr. 413:6) (Nursing Homes' witness identifying Landmark and Good Samaritan as similar to Heritage). Heritage, in fact, acknowledged its proposal is like others in the planning area when it established its Medicare reimbursement rate based on Yakima County nursing homes with Medicare resident

admissions similar to it. AR 2512. Nonetheless, Heritage ignored the no less than 50 percent Medicaid occupancy rate of the two Yakima facilities most like it. *See* AR 4495 (Tr. 412:25); AR 4496 (Tr. 413:6).

The Department evaluates the reasonableness of revenue projections by examining the payer mix of patients in the planning area and, thereby, the payer mix that could potentially occupy an applicant's beds. Heritage, in contrast, ignored the planning area market demand and instead used the example of two facilities located 180 miles away on the opposite side of the Cascade Mountains. AR 2464 (FF 2.19), AR 2571. It was not unreasonable for the Review Officer to question the credibility of Heritage's assumptions.

b. The Final Order Is Reasonable in Reaching a Different Decision Than the Program Analyst

Heritage, asserting that the Review Officer has "no expertise or experience on financial matters," infers the Review Officer was arbitrary in not reaching the same conclusion about financial feasibility as the Program analyst. *See* Op.Br. at 23, 24–26, 31–38. This argument is misguided. Like the Review Officer, the analyst wanted to know if Heritage would be financially feasible if experiencing a Medicaid occupancy rate more like the Yakima County average. AR 2569. The only difference is that the analyst felt constrained by RCW 70.38.115(13)(b) to use the information in analyzing financial feasibility. AR 2569, AR 4861 (Tr. 777:6–8).

The effect of RCW 70.38.115(13)(b) on a financial feasibility analysis is a question of law. As previously discussed, RCW 70.38.115(13)(b) concerns numeric need, not payer mix. It does not prevent the Department from using a planning area's average payer mix—which incorporates the Medicaid occupancy rate—to verify the validity of financial projections. Also as previously discussed, the Department's use of the average payer mix is consistent with its statutory authority. Thus, the Final Order is not arbitrary or capricious for the fact it reached a different conclusion than the CN Program analyst who had misinterpreted his obligations under RCW 70.38.115(13)(b). In any case, the Legislature vests reviewing officers with final decision-making authority, RCW 34.05.464(4). Only the final decision-maker's findings of fact are relevant on appeal, even if modifying or replacing the findings of subordinates. *Tapper*, 122 Wn.2d at 405–06; *Hardee*, 172 Wn.2d at 18–20.

c. Heritage's Testimony About More Medicaid Patients Increasing Profitability Is Not Credible

Heritage asserts that one of its witnesses testified that more Medicaid patients at Heritage would increase the total occupancy of the facility making it more profitable. Op.Br. 24. The Reviewing Officer was reasonable in not acknowledging this testimony by the president and chief operating officer of Prestige. AR 4740 (Tr. 656:25). The testimony is not

credible because it is indefinite. The witness provided no patient or financial projections to support his claim. See AR 4779-80 (Tr. 695:22-25; 696:1-6). Further, the testimony includes an unsupported assumption that Heritage's total occupancy would increase to more than the county average. In its application, Heritage assumed a total occupancy rate like that of other nursing homes in the county, about 85 percent. AR 2754. The witness provided no explanation how its total occupancy rate would increase over the county average when Yakima County had a surplus of 182 nursing home beds. Finally, the payer mix resulting from the addition of Medicaid patients is unknown, making comparison against the average payer mix in Yakima County impossible. Thus, the unsupported statement does not address the question of whether Heritage would be financially feasible if it had a payer mix more like the county average.

As established in the preceding discussion, Heritage fails its burden to show that FF 2.20, FF 2.23, and COL 3.12 are invalid for any of the reasons set forth in RCW 34.05.570(3). The Final Order correctly concluded that Heritage failed the financial feasibility criteria in WAC 246-310-220.

B. Heritage Failed to Meet Cost Containment Criteria Because Heritage Failed to Meet Financial Feasibility Criteria

The Final Order concludes that Heritage failed to meet the cost containment criteria under WAC 246-310-240. AR 2482. Relative to cost containment, Heritage challenges FF 2.41, 2.42, and COL 3.16 of the Final Order. Op.Br. 8-9, 9-10.

WAC 246-310-240 provides that the Department must determine the proposed project will foster cost containment based on the following criteria:

- (1) Superior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable.
- (2) In the case of a project involving construction:
 - (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.

