

No. 43193-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KADLEC REGIONAL MEDICAL CENTER, a
Washington nonprofit corporation,

Petitioner,

v.

DEPARTMENT OF HEALTH OF THE STATE OF
WASHINGTON,

Respondent.

OPENING BRIEF OF KADLEC REGIONAL
MEDICAL CENTER

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I. INTRODUCTION

This judicial review proceeding relates to a Certificate of Need (“CON”) decision of the Washington State Department of Health (the “Department”) to approve only 55 additional acute care hospital beds at Kadlec Regional Medical Center (“Kadlec”) rather than all 114 additional beds requested by Kadlec. Kadlec submits that it has the right to an adjudicative proceeding or, alternatively, judicial review, with respect to the Department's denial of Kadlec's larger expansion request. The Department argues that because it "granted" Kadlec's application by approving a 55-bed expansion, Kadlec has no right to appellate review, by any administrative law judge or any court, of the Department's decision to deny Kadlec's larger expansion request.

Kadlec requests that the Court remand this matter to the Department to conduct the adjudicative proceeding requested by Kadlec with respect to the Department's denial of Kadlec's 114-bed expansion request. Alternatively, if the Court determines that Kadlec does not have the right to an adjudicative proceeding, Kadlec requests that the Court conduct a judicial review of the Department's denial of Kadlec's larger expansion request.

II. ASSIGNMENTS OF ERROR

A. The Department erred by dismissing the adjudicative proceeding commenced by Kadlec.

B. The Department erred by denying Kadlec's application for 114 additional beds.¹

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Issues Pertaining to Assignment of Error no. 1:

1. Whether the Department must conduct an adjudicative proceeding because Kadlec was denied a CON for 114 additional beds and Kadlec therefore had the right to an adjudicative proceeding regarding that denial.

2. Whether the Department must conduct an adjudicative proceeding because the Department informed Kadlec in writing, when denying Kadlec's 114-bed request, that Kadlec could appeal the decision in an adjudicative proceeding.

B. Issue Pertaining to Assignment of Error no. 2:

Whether the Department's use of the "medium" population projection prepared by the Office of Financial Management ("OFM"), to determine acute care bed need in the Benton-Franklin Planning Area, was arbitrary or capricious, because the Department's standards require it to use the "most accurate" population projection, which in this case was the "high" population projection prepared by OFM.

¹ Kadlec's CON application also included a 75-bed request, i.e., one smaller than the full, 114-bed expansion but larger than the 55-bed expansion approved by the Department. Kadlec also challenges the Department's denial of its 75-bed request. However, for ease of reference, when discussing the larger expansion requests in this brief, Kadlec will simply refer to the 114-bed request.

IV. NOTE REGARDING RECORD CITATIONS

The Administrative Record (“AR”) produced by the Department contains some page-numbering errors. For example, after AR 1036, the page numbering re-starts at 938, so there are two sections of the record numbered AR 938-1036. To avoid confusion, this brief includes parenthetical descriptions of the documents being referred to, following the AR page citations.

V. STATEMENT OF THE CASE

A. Kadlec is the Tri-Cities’ principal provider of hospital services.

Kadlec is a non-profit, tertiary medical center in Richland, Washington. AR 640 (application). Including the 55 additional acute care beds recently approved by the Department, Kadlec is now licensed for 231 acute care beds, 12 rehabilitation beds, 12 level II intermediate care nursery bassinets, and 15 level III neonatal intensive care nursery bassinets, for a total bed count of 270. AR 1606 (CON).

There are three other hospitals in the “planning area” at issue here, defined as Benton and Franklin counties. AR 100 (evaluation). However, Kadlec is by far the largest provider of hospital services in the planning area. Kadlec provides 45% of the inpatient hospital care for planning-area residents. AR 648 (application). The other three hospitals in the planning area are Kennewick Public Hospital District, d/b/a Kennewick General Hospital (“KGH”), in Kennewick, which is licensed for 101 acute care beds; Lourdes Medical Center (“Lourdes”), a 25-bed critical access hospital in Pasco; and Prosser Memorial Hospital (“Prosser”), a 25-bed

critical access hospital in Prosser. AR 58 (evaluation). Combined, KGH, Lourdes, and Prosser provide 39% of the inpatient hospital care for planning-area residents. AR 648 (application). The remaining 16% of the inpatient hospital care for planning-area residents is provided by hospitals outside of the planning area. AR 648-49 (application).

