

FILED  
Court of Appeals  
Division II  
State of Washington  
3/15/2019 3:13 PM

No. 52393-1-II

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

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HERITAGE GROVE, a Washington not-for profit corporation;  
PRESTIGE CARE, INC., a Washington corporation; CARE CENTER  
(YAKIMA), INC., a Washington corporation; and YAKIMA VALLEY  
VENTURES, LLC, a Washington limited liability company,

Petitioners,

v.

DEPARTMENT OF HEALTH, STATE OF WASHINGTON 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.

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**RESPONSE BRIEF OF NURSING HOME RESPONDENTS**

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Brian W. Grimm, WSBA #29619  
BGrimm@perkinscoie.com  
PERKINS COIE LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
T: 206.359.8000 | F: 206.359.9000

Attorneys for Nursing Home  
Respondents

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. COUNTERSTATEMENT OF THE CASE..... 2

    A. Washington regulates the state’s healthcare infrastructure in part through Certificate of Need laws. ....2

    B. Heritage Grove applies for a Certificate of Need to establish a new nursing home in Yakima. ....3

    C. The Department requests additional information from Heritage Grove regarding its payor mix assumption. ....4

    D. Heritage Grove asks the Department to begin review of the application without further screening. ....6

    E. The Department denies Heritage Grove’s application.....7

    F. The Superior Court affirms the Department’s final order under the applicable judicial review standard and also dismisses Heritage Grove’s petition as moot. ....11

III. COUNTERSTATEMENT OF ISSUES PRESENTED..... 11

IV. STANDARD OF REVIEW ..... 12

    A. Department’s denial of Heritage Grove’s CN application.....12

    B. Superior Court’s dismissal of Heritage Grove’s petition as moot.....13

V.	ARGUMENT .....	14
A.	The Court reviews the final order issued by the Review Officer designated by the Secretary of Health, not the earlier decisions of subordinate agency officials that were superseded by the final order. ....	14
B.	The Court should affirm the Department’s denial of Heritage Grove’s Certificate of Need application. ....	18
C.	The Court should affirm the Superior Court’s dismissal of Heritage Grove’s petition as moot. ....	24
VI.	CONCLUSION.....	27

## TABLE OF AUTHORITIES

### Cases

<i>Chandler v. State, Office of Ins. Com’r,</i> 141 Wn. App. 639, 173 P.3d 275 (2007).....	15
<i>DaVita, Inc. v. Wash. State Dep’t of Health,</i> 137 Wn. App. 174, 181, 151 P.3d 1095 (2007).....	12, 13
<i>Inland Foundry Co., Inc. v. Spokane Cty. Air Pollution Control Auth.,</i> 98 Wn. App. 121, 989 P.2d 102 (1999).....	26
<i>Lane v. Dep’t of Labor &amp; Indus.,</i> 21 Wn.2d 420, 151 P.2d 440 (1944).....	26
<i>Nw. Steelhead &amp; Salmon Council of Trout Unlimited v. Wash. State Dep’t of Fisheries,</i> 78 Wn. App. 778, 896 P.2d 1292 (1995).....	16
<i>Olympic Healthcare Servs. II LLC v. Dep’t of Soc. &amp; Health Servs.,</i> 175 Wn. App. 174, 304 P.3d 491 (2013).....	16
<i>Overlake Hosp. Ass’n v. Dep’t of Health of State of Wash.,</i> 170 Wn.2d 43, 239 P.3d 1095 (2010).....	12
<i>Providence Health &amp; Servs.-Wash. v. Dep’t of Health of the State of Wash.,</i> 194 Wn. App. 849, 857, 378 P.3d 249 (2016).....	13
<i>Regan v. State Dep’t of Licensing,</i> 130 Wn. App. 39, 121 P.3d 731 (2005).....	16
<i>Rosling v. Seattle Bldg. &amp; Const. Trades Council,</i> 62 Wn.2d 905, 385 P.2d 29 (1963).....	25
<i>SEIU Healthcare 775NW v. Gregoire,</i> 168 Wn.2d 593, 229 P.3d 774 (2010).....	25
<i>Southwick, Inc. v. Wash. State,</i> 200 Wn. App. 890, 403 P.3d 934 (2017).....	14
<i>St. Joseph Hosp. &amp; Health Care Ctr. v. Dep’t of Health,</i> 125 Wn.2d 733, 887 P.2d 891 (1995).....	2

<i>Tapper v. State Employment Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	15
<i>Univ. of Wash. Med. Ctr. v. Wash. State Dep't of Health</i> , 164 Wn.2d 95, 187 P.3d 243 (2008).....	13
<i>Valentine v. Dep't of Licensing</i> , 77 Wn. App. 838, 894 P.2d 1352 (1995).....	16