Heritage first asserts FF 2.41 and FF 2.42 are errors of law because both rely on FF 2.20 and 2.23, which concern Heritage's use of an unrealistic Medicaid occupancy rate to project revenue. This attack fails because FF 2.20 and 2.23 are supported by substantial evidence, consistent with the law, and reasonable, as previously shown. The remainder of Heritage's arguments also fail.

1. A Proposal That Is Not Financially Feasible Cannot Be a Superior Alternative

FF 2.41 finds that Heritage's proposal is not the superior alternative under WAC 246-310-240(1) because it failed to meet the financial

feasibility criteria. AR 2475. Heritage argues FF 2.41 is an error of law for creating a different superior alternative standard than required by rule. Op.Br. 39–40. This challenge fails because it reflects a misunderstanding of the Review Officer’s comment, “[t]herefore, it cannot be a viable, let alone best, alternative.” AR 2475. The opening brief is not entirely clear what new standard Heritage thinks is created by use of the term “best” instead of “superior,” but the only meaning of the clause is that a proposal must be viable before it can be shown to foster containment of health care costs in the planning area as required by WAC 246-310-240(1). A proposal cannot be a superior alternative for containing costs if the proposal has failed to meet financial feasibility criteria under WAC 246-310-220. AR 2768.

Heritage also argues FF 2.41 is arbitrary because it does not examine the “do nothing” alternative. Op.Br. 40. FF 2.41 is not arbitrary for its silence on the “do nothing” alternative. Examination of the “do nothing” alternative would have been necessary only for comparison with a project that survived the initial test of meeting the CN criteria under WAC 246-310-210, -220, and -230. AR 2768; WAC 246-310-240. Because Heritage’s proposal failed this initial test, the Review Officer was not willful or unreasoning for not undertaking a superfluous analysis of the “do nothing” proposal.

2. There Is No Basis to Determine Whether Construction Costs Are Reasonable If Heritage Has Failed to Show It Can Meet Its Capital Costs

FF 2.42 concludes, based on the financial feasibility criteria, that there is insufficient evidence to determine whether Heritage met the requirement of WAC 246-310-240(2) to show its construction costs/energy conservation were reasonable and whether the project has an unreasonable impact on costs to the public. AR 2475-76. Heritage argues FF 2.42 is arbitrary because it made no findings about construction costs. Op.Br. 40. This argument does not comprehend the meaning of FF 2.42 with regard to the connection between capital costs and construction costs. Heritage failed to meet the financial feasibility requirements because it was unable to show that it could meet the “immediate and long-range *capital* and operating costs of the project.” WAC 246-310-220(1) (emphasis added). Construction costs are capital costs. WAC 246-310-010(10) (defining capital expenditure as an expenditure not chargeable as an expense of operation or maintenance). If Heritage cannot show it could meet the capital cost of the project because of over-optimistic Medicaid occupancy rates, there is no basis to determine if the costs, scope and method of construction are reasonable.

Heritage fails to show under RCW 34.05.570(3) that FF 2.41, FF 2.42, and COL 3.16 are errors of law or arbitrary. The Final Order correctly

concluded that Heritage failed the cost containment criteria in WAC 246-310-240(1)(2).

This Court should affirm the Final Order because Heritage has failed its burden to demonstrate invalidity for any reason under RCW 34.05.570(3).

VII. ARGUMENT ON EQUAL ACCESS TO JUSTICE ACT

As discussed above, Heritage should not prevail in this case. Even if it does, Heritage is not eligible for attorneys' fees and other expenses under Washington's Equal Access to Justice Act (EAJA), RCW 4.84.340-.360. Heritage is not a qualified party because the true parties in interest are for-profit corporations. Further, the Department was substantially justified in denying Heritage's application where the Department faced a novel and close question of statutory interpretation, complied with express statutory authority, and otherwise followed its usual procedures to determine financial feasibility.

A. Heritage Is Not a Qualified Party Under The EAJA or Even the True Party in Interest

To collect fees under the EAJA, a prevailing party must be a "qualified party" as defined in RCW 4.84.340. The statute classifies an organization that is exempt from taxation under Section 501(c)(3) of the Federal Internal Revenue Code as a qualified party. RCW 4.84.340(5). The

EAJA, however, also provides that the requirement to award of fees and expenses does not apply “unless *all* parties challenging the agency action are qualified parties.” RCW 4.84.350(2) (emphasis added).

Heritage Grove is a non-profit corporation. Prestige, however, is a for-profit organization operating nursing facilities in over 70 locations and in 7 states. AR 2747. The remaining appellants are for-profit organizations affiliated with Prestige. AR 2488. Thus, Heritage has failed to meet its burden to show that all appellants are qualified parties.