Kadlec also is the only hospital in the planning area which provides a substantial amount of care relating to the most complex inpatient treatment. For such services, Kadlec provides 92% of the care delivered in the planning area. AR 650 (application).²

Finally, Kadlec effectively serves as the “safety net” in the Tri-Cities for persons who need hospital care but cannot afford to pay for it. In 2008, Kadlec provided \$13.8 million in charity care. AR 1164 (letter from J. Meek). The other two Tri-Cities hospitals, KGH and Lourdes, combined for an additional \$6.7 million in charity care, which was reasonable given their respective sizes. *Id.* However, this still means that in real dollars, Kadlec provides two-thirds of the charity care in the Tri-Cities.

In summary, therefore, Kadlec is the Tri-Cities’ principal provider of hospital services; the Tri-Cities’ only provider of many complex

² The State provides Diagnosis Related Group (“DRG”) “weight” statistics for every inpatient discharge in Washington as part of the Comprehensive Hospital Abstract Reporting System. The weight reflects the complexity of care. The highest-weight DRG is for a heart transplant on a patient with complicating co-morbidities. The lowest-weight DRG is for a normal newborn delivery. For the 30 highest-weight DRGs (of which Kadlec provides 15), Tri-Cities hospitals had 251 discharges in 2008. Of these patients, 232 were treated at Kadlec; 12 were treated at KGH; 5 were treated at Lourdes; and 2 were treated at Prosser. Therefore Kadlec provided approximately 92% of the care delivered in the planning area for the highest-weight DRGs. AR 649-50 (application).

hospital services; and the Tri-Cities' principal provider of hospital care for indigent persons. It is therefore critical to the region's healthcare system that Kadlec be licensed for a sufficient number of hospital beds to meet community need.

B. Benton and Franklin counties constitute one of the fastest-growing communities in Washington.

The community Kadlec serves is one of the fastest growing in Washington, and has been so for a long time. For the last 20 years, the population of Benton and Franklin counties has been consistently growing by 2.5%/year, compared to a statewide population growth rate of 1.65%/year. This substantial difference in annual growth rates adds up. Over that 20-year period, the statewide population grew by 37%. The Benton-Franklin population, in comparison, grew by 61%. AR 660 (application). As of 2009, 242,000 people lived in Benton and Franklin counties. AR 635 (application).

Moreover, the growth rate for persons age 65 and older in Benton and Franklin counties has been growing even faster than the growth rate for persons under 65. During 2000-2008, the 65+ age cohort grew by 30% (3.1%/year), compared to 22% (2.5%/year) for the 0-64 age cohort. AR 660 (application). This is significant because persons 65 and older utilize inpatient healthcare services at a rate five times that of persons under 65. AR 661 (application). Therefore, due to the demographic shift in Benton and Franklin counties towards an older population, Benton and Franklin

counties will need even greater healthcare infrastructure in the future than the population growth alone would suggest.

C. Benton and Franklin counties need more hospital beds.

Unsurprisingly, the planning area's population growth, projected to continue, means the planning area needs additional hospital beds. All three parties to this proceeding—petitioner Kadlec; respondent Department; and intervenor KGH—agree that this is the case. In its application, Kadlec projected that the planning area would need an additional 61 beds by 2012. AR 837 (application). This bed need is projected to grow rapidly over the next few years, as a result of the growing and aging population resident in the planning area. By 2017, only five years from now, Kadlec projected that the planning area would need 134 additional beds. AR 837 (application).³ The Department and KGH dispute the size of the projected bed shortage, but agree with Kadlec that there is a projected bed shortage. AR 2015 (Department's bed-need projection); AR 1699 (KGH's bed-need projection).