**Statutes**

RCW 34.05.461 .....	17
RCW 34.05.464 .....	15, 16, 17
RCW 34.05.570 .....	12
RCW 70.38.015 .....	3
RCW 70.38.025 .....	2
RCW 70.38.105 .....	2

**Regulations**

WAC 246-10-701.....	8
WAC 246-10-702.....	9, 17
WAC 246-310-210.....	3
WAC 246-310-220.....	passim
WAC 246-310-230.....	3
WAC 246-310-240.....	3, 18

## I. INTRODUCTION

The Department of Health denied Heritage Grove's Certificate of Need ("CN") application to build a new nursing home in Yakima because it failed to satisfy the regulatory financial feasibility and cost containment standards. Specifically, Heritage Grove relied upon an unreasonable "payor mix" assumption for its proposed facility: Heritage Grove assumed that only 25% of its patients would be Medicaid beneficiaries, even though 69% of nursing home patients in Yakima County are on Medicaid and Heritage Grove agreed to follow a nondiscrimination policy mandating admission of patients irrespective of insurance type. For nursing homes, payor mix has a substantial effect on financial performance due to the large disparity in reimbursement rates between different types of payors. Heritage Grove's unreasonable payor mix assumption resulted in unreliable financial projections that overstated likely revenue. The Department's factual findings to this effect are supported by substantial evidence, and the Court should affirm the Department's denial of Heritage Grove's application on this ground under the deferential judicial review standard applicable to this type of agency decision.

Irrespective of the merits of the underlying Department order, however, the Court should affirm the Superior Court's dismissal of Heritage Grove's petition for judicial review as moot. Heritage Grove's

CN application depended upon an exemption from the “numeric need” requirement for nursing home CN applications, created by a time-limited nonclaim statute that allows certain “banked” nursing home beds to be unbanked without a showing of numeric need if a CN to do so is obtained within eight years. Because Heritage Grove’s CN application was denied, and the time limit to rely upon the exemption has now expired, Heritage Grove’s claim is moot and, therefore, nonjusticiable.<sup>1</sup>

## II. COUNTERSTATEMENT OF THE CASE

### A. Washington regulates the state’s healthcare infrastructure in part through Certificate of Need laws.

New healthcare facilities may be established in Washington only if a CN is granted by the Department. *See* RCW 70.38.105(3), (4)(a); *see also* RCW 70.38.025(6) (defining healthcare facility to include nursing homes). The public policy underlying Washington’s CN laws is that a facility should not be built if it is not needed. *See St. Joseph Hosp. & Health Care Ctr. v. Dep’t of Health*, 125 Wn.2d 733, 741, 887 P.2d 891 (1995) (noting that “our Legislature made the judgment that competition ha[s] a tendency to drive health care costs up rather than down and government therefore need[s] to restrain marketplace forces”); *see also*

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<sup>1</sup> For ease of reference, the Nursing Home Respondents (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) will refer to Petitioners (Heritage Grove, Prestige Care, Inc., Care Center (Yakima), Inc., and Yakima Valley Ventures, LLC) simply as “Heritage Grove.”

RCW 70.38.015(1) (identifying strategic health planning strategy). To obtain a CN, an applicant must satisfy statutory and regulatory criteria, not only related to numeric need (i.e., that projected demand exceeds existing capacity for the type of facility proposed), but also related to access, financial feasibility, quality, cost containment, and other criteria. *See* RCW 70.38.115(2); WAC 246-310-210, 220, 230, 240.

**B. Heritage Grove applies for a Certificate of Need to establish a new nursing home in Yakima.**

Heritage Grove applied for a CN to build a \$19 million, 97-bed nursing home in Yakima, Washington. AR 2946. In its application, Heritage Grove explained how, in Heritage Grove’s view, its project would satisfy each of the applicable CN criteria.

With respect to the “access” requirement that “[a]ll residents of the service area, including low-income persons ... are likely to have adequate access” to the facility, *see* WAC 246-310-210(2), Heritage Grove agreed to not discriminate among potential patients based on insurance type. AR 2879; *see also* AR 2937 (Heritage Grove’s proposed admission policy, stating: “While the Facility must receive payment for its services, the Facility does not discriminate among persons based on the source of that payment.”).

With respect to the “financial feasibility” requirements that “[t]he immediate and long-range capital and operating costs of the project can be met”; “[t]he costs of the project, including any construction costs, will probably not result in an unreasonable impact on the costs and charges for health services”; and “[t]he project can be appropriately financed[,]” *see* WAC 246-310-220, Heritage Grove made certain financial projections. These relied upon a payor mix assumption that only 25% of Heritage Grove’s patients would be Medicaid beneficiaries. AR 3299. A nursing home’s payor mix has a significant impact on its financial viability because of the disparity between reimbursement rates by type of payor. AR 2892 (Heritage Grove’s projection that it will be reimbursed at \$504/day for Medicare patients but only \$167/day for Medicaid patients).

