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STATE OF WASHINGTON

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

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DEPARTMENT OF HEALTH OF THE STATE OF WASHINGTON,

Appellant,

v.

THE POLYCLINIC, a Professional Corporation, a Washington  
corporation and SWEDISH HEALTH SERVICES, a Washington  
nonprofit corporation,

Respondents.

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**BRIEF OF APPELLANT WASHINGTON STATE DEPARTMENT  
OF HEALTH**

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## I. INTRODUCTION

RCW 70.38 requires a health care provider to apply for a Certificate of Need from the Appellant Department of Health (Department) when seeking to establish certain types of facilities and services. For approval, an applicant must meet certain criteria. RCW 70.38.115(2). The process assures that health care is accessible to Washington residents, and helps control health care costs. RCW 70.38.015(1). Costs are controlled by requiring that existing facilities are well utilized before new facilities are approved. *St. Joseph Hospital v. Dep't of Health*, 125 Wn.2d 733, 736, 887 P.2d 891 (1995).

Specifically, a Certificate of Need is required prior to the “construction, development, or other establishment of a new health care facility,” including an ambulatory surgery facility. RCW 70.38.105(4)(a). In 1991, Respondent Polyclinic received a Certificate of Need to establish an ambulatory surgery facility. The certificate contained two important restrictions: (1) the facility could have only three operating rooms, and (2) the facility would be located at 1145 Broadway in Seattle.

Polyclinic recently developed plans to increase the number of operating rooms from three to ten and to move the facility to a nearby location. Polyclinic asked the Department whether the planned expansion and relocation would require Certificate of Need approval under RCW

70.38.105(4)(a). When the Department informed Polyclinic that approval would be required, Polyclinic filed a superior court action challenging the decision.

The plain meaning of a “new” health care facility in RCW 70.38.105(4)(a) requires Polyclinic to obtain a new Certificate of Need in order to increase the number of approved operating rooms and move to a new unapproved location.

Several past Department decisions mistakenly allowed expansion or relocation of other ambulatory surgery facilities without Certificate of Need approval. Based on these decisions, the superior court held that the Department may not require approval of Polyclinic’s expansion and relocation without imposing the requirement in a rule adopted under the Administrative Procedures Act (RCW 34.05). This holding directly conflicts with the law, and should be overturned.

## **II. ASSIGNMENT OF ERROR**

The superior court erred in failing to uphold the Department’s interpretation of RCW 70.38.105(4)(a) as requiring Polyclinic to obtain a Certificate of Need in order to expand or relocate its ambulatory surgery facility. The superior court also erred in holding that the Department may not enforce its interpretation of RCW 70.38.105(4)(a) without adopting the interpretation in rule under RCW 34.05.

### III. ISSUES RELATED TO ASSIGNMENT OF ERROR

The “construction, development, or other establishment of a new” ambulatory surgery facility requires Certificate of Need approval. RCW 70.38.105(4)(a). Polyclinic received approval for an ambulatory surgery facility with three operating rooms at 1145 Broadway in Seattle. Under RCW 70.38.105(4)(a), must Polyclinic obtain a new Certificate of Need in order to establish a facility with seven additional *unapproved* operating rooms at a new *unapproved* location?

The Department mistakenly allowed several ambulatory surgery facilities to expand their operating rooms and to relocate without obtaining a new Certificate of Need, as required by RCW 70.38.105(4)(a). Is the Department prevented from correctly applying RCW 70.38.105(4)(a) in Polyclinic’s case until it adopts an administrative rule reiterating the statutory requirement?

### IV. STATEMENT OF CASE

The Department administers the Certificate of Need law under RCW 70.38 and WAC 246-310. RCW 70.38.105(4)(a) requires an entity to obtain a Certificate of Need prior to “constructing, developing, or otherwise establishing a new health care facility.” A health care facility includes an “ambulatory surgery facility”. RCW 70.38.025(6). An

ambulatory surgery facility is a facility where surgery is performed without hospitalization. WAC 246-310-010(5).

Polyclinic applied for a Certificate of Need to establish an ambulatory surgery facility with three operating rooms. Clerk's Papers (CP) at 154. In May 1991, the Department granted CN # 1046 to Polyclinic for a facility with three operating rooms at 1145 Broadway in Seattle. CP at 156. The facility continues in operation, and is now operated jointly by Polyclinic and Swedish Health Services (Polyclinic).