D. Kadlec often is effectively “full.”

The planning area's shortage of hospital beds is not merely a theoretical possibility. It is an existing fact, as demonstrated by Kadlec's own occupancy statistics. Under the State's standards, the target

³ These figures actually understate the bed need. As explained below, the actual bed need is approximately 22 beds more than Kadlec projected in its application. See note 13, below.

occupancy rate for a hospital of Kadlec's size is 65%. AR 107 (evaluation).⁴ Kadlec already is operating well above this standard.

As of November 4, 2009, the day it filed its CON application, Kadlec's "midnight census" showed that 70% of its beds were occupied on any given night. During the day, 80% of beds in certain units frequently were occupied. AR 633 (application).

As of April 6, 2010, the date of the public hearing conducted on Kadlec's CON application, Kadlec's occupancy rate was 73%. In the Intermediate Care Unit, 27 of 28 beds were occupied; in the Medical Unit, 36 of 38 beds were occupied; and, in the Intensive Care Unit, 18 of 20 beds were occupied. AR 1591 (rebuttal comments). These three units were 90-96% full.

Therefore, Kadlec's actual experience confirms what the bed-need projections show: Kadlec is going to need more beds—and a lot of them—if it is to continue meeting the healthcare needs of planning-area residents.

⁴ "Target" occupancy rates are relevant because a hospital cannot reasonably be expected to have 100% occupancy. Some beds will always be empty while being turned over between patients. Additionally, there are variances (even "surges") in demand for hospital beds, and if a hospital were to operate near 100% occupancy on a regular basis, this would create serious problems when demand for beds is high. Therefore, the State has determined appropriate, or "target," occupancy levels for hospitals, based on their size. The State's target occupancy rate for hospitals with 100-199 beds is 65%, which is applicable to Kadlec and KGH. The State's target occupancy rate for hospitals with 1-49 beds is 50%, which is applicable to Lourdes and Prosser. Application of these target occupancy rate to the respective number of beds of the planning area's four hospitals result in a weighted occupancy standard for the planning area of 62.71%, which is the figure used in the Department's bed-need calculation. AR 107 (evaluation).

E. Kadlec and KGH apply for CONs to add beds.

In Washington, a hospital must obtain a CON from the Department before increasing its licensed bed capacity. *See* RCW 70.38.105(4)(e); WAC 246-310-020(1)(c). On November 4, 2009, Kadlec filed a CON application to add beds. AR 625-1033 (Kadlec's application). Kadlec's application included requests for 114, 75, and 55 beds. The reason Kadlec included multiple requests was that it did not know what population forecast the Department would use in projecting bed need (an issue discussed in detail below), and therefore requested the full number of beds it believes are needed, based on its bed-need calculation, and that Kadlec is in a position to add (114), but also included smaller requests in the event the Department were to use an overly-conservative bed-need projection.⁵ On December 7, 2011, the planning area's second-largest hospital, KGH, also filed a CON application to add 25 beds to its facility. AR 1670-1861 (KGH's application).

F. The Department reviews the Kadlec and KGH applications.

Because Kadlec and KGH were seeking to add beds in the same planning area, the Department reviewed their applications concurrently. AR 938 (M. Thomas letter). Pursuant to its standard procedures, the Department requested supplemental information from the applicants, and

⁵ Based on Kadlec's immediate need for additional beds, and its previous experience seeking CON approval to add additional beds, it could not risk an "all-or-nothing" approach of including only a request for 114 beds in its application. AR 636. However, this does not mean that Kadlec believed the smaller expansion would be sufficient to meet projected planning-area need. To the contrary, although 55 additional beds would help relieve the immediate pressure on Kadlec, illustrated by the occupancy statistics discussed above, it will not be sufficient to meet the long-term, or even intermediate-term, needs of the community.

the applicants provided supplemental information in support of their applications. AR 940-1018 (Kadlec's screening responses); AR 1868-1904 (KGH's screening responses).

The Department conducted a public hearing on April 6, 2010. AR 1025 (public hearing notice). At least 135 people attended the hearing. AR 1029-42 (sign-in sheet). All 135 attendees supported approval of additional hospital beds in the Tri-Cities. AR 1029-42.⁶

In addition, the Department received more than 600 pages of written public comments, which overwhelmingly supported approval of additional beds at Kadlec. AR 514-1186 (public comments). Among the supporters of Kadlec's application were legislators; local public officials; business organizations, such as the TRIDEC and the Tri-City Regional Chamber of Commerce; and educational institutions, such as Washington State University, Tri-Cities. AR 1043, 1045, 1046, 1060, 1147-48, 1169-70 (support letters).