**C. The Department requests additional information from Heritage Grove regarding its payor mix assumption.**

Consistent with its regulations, the Department “screened” Heritage Grove’s application and requested supplemental information. AR 2947-49; *see also* WAC 246-310-090(2) (screening process). In screening, the Department asked Heritage Grove to explain its assumption that only 25% of its patients would be Medicaid beneficiaries in light of the 69% rate in Yakima County and Heritage Grove’s assurance that it would not discriminate between patients based on insurance type:

Please explain how Heritage Grove is expecting to serve their fair share of Medicaid patients when their Medicaid patient days are projected at 25% of total days and the Yakima County average of Medicaid nursing home patient days for 2011 is 69% according to data provided by the Department of Social and Health Services.

AR 2948. In other words, the Department pointed out, if 69% of nursing home patients in Yakima are on Medicaid, and Heritage Grove is going to admit patients irrespective of insurance type, as it agreed to do, it would appear quite unrealistic to project that only 25% of Heritage Grove's patients will be Medicaid beneficiaries.

In response, Heritage Grove confirmed that it would not discriminate among patients based on insurance type. AR 2951. But it admitted that its 25% Medicaid assumption was *not* based on the patient population of Yakima County (69% Medicaid), where it proposed to build the facility, but instead was based on facilities in Lacey, Washington (27% Medicaid) and Vancouver, Washington (30% Medicaid). AR 2951.

The Department also gave Heritage Grove the opportunity to demonstrate the financial feasibility of its project if its payor mix better reflected the actual situation in the planning area:

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

AR 2949. In response, Heritage Grove conceded that if its facility “were to experience 60% Medicaid occupancy, its net income would be reduced[,]” but declined the opportunity to quantify the reduction or show that the proposed facility still would be financially viable. AR 2952.

**D. Heritage Grove asks the Department to begin review of the application without further screening.**

When a CN applicant responds to the Department’s screening questions, it has the option of requesting additional screening, to ensure that the information it has provided is sufficient, or requesting that the Department begin review of the application immediately, without further screening. *See* WAC 246-310-090(2). Heritage Grove declined the opportunity for additional screening, and requested that the Department begin review. AR 2950.

Pursuant to Heritage Grove’s request, the Department began review of the application. The Department received public comments on Heritage Grove’s application, including from the Nursing Home Respondents; conducted a public hearing; and received rebuttal comments

from Heritage Grove in response to the public comments and the testimony at the public hearing. AR 2976-3122.<sup>2</sup>

**E. The Department denies Heritage Grove’s application.**

Although agency staff and the hearing officer initially determined that Heritage Grove’s application should be approved, the Department ultimately denied the application.

**1. Evaluation.**

On July 15, 2015, the Department issued its evaluation of Heritage Grove’s application. Agency staff apparently accepted that it was reasonable for Heritage Grove to use “[t]he two newest facilities in Washington[,]” specifically a facility in Vancouver which “experienced 30% Medicaid occupancy” and a facility in Lacey which has “27% Medicaid occupancy[,]” rather than the actual payor mix in Yakima County, “as a guideline for the Medicaid percent occupancy” at Heritage Grove’s proposed facility in Yakima. AR 3134. Agency staff accordingly

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<sup>2</sup> Although not relevant to the legal issues in this appeal, the reason for the Nursing Home Respondents’ opposition to Heritage Grove’s project may be helpful for context. The Nursing Home Respondents explained to the Department that if the Heritage Grove facility were allowed to open and follow its proposed business plan, it would severely impact the financial viability of the existing facilities, and likely would cause some of them to close. *See, e.g.*, AR 3039 (Willow Springs comments, projecting that it will be “put ... out of business in a very short amount of time”); AR 3049 (Selah comments, explaining that “there is no amount of staffing and expense cuts that [it] could make to prevent [the] facility from going bankrupt and closing”); AR 3055 (Emerald Care’s comments, explaining that it plays a special role in the community due to its proximity to the Yakima Nation, and projecting that if Heritage Grove opens, it would cause “a catastrophic income reduction” threatening the survival of the facility, and at minimum requiring it to eliminate “[a]ll special programs”).

determined that the application could be approved with certain conditions, including that “Heritage Grove and any subsequent owners of the skilled nursing facility must not develop any policies or practices that discriminate against admission of patients based on payer source.” AR 3124. Heritage Grove accepted the conditions, AR 3150, and the Department sent it a CN incorporating them. AR 3153-54.