Following an inquiry from Polyclinic, the Department informed the company that a new Certificate of Need would be required in order to expand its number of approved operating rooms and to change the approved location of the facility. CP at 18. Polyclinic filed a lawsuit in Thurston County Superior Court contesting the Department's decision to require Certificate of Need approval of the planned expansion and relocation. CP at 6-42.

Several past Department decisions mistakenly allowed expansion or relocation of ambulatory surgery facilities without Certificate of Need review. CP at 152. Based on these decisions, the superior court held that the Department could not require review of Polyclinic's proposed expansion and relocation without imposing the requirement in a "rule"

adopted under the Administrative Procedures Act (RCW 34.05). CP at 78-84. The Department appeals this holding.

## V. STANDARD OF REVIEW

Polyclinic challenges the Department's interpretation of RCW 70.38.105(4)(a) as requiring Polyclinic to obtain a new Certificate of Need in order to expand and relocate its ambulatory surgery facility. An agency's decision is presumed correct, and the challenger has the burden of overcoming that presumption. RCW 34.05.570(1); *Overlake Hospital Ass'n v. Dep't of Health*, 170 Wn.2d 43, 49-50, 239 P.3d 1095 (2010). Interpretations of statutes are reviewed de novo by the appellate court. *Odyssey Healthcare v. Dep't of Health*, 145 Wn. App. 131, 140, 185 P.3d 652 (2008).

## VI. ARGUMENT

### A. Polyclinic's Planned Expansion And Relocation Is The "Construction, Development, Or Other Establishment Of A New Health Care Facility" For Which Certificate Of Need Approval Is Required Under RCW 70.38.105(4)(a)

RCW 70.38.105(4)(a) requires Certificate of Need approval whenever an entity proposes the "construction, development, or other establishment of a new health care facility." Under this statute, Polyclinic's proposed expansion and relocation are both subject to Certificate of Need review.

**1. Polyclinic's Plan To Expand Its Number Of Approved Operation Rooms Requires Certificate Of Need Approval**

For approval, a Certificate of Need applicant must show that the population to be served has "need" for the proposed facility. RCW 70.38.115(2)(a); WAC 246-310-210(1). The applicant must also meet other criteria. RCW 70.38.115(2); WAC 246-310-210 (need and accessibility); WAC 246-310-220 (financial feasibility); WAC 246-310-230 (structure and process of care); WAC 246-310-240 (cost containment).

Regarding the "need" criterion for an ambulatory surgery facility application, the Department has adopted a methodology to determine the number of operating rooms that will be "needed" in the future to serve patients in the planning area where the facility would be located. WAC 246-310-270. The methodology identifies the current number of operating rooms in the planning area. It then considers various factors, such as use rates and projected population growth, to determine whether *additional* operating rooms will be needed in the future to serve residents of the planning area.

In 1990, Polyclinic applied for approval of a facility with three operating rooms. The methodology in WAC 246-310-270 showed need for three operating rooms, and Polyclinic met all criteria for Certificate of

Need approval. Hence, in 1991, the Department issued CN # 1046 to Polyclinic for an ambulatory surgery facility restricted to three operating rooms.

Polyclinic now plans to expand its facility to ten operating rooms, seven more than the number authorized by CN # 1046. The “construction, development, or other establishment of a new health care facility” is subject to Certificate of Need review under RCW 70.38.105(4)(a). Under this statute, Polyclinic must obtain a new Certificate of Need in order to operate *more than* the three approved operating rooms.

Polyclinic contends that its planned expansion (from three to ten operating rooms) is not a “new” facility within the meaning of RCW 70.38.105(4)(a) because the Polyclinic facility (with three operating rooms) already exists. CP 169-70. This contention is without merit.

The meaning of “new” in RCW 70.38.105(4)(a) is not defined. Courts give undefined statutory terms their common dictionary meaning. *Budget Rent A Car Corp. v. Dep’t of Licensing*, 144 Wn.2d 889, 899-900, 31 P.3d 1174 (2001). “New” means “having originated or occurred lately.” *Webster’s Third New International Dictionary of the English Language* 1522 (2002).

CN # 1046 expressly limits Polyclinic to just three operating rooms. Hence, an expanded Polyclinic facility, having *more than* three

operating rooms, plainly would constitute the construction, development, or other establishment of a “new” health care facility in that such a facility *has not previously existed*.