Perhaps most notably, several other hospitals supported Kadlec's application. Seattle Children's, which has partnered with Kadlec to provide pediatric care in the Tri-Cities, urged approval of additional beds at Kadlec. AR 1146 (support letter). Good Shepherd Health Care System, a critical-access hospital in Hermiston, Oregon, explained that Kadlec is Good Shepherd's "designated referral hospital" for those patients which "Good Shepherd does not have the capabilities to treat" and that "[i]t is

⁶ One hundred thirty-two attendees explicitly supported either Kadlec's proposed expansion or KGH's proposed expansion; three stated that they were "neutral," suggesting support for both proposals. AR 1029-42 (sign-in sheet).

critical for patient safety and quality of care that Kadlec have adequate capacity to accommodate these tertiary patients.” Good Shepherd noted Kadlec’s “very high occupancy rates” and asked the Department to approve all 114 beds requested by Kadlec. AR 1078-79 (support letter). Columbia County Health System (Dayton, WA) and Wallowa County Health Care District (Enterprise, OR) also supported Kadlec’s application. AR 1080, 1082 (support letters).

G. The Department approves 55 additional beds at Kadlec.

On November 3, 2010, the Department issued its evaluation of the Kadlec and KGH applications. AR 8-62 (evaluation). The Department approved Kadlec’s 55-bed request, but denied Kadlec’s 114-bed request. The Department denied KGH’s application. AR 9 (evaluation).⁷ The same day, the Department issued CON #1430 to Kadlec to add 55 acute care beds. AR 1606 (CON).

H. Kadlec commences an adjudicative proceeding.

The Department informed Kadlec that it could appeal the Department's denial of Kadlec's larger bed requests. In a cover letter accompanying the CON, Steven M. Saxe, Director, Health Professions and Facilities, Washington State Department of Health, wrote to Rand Wortman, Chief Executive Officer, Kadlec Regional Medical Center, as follows:

⁷ The merits of KGH’s application are not at issue in this judicial review, and therefore have not been addressed in this brief. This proceeding relates only to Kadlec’s application.

This decision may be appealed. The two appeal options are listed below.

Appeal Option 1:

You or any interested or affected person may request a public hearing to reconsider this decision. The request must state the specific reasons for reconsideration in accordance with Washington Administrative Code 246-310-560. A reconsideration request must be received within 28 calendar days from the date of the decision at one of the following addresses: ...

Appeal Option 2:

You or any affected person with standing may request an adjudicative proceeding to contest this decision within 28 calendar days from the date of this letter. The notice of appeal must be filed according to the provisions or Revised Code of Washington 34.05 and Washington Administrative Code 246-310-610. A request for an adjudicative proceeding must be received within the 28 days at one of the following addresses: ...

AR 1604-05 (S. Saxe letter) (emphasis added).

Kadlec chose "Appeal Option 2." On December 1, 2010, Kadlec timely commenced an adjudicative proceeding regarding the Department's denial of its request for 114 beds. AR 1-5 (application). The adjudicative proceeding (Department of Health case no. M2010-1529) was assigned to Health Law Judge John F. Kuntz (the "HLJ").⁸ AR 67-70 (scheduling order and notice of hearing).

⁸ A health law judge is an administrative law judge employed by the Department. The health law judge presiding over a CON adjudicative proceeding is designated by the Secretary of Health to make the Department's final decision on a CON application. *See DaVita, Inc. v. Wash. State Dep't of Health*, 137 Wn. App. 174, 182-83, 151 P.3d 1095 (2007).