**2. Initial Order.**

The Nursing Home Respondents requested an adjudicative proceeding regarding the Department’s decision on Heritage Grove’s application. On May 8, 2017, the hearing officer issued his Findings of Fact, Conclusions of Law, and Initial Order, approving Heritage Grove’s application. AR 2140-84. Like the agency staff, the hearing officer apparently determined that Heritage Grove’s assumption that its Medicaid occupancy would be only 25% was reasonable, even though it was based on the 27% and 30% Medicaid occupancy rates at two facilities in western Washington rather than the 69% Medicaid occupancy rate in Yakima County, where the facility would be built. AR 2155-56.

**3. Final Order.**

The Nursing Home Respondents requested administrative review of the decision, the final level of agency review available for CN decisions. *See* WAC 246-10-701. The Secretary of Health designated

Kristi Weeks to be the Review Officer. AR 2340. Under Department rules, Review Officer Weeks had broad discretion in fashioning the Department's final order on Heritage Grove's application, including the power to "modify or revise the initial order in whole or in part[.]" WAC 246-10-702(1)(c).

On August 25, 2017, the Review Officer issued her Findings of Fact, Conclusions of Law, and Final Order on behalf of the Secretary. She denied Heritage Grove's application:

#### **FINAL ORDER**

Based on the foregoing, IT IS HEREBY ORDERED:

4.1 Heritage Grove's application for a certificate of need to construct a 97-bed skilled nursing facility using 97 previously banked nursing home beds is DENIED.

AR 2482.

The Review Officer found that agency staff erroneously had "accepted at face-value" that Heritage Grove's Medicaid occupancy rate would be consistent with "two facilities of similar design" in western Washington, even though "[n]either of these facilities is located in the relevant planning area, Yakima County." AR 2464. The Review Officer further found that "the average Medicaid occupancy for nursing homes in Yakima County was 69 percent" and that Heritage Grove declined the opportunity to show in screening that its \$19 million facility still would be

financially viable if its payor mix reflected the actual Yakima County patient population rather than the Medicaid census at selected facilities in western Washington. AR 2465. And, the Review Officer found, “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[.]” AR 2465-66. Finally, the Review Officer found as follows:

Based on 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 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.

AR 2466-67. The Review Officer also found that because Heritage Grove’s application failed to demonstrate financial feasibility, it also failed the “superior alternative” test in the Department’s cost containment criteria set forth in WAC 246-310-220. AR 2475 (explaining that an application that that is not financially feasible by definition cannot be the best available option).

**F. The Superior Court affirms the Department’s final order under the applicable judicial review standard and also dismisses Heritage Grove’s petition as moot.**

Heritage Grove sought judicial review in Thurston County Superior Court, where it was considered by the Honorable Carol Murphy. Judge Murphy affirmed the Department’s denial of Heritage Grove’s application under the judicial review standard, and also dismissed Heritage Grove’s petition as moot. CP 1024-34. With respect to the Department’s denial of Heritage Grove’s application, Judge Murphy determined that “the record supports the finding that the applicant did not meet the financial feasibility review criteria.” CP 1030. With respect to the mootness of Heritage Grove’s petition, Judge Murphy determined that Heritage Grove could rely upon the RCW 70.38.115(13)(b) exemption only if it obtained a CN within eight years of banking the beds, but “[t]hat did not occur here.” CP 1031.

**III. COUNTERSTATEMENT OF ISSUES PRESENTED**

This judicial review proceeding presents two issues:

1. Whether substantial evidence supports the Department’s determination that Heritage Grove failed to demonstrate that its application satisfies the Department’s financial feasibility and cost containment criteria because Heritage Grove’s payor mix assumption is unreasonable.

2. Whether Heritage Grove’s petition should, in any event, be dismissed as moot because Heritage Grove failed to exercise the exemption within the time-limited, nonclaim period of eight years in RCW 70.38.115(13)(b).

#### IV. STANDARD OF REVIEW

##### A. Department’s denial of Heritage Grove’s CN application.

In a judicial review proceeding under the Administrative Procedure Act (“APA”), “[t]he burden of demonstrating the invalidity of agency action is on the party asserting invalidity.” RCW 34.05.570(1)(a). In CN cases, “the agency decision is presumed correct and . . . the challengers have the burden of overcoming that presumption.” *Overlake Hosp. Ass’n v. Dep’t of Health of State of Wash.*, 170 Wn.2d 43, 49-50, 239 P.3d 1095 (2010). Therefore, the Court should begin with the presumption that the final order denying Heritage Grove’s CN application was correct and Heritage Grove bears the burden of demonstrating otherwise.

Under the APA, judicial relief from agency adjudicative decision-making is available “only in limited circumstances.” *DaVita, Inc. v. Wash. State Dep’t of Health*, 137 Wn. App. 174, 181, 151 P.3d 1095 (2007). The Court reviews an agency order to determine if “[t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court.” RCW 34.05.570(3)(e). When doing so, the Court

analyzes the “agency’s factual findings to determine whether they are supported by substantial evidence sufficient to persuade a fair-minded person of the declared premise.” *DaVita*, 137 Wn. App at 181. The Court “review[s] the evidence in the light most favorable to ‘the party who prevailed in the highest forum that exercised factfinding authority.’” *Univ. of Wash. Med. Ctr. v. Wash. State Dep’t of Health*, 164 Wn.2d 95, 104, 187 P.3d 243 (2008). The Court should “overturn an agency’s factual findings only if they are clearly erroneous.” *DaVita*, 137 Wn. App. at 181.