Further, Heritage Gove is not the entity that would prevail in this matter because its true interest in this proceeding is tenuous. As Heritage Grove testified at hearing, it has no offices, no employees, no assets, and no operation. AR 4432 (Tr. 349:8–15). Under the CN application, Prestige would open and initially manage the nursing home. AR 2496. Heritage’s project would be financed by commercial loans valued at \$18.7 million secured by Prestige; public funding and private foundation support was not available because “Prestige Care, Inc. is not a non-profit corporation.” AR 2508. Further, Yakima Valley Ventures would own and incur the debt for the land and the facility, then lease it to Heritage Grove—who would be the “owner” only for so long as it took to unbank the beds without showing need as authorized by RCW 70.38.115(13)(b). AR 2488, 2507.

B. The Department Was Substantially Justified to Deny Heritage's Application

Heritage also is not due attorneys' fees under the EAJA because the Department was substantially justified in denying the application. A court will not award attorneys' fees under the EAJA if agency action is "substantially justified." RCW 4.84.350(1). An agency is substantially justified if the action is justified to a degree that would satisfy a reasonable person. *Raven v. Dep't of Soc. & Health Servs.*, 177 Wn.2d 804, 832, 306 P.3d 920, 934 (2013). In matters involving novel and close questions at the intersection of statutory authority, an agency's action is reasonable and thus substantially justified even if the court determines the agency reached the wrong conclusion. See *Dep't of Labor & Indus. of State v. Lyons Enterprises, Inc.*, 186 Wn. App. 518, 542, 347 P.3d 464, 476 (2015), *aff'd*, 185 Wn.2d 721, 374 P.3d 1097 (2016), *as amended* (July 13, 2016); *Johnson v. U.S. Dep't of Hous. & Urban Dev. (HUD)*, 939 F.2d 586, 589–90 (8th Cir. 1991); *Plum Creek Timber Co., L.P. v. Washington State Forest Practices Appeals Bd.*, 99 Wn. App. 579, 595–96, 993 P.2d 287, 295 (2000).

The issue in this case is at the intersection of RCW 70.38.115(2) and RCW 70.38.115(13)(b). RCW 70.38.115(2) requires the Department to consider, among other things, (1) if the population to be served by a new facility has need for the facility and (2) whether a proposed project is

financially feasible. RCW 70.38.115(2)(a) and (c). RCW 70.38.115(13)(b) provides the unique and special privilege of allowing a former nursing home licensee to avoid the first requirement to show whether the community has need for the beds. The Department complied with this provision and did not require Heritage to show that the community had need for the beds even though Yakima County had a surplus of 182 beds.

The statute is silent, however, on any change to financial feasibility criteria. The Department's usual methodology for addressing the criteria is to consider the effect of the community's existing payer mix of Medicare, Medicaid, private payer, and managed care patients on the potential revenues generated by the facility. *See* AR 4860 (Tr. 776:22); AR 4861 (Tr. 777:1-3). Because this is the Department's usual practice and the practice is otherwise consistent with the Department's statutory authority, the Department was reasonable in applying the same methodology to this matter in absence of Legislative directive to the contrary. The superior court upheld the Department's Final Order, which supports a conclusion that the Department was reasonable in denying Heritage Grove's application.

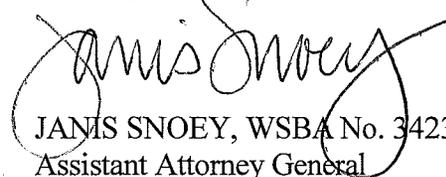
For the above reasons, the Court should deny Heritage's request for attorneys' fees and other expenses under the EAJA. Further, because Heritage Grove raises this issue for the first time before this Court under RAP 18.1(a), Heritage is not eligible for superior court costs.

VIII. CONCLUSION

The Department respectfully request that this Court affirm that this matter is moot and dismissed because Heritage Grove's right to replace beds without showing need under RCW 70.38.115(13)(b) expired. If not dismissing the matter for mootness, the Department requests the Court affirm the Final Order. The Department further requests that the Court deny an award of attorneys' fees and expenses under the EAJA, or for any other reason, to Heritage.

RESPECTFULLY SUBMITTED this 14th day of March, 2019.

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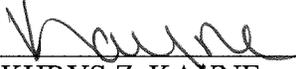
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 14 day of March, 2019, at Olympia, Washington.



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