Moreover, the Certificate of Need law should be interpreted consistent with the purpose of the law. *Overlake Hospital Ass’n*, 170 Wn.2d at 52. Allowing Polyclinic to more than triple its number of approved operating rooms, without Certificate of Need approval, would be directly contrary to the purpose of the law. The methodology in WAC 246-310-270 – requiring that an ambulatory surgery facility applicant show need for a certain number of operating rooms – means that operating rooms may be approved *only* when the current supply is inadequate to meet the future need. This requirement would be entirely frustrated if an ambulatory surgery facility approved for three operating rooms – once opened – could add as many operating rooms as it wanted, *without* having to demonstrate that more than three operating rooms were needed to serve patients.

Furthermore, bypassing Certificate of Need review would allow Polyclinic to evade the other above-identified criteria for obtaining approval to establish a new health care facility.

In summary, the three operating-room restriction in CN # 1046 prohibits Polyclinic from having more than three operating rooms.

Hence, Polyclinic's plan to expand to ten operating rooms constitutes the "construction, development, or other establishment of a new health care facility" subject to Certificate of Need review under RCW 70.38.105(4)(a). Under its current Certificate of Need, Polyclinic simply may not operate seven additional *unapproved* operating rooms.

**2. Polyclinic's Plan To Relocate Its Facility Also Requires Certificate Of Need Approval**

CN # 1046 approved Polyclinic's facility for a specific location: 1145 Broadway in Seattle. Polyclinic challenges the Department position that Certificate of Need approval is required to change the site of the facility. This challenge is without merit. Plainly, a change of site would involve the construction, development or other establishment of a facility that is "new" in that such a facility *has not previously existed*. Hence, Certificate of Need approval is required under RCW 70.38.105(4)(a).

The Department's position is supported by the regulatory scheme for site changes. Under WAC 246-310-570(1)(f), a Certificate of Need holder may request an "amended" certificate to change an approved site. However, there is a very limited window of opportunity to do so. The request must be made within 90 days of project completion and the certificate holder has made "substantial and continuing progress" towards commencing the project at the new site within two years of issuance

of the certificate. WAC 246-310-570(2)(a); WAC 246-310-580(1); WAC 246-310-570(4).

Hence, under WAC 246-310-570, not only is Polyclinic prohibited from changing sites without Certificate of Need approval, it is not even eligible for Certificate of Need site-change approval at this point in time. Accordingly, Polyclinic's only option for relocating the facility is obtaining a new Certificate of Need for "construction, development, or other establishment of a new health care facility," as required by RCW 70.38.105(4)(a). An application will be approved if Polyclinic can satisfy all the criteria for Certificate of Need approval.

**B. The Department's Prior Decisions Do Not Exempt Polyclinic From The Statutory Requirement To Obtain A Certificate Of Need When It Seeks To Establish A New Ambulatory Surgery Facility**

Several past Department decisions allowed ambulatory surgery facilities to expand or relocate without Certificate of Need approval. Polyclinic contends that the Department must follow these past decisions and allow Polyclinic to expand and relocate without Certificate of Need approval. This contention is without merit.

**1. Agency Decisions Cannot Change A Statutory Requirement**

The issue in this case is whether the Department's past interpretation of RCW 70.38.105(4)(a) gives Polyclinic the right to expand

or relocate without Certificate of Need approval. An agency's interpretation of a statute will be overturned if it is inconsistent with the plain meaning or intent of the statute. *Agrilink Foods Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005). Hence, an agency's incorrect interpretation of a statute does not relieve a regulated entity from having to comply with the requirements of the statute.

This principle is well illustrated by *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). In that case, in 1973, the Department of Ecology issued a water right to a residential development based on the system's capacity. *Id.* at 587. Then, in 2001, the department abandoned its prior interpretation of the statute, and conditioned its award of the water right on the beneficial use of the water, rather than on the water system's capacity. The new beneficial-use condition was more restrictive than the previous system-capacity condition. *Id.* at 588. The Court determined the beneficial-use condition was consistent with the governing statute. *Id.* at 590-97. It rejected the argument that the prior award of the license had created a "vested right" to use water based on the system's capacity. *Id.* at 598. The Court held that the department's award of the license under the system-capacity standard was "*ultra virus*," and the department did not act arbitrarily and capriciously in changing to the correct beneficial-use standard. *Id.*

The rationale behind the *Agrilink Foods* and *Theodoratus* holdings is that an agency cannot change a statutory requirement by incorrectly interpreting the requirement. Through misinterpretation of a statute, an agency cannot commandeer the authority of the Legislature to make the law.