**B. Superior Court’s dismissal of Heritage Grove’s petition as moot.**

Whether Heritage Grove’s petition should be denied as moot depends upon the interpretation of the time-limited nonclaim statute at issue, RCW 70.38.115(13)(b). Statutory interpretation is an issue of law reviewed de novo. However, the Court “give[s] weight to the agency’s interpretation of the statutes it administers[.]” *DaVita*, 137 Wn. App. at 181; *see also Providence Health & Servs.-Wash. v. Dep’t of Health of the State of Wash.*, 194 Wn. App. 849, 857, 378 P.3d 249 (2016) (“Under the error of law standard, this court may substitute its interpretation of the law for that of the agency, but the agency’s interpretation is accorded substantial deference, particularly where the agency has special knowledge and expertise.”).

## V. ARGUMENT

**A. The Court reviews the final order issued by the Review Officer designated by the Secretary of Health, not the earlier decisions of subordinate agency officials that were superseded by the final order.**

Heritage Grove's argument relies heavily on the decisions of subordinate agency officials that Heritage Grove's application should be approved, made *before* the Review Officer issued the Department's final order denying Heritage Grove's application. Specifically, Heritage Grove cites the evaluation prepared by agency staff at the conclusion of the application process and the initial order issued by the hearing officer following the adjudicative proceeding. *See, e.g.*, Opening Brief of Appellant ("Pet. Br.") at 2, 13, 23, 24-25, 32-33, 33-34, 35-36, 37-38, 41, 42-43 (citing evaluation and/or initial order). However, the staff evaluation and hearing officer's initial order are irrelevant for purposes of this judicial review proceeding.

Under the APA, judicial review is limited to *final* agency action. *See, e.g., Southwick, Inc. v. Washington State*, 200 Wn. App. 890, 896, 403 P.3d 934 (2017) ("We review the Board's final order, not the presiding officer's decision or the superior court's order."). The APA vests agencies with the authority to review the decisions of agency officials before those determinations become the agency's final decisions. *See Chandler v. State, Office of Ins. Com'r*, 141 Wn. App. 639, 649, 173 P.3d

275 (2007) (“In RCW 34.05.464, WAPA sets forth procedures by which agencies may conduct internal reviews of initial orders.”); *see also* RCW 34.05.464(4) (“The officer reviewing the initial order (including the agency head reviewing an initial order) is, for the purposes of this chapter, termed the reviewing officer. The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the reviewing officer upon notice to all the parties. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer’s opportunity to observe the witnesses.”).

In providing for internal agency review, “the Legislature has made the judgment that the final authority for agency decision-making should rest with the agency head rather than with his or her subordinates, and that such final authority includes ‘all the decision-making power’ of the hearing officer.” *Tapper v. State Employment Sec. Dep’t*, 122 Wn.2d 397, 405, 858 P.2d 494 (1993) (quoting RCW 34.05.464(4)). The Washington Supreme Court has observed how “the federal courts have interpreted a virtually identical provision of the Federal Administrative Procedure Act to allow agency heads to substitute their own findings of fact for those

made by hearing officers.” *Id.* at 404. The Supreme Court held that “it is the Commissioner’s findings of fact, to the extent they modify or replace the findings of the ALJ, which are relevant on appeal.” *Id.* at 406.

Washington courts have consistently followed *Tapper* to conclude that a hearing officer’s initial findings of fact have no bearing on appeal if they have been subsequently modified or replaced through the agency’s internal review process. *See, e.g., Regan v. State Dep’t of Licensing*, 130 Wn. App. 39, 49, 121 P.3d 731 (2005); *Valentine v. Dep’t of Licensing*, 77 Wn. App. 838, 844, 894 P.2d 1352 (1995), *as amended* (May 31, 1995).

Similarly, a review officer’s conclusions of law replace those made by the lower-ranking official in the initial order. *See, e.g., Nw. Steelhead & Salmon Council of Trout Unlimited v. Wash. State Dep’t of Fisheries*, 78 Wn. App. 778, 786, 896 P.2d 1292 (1995) (“[B]ecause RCW 34.05.464(4) provides the agency head with ‘all the decision-making power that the reviewing officer would have had to decide and enter the final order’, it follows that the agency head also may substitute his or her own conclusions of law for those made by the hearings officer.”); *Olympic Healthcare Servs. II LLC v. Dep’t of Soc. & Health Servs.*, 175 Wn. App. 174, 184, 304 P.3d 491 (2013) (“[T]he Board’s reviewing judge acted within her authority when she rewrote the ALJ’s initial order, findings of fact, and conclusions of law.”).

