

No. 72612-9-I

---

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

SWEDISH HEALTH SERVICES,  
a Washington nonprofit corporation,

Petitioner,

v.

DEPARTMENT OF HEALTH OF THE STATE OF  
WASHINGTON,

Respondent.

---

REPLY BRIEF OF SWEDISH HEALTH SERVICES

---

Brian W. Grimm, WSBA No. 29619  
PERKINS COIE LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
(T) 206.359.8000  
(F) 206.359.9000

Attorneys for Petitioner,  
Swedish Health Services

2015 FEB 27 11:2:05  
COURT OF APPEALS  
STATE OF WASHINGTON

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ARGUMENT .....	1
A.	The Supreme Court decided the legal issue before this Court in the <i>Odyssey</i> case. ....	1
B.	The nature of the Supreme Court’s holding in <i>Odyssey</i> is underscored by the dissent. ....	4
C.	<i>Odyssey</i> related to whether a CON application may be approved even if applicable CON requirements are <i>not</i> satisfied, not merely to what evidence may be considered that the applicable CON requirements <i>have been</i> satisfied.....	5
D.	The Court need not decide whether special circumstances <i>warrant approval</i> of Swedish’s application, only whether special circumstances <i>may be considered</i> . ....	6
III.	CONCLUSION .....	7

**TABLE OF AUTHORITIES**

**Cases**

*King County Public Hospital District No. 2 v. Washington State  
Department of Health,*  
178 Wn.2d 363, 309 P.3d 416 (2013)..... passim

**Regulations**

WAC 246-310-290..... 2, 5

**Other Authorities**

Supplemental Brief of Washington State Department of Health,  
*King County Public Hospital District No. 2 v. Washington State  
Department of Health,* 178 Wn.2d 363 (2013) (No. 87574-0),  
2012 WL 6827560 ..... 3

## I. INTRODUCTION

The only issue before the Court is whether the Department may approve a CON application that does not satisfy applicable CON requirements, based on “special circumstances.” If, as a matter of law, a non-conforming CON application cannot be approved based on special circumstances, the Court should affirm the Department’s decision. If, however, a non-conforming CON application *can* be approved based on special circumstances, the Court should reverse the Department’s summary judgment order, and remand this matter to the Department for an adjudicative hearing to determine whether special circumstances warrant approval of Swedish’s application to provide elective PCIs at First Hill.<sup>1</sup>

## II. ARGUMENT

### A. **The Supreme Court decided the legal issue before this Court in the *Odyssey* case.**

Although there are several court opinions from other states addressing approval of non-conforming CON applications, two of which were referenced in Swedish’s opening brief, the only prior Washington case addressing this legal issue is *King County Public Hospital District No. 2 v. Washington State Department of Health*, 178 Wn.2d 363, 309 P.3d 416 (2013) (the “*Odyssey*” case). However, Swedish submits that

---

<sup>1</sup> Swedish uses the same defined terms in this reply brief that it identified in its opening brief.

*Odyssey* decided the precise legal issue before this Court, and should determine the outcome of this case.

Odyssey Healthcare's CON application to establish a hospice agency in King County did not satisfy at least one of the CON requirements relating to new hospice agencies. The applicable regulations required Odyssey Healthcare to demonstrate need for a new hospice agency based on actual data for the three years prior to the filing of the application. *See* WAC 246-310-290(7). Odyssey Healthcare could not do so. *Odyssey*, 178 Wn.2d at 368. However, the Department approved Odyssey Healthcare's application based on special circumstances, specifically that if data for years *after* the application was considered, need could be demonstrated. *Id.*, at 371.

Several competitors challenged the Department's decision, arguing that Odyssey Healthcare's application could not be approved unless it satisfied the applicable CON regulations. The competitors prevailed in the superior court; Odyssey Healthcare prevailed in this Court; and the case ultimately was heard by the Supreme Court. *Id.*, at 366.

In its supplemental brief in the Supreme Court, the Department explained that its approval was based on the special circumstances relating to Odyssey Healthcare's application. The Department explained that had Odyssey applied in 2008 (i.e., two years after it actually applied in 2006),

its application would have been approved, because a need forecast based on data for the three years prior to 2008 would have demonstrated need. *See* Supplemental Brief of Washington State Department of Health, *Odyssey*, 2012 WL 6827560, at \*10-11. The Department considered Odyssey Healthcare's failure to file a 2008 application to be "understandable" in light of the ongoing litigation relating to its 2006 application and other circumstances. *Id.*, at \*4. The Department also determined that there would be "no unfairness" to other applicants in approving Odyssey Healthcare's application, because no other providers had filed competing applications that would be prejudiced as a result. *Id.*, at \*11. Finally, the Department emphasized that Odyssey Healthcare's application presented an "unusual" situation which was "unlikely to often recur[.]" *Id.*, at \*12.

Thus, the Department argued to the Supreme Court, it "was principled, fair, and certainly not manifestly unreasonable for the Department to consider the December 2008 need calculations" and approve Odyssey Healthcare's application on this basis. *Id.*, at \*11.

The Supreme Court agreed with the Department. It determined that "[i]n light of the special circumstances described by the department, the HLJ did not abuse his discretion by considering the 2008 need calculation" and approving Odyssey Healthcare's application. *Odyssey*,

178 Wn.2d at 374. It identified the same special circumstances that the Department described in its brief: that had Odyssey Healthcare filed an application two years later, in 2008, it would have been approved; it was “reasonable” for the company not to have done so, given the ongoing litigation and other circumstances; and there were no competing applications that would be prejudiced by the approval. *Id.*, at 374-5.