Finally, it should be noted that, in *Theodoratus*, the Department of Ecology altered its interpretation of the law to the licensee's detriment after issuing the license. In contrast, in 1991, the Department approved Polyclinic for three operating rooms at 1145 Broadway in Seattle – and never told Polyclinic that it could operate more than three operating rooms at a different location. To the contrary, in 2014, the Department told Polyclinic that a new Certificate of Need would be required if it wanted to expand or relocate its facility.

In summary, the Department may change its interpretation of RCW 70.38.105(4)(a) to correctly require Polyclinic to obtain a new Certificate of Need prior to any expansion or relocation of its facility. Not only is the Department entitled to correct its prior interpretation, but it is obligated to do so.

2. **Under RCW 70.38.105(4)(a), The Department May Require Polyclinic To Obtain A New Certificate of Need For Its Expansion And Location Without Adopting A Rule Reiterating The Statutory Requirement**

The superior court did not reach the issue of whether RCW 70.38.105(4)(a) requires Certificate of Need approval for Polyclinic's expansion or relocation. Instead, given the Department's past interpretation of the statute, the superior court ruled the Department may not enforce the law unless it first adopts the new interpretation in a rule under the Administrative Procedures Act (RCW 34.05). The superior court's holding is wrong.

A "rule," which must be adopted under the rule-making provisions in RCW 34.05, is defined by RCW 34.05.010(16) to include:

any agency order, directive, or regulation of general applicability . . . (d) which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession . . .<sup>1</sup>

However, an agency's "rudimentary interpretation" of a statute does not meet the definition of a rule. *Budget Rent A Car Corp.*, 144 Wn.2d at 898. Hence, such an interpretation need not be adopted in rule under RCW 34.05, as the rule-making requirement is not intended to "straightjacket" administrative action. *Id.* In *Budget*, the court held that

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<sup>1</sup> Similarly, a "significant legislative rule" occurs when the agency "establishes, alters, or revokes any qualification or standard for the issuance suspension, or revocation of a license or permit." RCW 34.05.328(5)(c)(iii)(B).

the statutory phrase “total number of cars in the fleet” for taxing purposes may be rudimentarily interpreted by the Department of Revenue to mean the total number “purchased during the assessment year,” *without* the agency having to adopt the interpretation in rule.

Similarly, the statutory phrase “sale or issuance” of a bond may be rudimentarily interpreted by the Department of Licensing to include discrete tasks involved in the sale of bonds, *without* the agency having to adopt the interpretation in rule. *Regan v. Dep’t of Licensing*, 130 Wn. App. 39, 54, 121 P.3d 731 (2005).

Based on these cases, when Polyclinic seeks a declaratory ruling on what constitutes a “new” health care facility under RCW 70.38.105(4)(a), the Department is not required to adopt a rule stating its rudimentary interpretation of the statute. It is hard to imagine a more rudimentary interpretation of a statute than is offered here. The Department is simply interpreting the plain meaning of “new” health care facility in RCW 70.38.105(4)(a) to include a facility that seeks to expand its number of approved operating rooms and to move from its approved location. In fact, the Department’s interpretation of RCW 70.38.105(4)(a) is much more rudimentary than the examples in *Budget* and *Regan*.

The “rudimentary-interpretation” holding applies with special force in Polyclinic’s case because it is beyond reasonable dispute that a

“new” ambulatory surgery facility, requiring Certificate of Need approval under RCW 70.38.105(4)(a), would include an existing facility that plans to add *unapproved* operating rooms at an *unapproved* location. The Department is not compelled to adopt a rule whose requirement would be patently obvious from the plain meaning of the statute.