In any event, there is no dispute that, under the APA, an agency has the power to make final interpretations of law when conducting its internal review. *See* RCW 34.05.464(8) (“A final order shall include, or incorporate by reference to the initial order, all matters required by RCW 34.05.461(3).”); RCW 34.05.461(3) (“Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . .”). The Department’s own rules similarly provide that a final order “shall contain . . . conclusions of law” and that a final order “may modify or revise the initial order in whole or in part.” WAC 246-10-702(1)(a), (c).

In summary, when an agency conducts an internal review of its decision pursuant to RCW 34.05.464(4), any initial order is irrelevant to a party’s petition for judicial review to this Court because that initial order does not constitute final agency action unless so adopted in the agency’s final order. The Review Officer’s final order in this matter denied Heritage Grove’s application for a CN. AR 2482. The final order contained findings of fact and conclusions of law, and did not adopt any part of the initial order issued by the hearing officer. *See* AR 2442-2484. Washington law is clear that this denial *is* the Department’s decision on Heritage Grove’s application, and this judicial review applies only to this final order.

**B. The Court should affirm the Department’s denial of Heritage Grove’s Certificate of Need application.**

**1. The Department’s financial feasibility and cost containment criteria are set forth in regulation.**

The Department did not adopt a “rule” regarding payor mix assumptions. *See* Pet. Br., at 27-30. It simply determined that Heritage Grove’s payor mix assumption was unreasonable for a facility in Yakima County, and therefore Heritage Grove’s financial projections were unreliable and its application had to be denied. This was a straightforward application of the “financial feasibility” regulatory criteria. *See* WAC 246-310-220 (requiring that “[t]he immediate and long-range capital and operating costs of the project can be met”; “[t]he costs of the project, including any construction costs, will probably not result in an unreasonable impact on the costs and charges for health services”; and “that the project can be appropriately financed”); AR 2479-80 (concluding that Heritage Grove failed to satisfy the financial feasibility requirements). It also determined that because Heritage Grove’s project failed financial feasibility, it also failed one of the “cost containment” regulatory sub-criteria. *See* WAC 246-310-240(1) (requiring that “[s]uperior alternatives, in terms of cost, efficiency, effectiveness, are not available or practicable”); AR 2475 (determining that because Heritage Grove’s

project failed financial feasibility, “it cannot be a viable, let alone best, alternative and also fails this sub-criterion”).

**2. The Department’s findings are supported by substantial evidence.**

Heritage Grove misapplies the standard of review, arguing that “substantial evidence supports the Program’s [e]valuation that all three of the sub-criteria of WAC 246-310-220 were met.” Pet. Br. at 30. Heritage Grove also identifies evidence that might have supported a finding that its payor mix assumption was reasonable. Pet. Br. at 22-25. But, as explained above, the Court reviews the Department’s final order, not the earlier evaluation prepared by agency staff that was superseded by the final order. The salient question is whether substantial evidence supports the Review Officer’s finding that Heritage Grove’s application does *not* satisfy the WAC 246-310-220 criteria, not whether the record contains evidence that could have supported a contrary finding had the Review Officer made one.

**a. Heritage Grove’s payor mix assumption was unreasonable.**

The record contains ample evidence supporting the Review Officer’s financial feasibility determination. The projected Medicaid patient days for the proposed new facility is approximately 25%, AR 3299, which is a striking figure for a low-income area such as Yakima County where the Department calculated the average Medicaid patient

days as 69%. AR 2948. The author of Heritage Grove’s financial projections, Bill Ulrich, admitted in his hearing testimony that he did not use county-wide data from the Yakima planning area in projecting the census mix for the proposed new facility. AR 4638 (noting, “we used data points that are admittedly higher than many of the facilities would experience in Yakima County currently”). Instead, the Medicaid assumption in the payor mix was projected based on facilities in Lacey and Vancouver, as Heritage Grove admitted in its screening responses. AR 4638-39; AR 2951. It is undisputed that the facilities on which Heritage Grove based its payor mix assumption are located nowhere near the geographic area where it proposes to build this facility. AR 2464 n.51 (“Both are located in Western Washington along the Interstate 5 corridor whereas Heritage Grove’s proposed new facility would be located in Central Washington.”).