**B. The nature of the Supreme Court’s holding in *Odyssey* is underscored by the dissent.**

*Odyssey* was not a unanimous opinion. Justice Johnson, joined by Justice Stephens, wrote a dissent in which he criticized the majority for affirming the Department’s approval of a CON application that did not satisfy the regulatory criteria. *Id.*, at 382. Justice Johnson stated that the Department’s reliance upon special circumstances “was an improper departure from specific department rules and regulations.” *Id.*, at 384. The special circumstances identified by the majority, he explained, “have no bearing on whether need existed when the application was filed”—i.e., on whether Odyssey Healthcare’s application actually satisfied the applicable CON requirements. *Id.*

The Supreme Court ruled that a CON application *can* be approved based on special circumstances, even if CON requirements are not satisfied, and affirmed the approval of Odyssey Healthcare’s application

based on such special circumstances. The dissent underscores the nature of this ruling.

**C. *Odyssey* related to whether a CON application may be approved even if applicable CON requirements are *not* satisfied, not merely to what evidence may be considered that the applicable CON requirements *have been* satisfied.**

As anticipated in Swedish's opening brief, the Department argues that *Odyssey* merely involved an "evidentiary" ruling. But the evidence relied upon by the Department in approving Odyssey Healthcare's application was not evidence that the application satisfied the applicable CON requirements. Instead, it was evidence of special circumstances.

The Department argues that "[t]he updated data showed that Odyssey *met* the criteria for Certificate of Need approval." Department of Health's Response to the Opening Brief of Swedish Health Services, January 27, 2015 ("Dept. Br."), at 9 (emphasis added). The Department is mistaken. The applicable regulation requires a hospice application to show need based on data from "the *last three* years" (in Odyssey Healthcare's case, 2003, 2004, and 2005). WAC 246-310-290(7) (emphasis added). Odyssey Healthcare's application was approved based on data from *one* of the "last three" years (i.e., 2005) and the two "next" years (i.e., 2006 and 2007). Moreover, if it were true that Odyssey Healthcare's 2006 application actually *satisfied* the applicable regulation,

as the Department argues, there would have been no reason for the Department, or the Supreme Court, to explain that it was “understandable” and “reasonable” for Odyssey to not have filed a later application and that there would be no prejudice to other providers; these other factors only were relevant because Odyssey Healthcare’s application did *not* satisfy the applicable regulation, and therefore the special circumstances surrounding Odyssey Healthcare’s application needed to be considered.

**D. The Court need not decide whether special circumstances warrant approval of Swedish’s application, only whether special circumstances may be considered.**

The Department appears to concede that there are *some* special circumstances that could warrant approval of Swedish’s application. Specifically, the Department states that if “Swedish had attempted to introduce updated data showing that existing programs were no longer below the 300 volume standard” it may have been possible for the Department to “approve Swedish’s application.” Dept. Br., at 9-10. This of course would be the closest parallel to the facts in *Odyssey*. However, the special circumstance identified by Swedish is not that other hospitals’ volumes have increased since Swedish filed its application, but rather that a PCI program at First Hill would have no effect on other hospitals, and therefore the other hospitals’ volumes are irrelevant.

If the Department had conducted an adjudicative hearing, considered Swedish's evidence of special circumstances, and determined that either Swedish failed to prove special circumstances, or that they were insufficient to warrant approval of Swedish's application, the Department's argument as to *which* special circumstances matter—i.e., increased volumes at other hospitals, but not a lack of impact on other hospitals—might be applicable. However, the Department granted summary judgment, determining as a matter of law that special circumstances may not be considered.

Therefore, the question before the Court is whether special circumstances may be considered as a matter of law, not whether special circumstances warrant approval of Swedish's application as a factual matter. The latter only may be determined on remand, after an evidentiary hearing has been conducted.

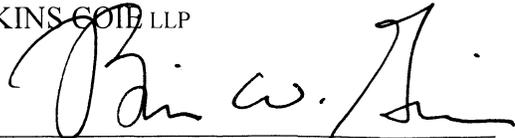
### III. CONCLUSION

The Supreme Court's opinion in the *Odyssey* case establishes, as a matter of law, that a CON application may be approved based on special circumstances. Whether special circumstances warrant approval of Swedish's application has yet to be determined. However, the Department's summary judgment decision, determining as a matter of law that special circumstances may not be considered, constituted legal error.

The Court accordingly should reverse the Department's decision and remand this matter to the Department to conduct an adjudicative hearing to determine whether special circumstances warrant approval of Swedish's application to provide elective PCIs at First Hill.

Respectfully submitted this 27th day of February 2015.

PERKINS GOIB LLP

By: 

Brian W. Grimm, WSBA No. 29619

1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000

Attorneys for Petitioner,  
Swedish Health Services

**CERTIFICATE OF SERVICE**

I certify that today I caused to be served the foregoing document on the following person by the method so indicated:

Party	Service
Richard A. McCartan Senior Counsel Office of the Attorney General Agriculture & Health Division 7141 Cleanwater Drive SW Olympia, WA 98504 Attorney for Washington State Department of Health	First Class Mail, Postage Prepaid & E-mail to:  <u>RichardM@atg.wa.gov</u> <u>RebeccaM3@atg.wa.gov</u> <u>LindaH5@atg.wa.gov</u> <u>AhdOlyEF@atg.wa.gov</u>

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 27th day of February, 2015, at Seattle, Washington.

  
\_\_\_\_\_  
Julie K. DeShaw, Legal Secretary

LEGAL124581073.1

2015 FEB 27 PM 2:05

OFFICE OF THE ATTORNEY GENERAL  
STATE OF WASHINGTON