“Altering” a licensing “standard” fits the definition of a rule. RCW 34.05.010(16)(d). The superior court held that the Department’s *change* in interpretation of RCW 70.38.105(4)(a) made the new interpretation a rule, requiring that it be adopted as a rule. This holding is wrong because the requirement for Certificate of Need approval of a “new” health care facility derives from RCW 70.38.105(4)(a). Of course, the Department has no authority to alter this statutory standard. The court in *Theodoratus* held that an agency acts *ultra virus* when it incorrectly applies statutory licensing standards. The superior court failed to understand that the Department’s current interpretation of RCW 70.38.105(4)(a) is not altering a standard, but rather is correctly interpreting a statutory standard. Accordingly, consistent with *Budget* and *Regan*, the Department need not adopt a rule in order to correctly require Certificate of Need review under RCW 70.38.105(4)(a) of Polyclinic’s expansion and relocation.

The superior court relied on two cases for requiring rule-making. CP at 181-82. In *Failor's Pharmacy v. Dept. of Soc. and Health Servs.*, 125 Wn.2d 488, 866 P.2d 147 (1994), a statute allowed the Department of Social and Health Services to contract for Medicaid Services. The department, without adopting a rule, implemented a reimbursement schedule for service providers. The Court held that the schedule met the definition of a rule, and therefore could not be implemented without being adopted in rule.

In *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 932 P.3d 139 (1997), a statute set four criteria for the Department of Ecology to apply in granting a water right permit. *Id.* at 399. In addition, the department adopted a policy (not in rule) prioritizing the processing of applications. The Court held that because this prioritization policy imposed a new permit qualification, it met the definition of a "rule" and could not be implemented without the agency adopting the policy in rule. *Id.*

*Failor's* and *Hillis* are easily distinguished from Polyclinic's case. The reimbursement schedule in *Failor's*, and the prioritization policy in *Hillis*, did not involve the rudimentary interpretation of a statute, but rather imposed substantive new standards for obtaining a benefit from the state.

In ruling against the Department, the superior court also cited two cases on the importance of an agency giving prior notice under RCW 34.05 of its interpretation of a statute. CP at 185-86; *Long Island Care Ltd. v. Coke*, 551 U.S. 158, 170 (2007); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012). However, of course, the rule-making notice requirements in RCW 34.05 apply only when the agency is adopting a requirement that meets the definition of a rule. The notice requirements do not apply when an agency, as in Polyclinic's case, is simply asserting a rudimentary interpretation of a statute, since such an interpretation does not meet the definition of a rule.

Moreover, it should be noted that *Long Island Care* and *Christopher* involved a very different factual situation than Polyclinic's case. In those cases, a changed agency interpretation, if followed by the court, would impose *retroactive* wage liability on employers. Polyclinic's case presents no similar lack-of-notice and fairness issue. *Before* Polyclinic undertook its expansion and relocation, the Department notified the company that Certificate of Need approval would be required. This advance notice avoided any unfairness in requiring Polyclinic to obtain Certificate of Need approval for its expansion and relocation.

In summary, the Department is not required to adopt a rule in order to rudimentarily interpret RCW 70.38.105(4)(a) as requiring Polyclinic to

obtain a new Certificate of Need in order to expand and relocate its ambulatory surgery facility. No statute, rule, or case law supports the superior court's ruling that adoption of a rule is required to enforce the statute.

## **VII. CONCLUSION**

RCW 70.38.105(4)(a) requires Certificate of Need approval from the Department for the "construction, development, or other establishment of a new" ambulatory surgery facility. Under this statute, Polyclinic received approval for an ambulatory surgery facility restricted to three operating rooms at 1145 Broadway in Seattle.

The Department respectfully requests that this court find that: (1) the Department correctly determined that, under RCW 70.38.105(4)(a), Certificate of Need approval is required for Polyclinic to expand its number of operating rooms or relocate its facility; and (2) the Department may enforce the statutory approval requirement without reiterating the requirement in a rule adopted under RCW 34.05.

If Polyclinic desires to expand from three to ten its number of operating rooms, and relocate its ambulatory surgery facility, it may apply for a new Certificate of Need to do so. The application will be approved if Polyclinic shows that the planning area needs seven additional operating

rooms to serve patients, and if the application meets all other criteria for Certificate of Need approval.

RESPECTFULLY SUBMITTED this 17 day of February, 2015.

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A handwritten signature in black ink, appearing to read 'Richard A. McCartan', written over a horizontal line.

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BY [Signature]  
DEPUTY

**CERTIFICATE OF SERVICE**

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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 17<sup>th</sup> day of February, 2015, at Olympia, Washington.

[Signature]  
MARILYN WHITFELDT