The relevance of the geographic area in which Heritage Grove proposes to build is not only self-evident, it also is referenced in the CN statutes. *See* RCW 70.38.115(2)(c) (requiring consideration of “[t]he 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*”) (emphasis added). Moreover, although Heritage Grove now argues that Yakima County Medicaid occupancy rates are “irrelevant” to its

application, Pet. Br. at 25, it effectively conceded the relevance of local data in its application. Heritage Grove used local, Yakima County data when calculating its projected Medicare reimbursement rate. Specifically, Heritage Grove examined the three nursing homes that have the highest Medicare resident days in the Yakima planning area—Good Samaritan, Willow Springs, and Landmark—to project the Medicare rate of \$504 in the application. AR 2892 (“The estimated Medicare rate was developed by reviewing facilities in Yakima County that have similar Medicare resident admissions”); AR 2952 (showing calculations).

- b.** If a reasonable payor mix assumption is used, Heritage Grove’s facility is not financially viable.

The Nursing Home Respondents’ expert witness, Norman Hyatt, testified that 50% Medicaid patient days—*double* the 25% assumption used in the application—would be a more realistic figure for a facility that focused on short-term rehabilitation in the Yakima planning area. AR 4497-98. Mr. Hyatt also explained that the existing nursing homes in the Yakima planning area most similar to the project proposed in the application—those with the *lowest* percentage of Medicaid patients—still experienced at least 50% Medicaid patient days. AR 4495-96 (discussing the Landmark and Good Samaritan facilities). Of course, most other facilities in Yakima County experience much higher percentages of

Medicaid residents in their payor mix, such as 90% Medicaid for the Emerald Care facility in Wapato. AR 4294.

Heritage Grove emphasizes in its brief that it will be able to attract large numbers of Medicare patients because its facility will feature the types of rehabilitation services that are attractive to short-stay, post-acute care patients. Pet. Br. at 22. But the record shows that at least two of the Nursing Home Respondents, Landmark and Good Samaritan, provide similar facilities. Landmark, built in 2000, has extensive rehabilitation facilities, equivalent to those that would be available in a community hospital. AR 4120. Similarly, Good Samaritan added a rehabilitation and therapy unit as part of a \$2.7 million renovation in 2007, and more recently has spent another \$1 million on a second therapy wing and additional equipment. AR 4460-62. Yet despite Landmark and Good Samaritan having precisely the types of facilities that short-stay, post-acute care Medicare patients might expect, both facilities still serve approximately 50% Medicaid patients. 4495-96.

For Medicaid residents, the application projected reimbursement of approximately \$166 per day. AR 4498; AR 2892. In contrast, the application projected \$235 per day for private-pay residents, \$454 per day for residents with private insurance, and \$504 per day for Medicare residents. AR 2892. Medicare and private insurance payors reimburse at

roughly three times the rate of Medicaid according to the applicant's projections. AR 2892; AR 3299. Mr. Hyatt explained that if those three payor types were reduced from approximately 75% to 50%, and Medicaid occupancy increased to 50%, Heritage Grove's \$19 million new facility would *not* be financially viable. AR 4497-98; *see also* AR 4485.

Of course, it was not the Nursing Home Respondents' (or the Department's) burden below to prove that Heritage Grove's project was not financially feasible; as the CN applicant, Heritage Grove bore the burden of proving that its application was financially feasible. The Review Officer determined that Heritage Grove failed to carry this burden. AR 2466.

**3. Heritage Grove's remaining arguments are misplaced.**

Heritage Grove makes a series of additional arguments regarding application of the CN criteria. *See* Pet. Br., at 26-40. The Department has thoroughly addressed each of them. *See* Response Brief of Respondent Department of Health ("Dept. Resp. Br."), at 25-35. In the interest of brevity, the Nursing Home Respondents will not duplicate that analysis here. Instead, we simply emphasize that notwithstanding Heritage Grove's assertions to the contrary, Heritage Grove is challenging here garden-variety agency findings within the agency's area of expertise: specifically, that Heritage Grove's payor mix assumption was unreasonable and its

project is not financially feasible. The Department's findings are supported by substantial evidence, including the actual payor mix data for the planning area at issue; the Medicaid occupancy rates at the local facilities most similar to Heritage Grove's proposed facility; the expert testimony that if Heritage Grove's facility were to experience a Medicaid occupancy rate consistent with the planning area as a whole, or even the most similar facilities, it would not be financially viable; and Heritage Grove's commitment to not discriminating among potential patients based on insurance type. Considering the evidence in the light most favorable to the prevailing parties below, the Department's finding easily is "supported by substantial evidence sufficient to persuade a fair-minded person" and not "clearly erroneous." Therefore, under the deferential APA standard applicable to agency actions such as the one at issue here, the Court should affirm the Department's denial of Heritage Grove's application.

**C. The Court should affirm the Superior Court's dismissal of Heritage Grove's petition as moot.**

The Department cogently explains the basis for its dismissal argument below and why the Court should affirm the Superior Court's order. *See* Dept. Resp. Br. at 14-21. In the interest of brevity, the Nursing Home Respondents will not duplicate that argument here. Instead, we simply emphasize the following four points.

First, any suggestion by Heritage Grove that dismissal on mootness grounds would somehow be unfair not only is irrelevant as a legal matter, for the reasons explained by the Department, it also is unfounded. At the time of Heritage Grove's application, Yakima County had a surplus of 182 nursing home beds. AR 531; AR 533-37. As explained above, the CN laws are designed to prevent unneeded facilities from being built. Therefore, to allow Heritage Grove to build this facility would contravene public policy. There is no question that but for the exemption created by RCW 70.38.115(13)(b), Heritage Grove's application would be denied. That Heritage Grove can no longer rely upon the exemption is in no way unfair within the context of the CN laws. Indeed, it is the right outcome from a health facility planning perspective.

Second, this is a jurisdictional issue. Washington courts do not have jurisdiction to consider issues that are moot. *See, e.g., Rosling v. Seattle Bldg. & Const. Trades Council*, 62 Wn.2d 905, 907, 385 P.2d 29 (1963) ("We have repeatedly held that we will not review a proceeding or cause which has become moot.") (citation omitted); *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 602, 229 P.3d 774 (2010) ("A case is moot if a court can no longer provide effective relief."). And "[w]ithout subject matter jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal." *Inland Foundry Co., Inc.*

*v. Spokane Cty. Air Pollution Control Auth.*, 98 Wn. App. 121, 123-24, 989 P.2d 102 (1999).

Third, unlike a traditional statute of limitation, which merely constrains the period in which an aggrieved party may seek a remedy to enforce its rights, the express time limit in RCW 70.38.115(13)(b) cannot be separated from the statutory right to a CN exemption. *See Lane v. Dep't of Labor & Indus.*, 21 Wn.2d 420, 425, 151 P.2d 440 (1944) (defining a nonclaim statute as one that “either by its plain terms or by the construction given it by the court makes the limitation of time inhere in the right or obligation rather than the remedy.”).

Fourth, as explained above, whether Heritage Grove was “issued” a CN by a subordinate agency official prior to the ultimate denial of its application is irrelevant, and this Court lacks jurisdiction to review such a preliminary determination in any event. *See, e.g., DaVita, Inc.*, 137 Wn. App. at 181. All that matters is the Department’s final order, and in the final order the Department denied Heritage Grove’s CN application. It has been more than eight years since Heritage Grove banked its beds and it does not have a CN. Therefore, if Heritage Grove wishes to pursue its project, its only option is to file a new application if and when it can demonstrate numeric need like any other applicant would have to do.

## VI. CONCLUSION

The Nursing Home Respondents respectfully request that the Court affirm the Department's denial of Heritage Grove's CN application and/or affirm the Superior Court's dismissal of Heritage Grove's petition as moot.

DATED: March 15, 2019

**PERKINS COIE LLP**

By: s/Brian W. Grimm  
Brian W. Grimm, WSBA #29619  
BGrimm@perkinscoie.com

1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
T: 206.359.8000 | F: 206.359.9000

Attorneys for Nursing Home  
Respondents

**CERTIFICATE OF SERVICE**

Today I caused to be served at the addresses stated below, via the method of service indicated, a true and correct copy of the foregoing

**Response Brief of Nursing Home Respondents.**

Thomas H. Grimm  
Ryan, Swanson & Cleveland, PLLC  
1201 Third Avenue, Suite 3400  
Seattle, WA 98101  
*Counsel for Petitioners*

- Via Hand Delivery
- Via U.S. Mail
- Via Overnight Delivery
- Via Facsimile
- Via E-filing
- Via E-mail (per agreement) to:  
Grimm@ryanlaw.com  
Walker@ryanlaw.com

Janis Snoey  
Assistant Attorney General  
Office of the Attorney General  
Agriculture & Health Division  
P.O. Box 40109  
Olympia, WA 98504  
*Counsel for Respondent Washington  
State Department of Health*

- Via Hand Delivery
- Via U.S. Mail
- Via Overnight Delivery
- Via Facsimile
- Via E-filing
- Via E-mail (per agreement) to:  
JanisS@atg.wa.gov  
BrendaC1@atg.wa.gov  
LindaH5@atg.wa.gov  
AhdOlyEF@atg.wa.gov  
KhrysK@atg.wa.gov

DATED: March 15, 2019

s/Sherri Wyatt  
\_\_\_\_\_  
SWyatt@perkinscoie.com

**PERKINS COIE LLP**

**March 15, 2019 - 3:13 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52393-1  
**Appellate Court Case Title:** Heritage Grove, et al., Appellants v. Department of Health, et al., Respondents  
**Superior Court Case Number:** 17-2-05158-3

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- walker@ryanlaw.com

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Sender Name: Brian Grimm - Email: BGrimm@perkinscoie.com  
Address:  
1201 3RD AVE STE 4900  
SEATTLE, WA, 98101-3099  
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