I. KGH also commences an adjudicative proceeding.

Like Kadlec, KGH received a letter from the Department informing it of its right to appeal the Department's denial of KGH's 25-bed request. AR 1607-08 (S. Saxe letter). KGH chose "Appeal Option 1." On December 1, 2010, KGH requested reconsideration of the Department's denial of its application. AR 1959-63 (request). The Department denied KGH's reconsideration request. AR 213 (denial). Accordingly, like Kadlec, KGH then chose "Appeal Option 2." On January 24, 2010, KGH commenced an adjudicative proceeding regarding the Department's denial of its application. AR 83-89 (application). The proceeding was assigned Department of Health case no. M2011-375. AR 216-19 (scheduling order and notice of hearing); AR 226-29 (corrected scheduling order and notice of hearing).

J. The Kadlec and KGH adjudicative proceedings are consolidated.

Kadlec and KGH each intervened in the adjudicative proceeding commenced by the other. AR 72-74 (order allowing intervention by KGH); AR 220-23 (order allowing intervention by Kadlec). With the agreement of the parties, the HLJ then consolidated the two adjudicative proceedings on March 30, 2011. AR 252-56 (order granting consolidation and amending scheduling order). The HLJ issued a discovery order, also with the agreement of the parties. AR 546-53 (discovery order). A four-day hearing was scheduled for November 29 – December 2, 2011. AR 256 (scheduling order).

K. The HLJ dismisses Kadlec's adjudicative proceeding.

On May 5, 2011, five months after Kadlec commenced its adjudicative proceeding, the Department moved to dismiss it. The Department argued that Kadlec did not have the right to an adjudicative proceeding, or, in the alternative, that Kadlec waived its right to an adjudicative proceeding. AR 427-31 (motion). On May 17, 2011, Kadlec filed a brief in opposition to the Department's motion. AR 570-80 (opposition). KGH took no position on the motion. On May 31, 2011, the Department filed a reply brief in support of its motion. AR 586-90 (reply).

On June 14, 2011, the HLJ granted the Department's motion to dismiss. AR 614-22 (order). The HLJ ruled, as a matter of law, that because Kadlec was awarded a CON for 55 additional beds, Kadlec was not "denied" a CON and "has no right" to an adjudicative proceeding with respect to the Department's denial of its 114-bed request. AR 618-19 (order). The HLJ also stated that even if Kadlec did have a right to an adjudicative proceeding, Kadlec's adding the 55 beds approved by the Department "constitutes a waiver" of that right. AR 619 (order).

L. Kadlec seeks judicial review by the Thurston County Superior Court.

On July 12, 2011, Kadlec sought judicial review in Thurston County Superior Court. CP 3-78. The proceeding (Thurston County case no. 11-2-01523-5) was assigned to the Honorable Christine A. Pomeroy.

In the Superior Court proceeding, Kadlec sought judicial review of the HLJ's dismissal order. In the alternative, were the Superior Court to

affirm the HLJ's dismissal order, Kadlec sought judicial review of the underlying Department decision denying Kadlec's larger bed request. CP 4.

M. The Superior Court affirms the HLJ's dismissal order and declines to conduct a judicial review of the underlying Department decision.

On February 28, 2012, the Superior Court affirmed the HLJ's dismissal order. The Superior Court determined that because the Department approved Kadlec's 55-bed request, Kadlec did not have the right to an adjudicative proceeding regarding the Department's denial of its larger bed request. CP 229. The Superior Court further determined that because the Department approved Kadlec's 55-bed request, Kadlec did not have standing to seek judicial review of the Department's denial of its larger bed request. CP 229.

N. Kadlec seeks judicial review by this Court.

On March 14, 2012, Kadlec timely filed a notice of appeal of the Superior Court's order. CP 231-39.

VI. STANDARD OF REVIEW

A. The Court reviews the Department's decisions, not the Superior Court's decision.

In a judicial review, the Court of Appeals sits in the same position as the Superior Court. In other words, the Court reviews *the Department's* decisions, not the superior court's decision, under the judicial-review standards set forth in the Administrative Procedure Act (the "APA"). *See*

King County v. Central Puget Sound Growth Mgmt. Hearings Bd., 142 Wn.2d 543, 553, 14 P.3d 133 (2000).

B. The Court should reverse the HLJ's dismissal order if the HLJ erroneously interpreted or applied the law.

Under the APA, the Court should reverse the HLJ's dismissal order if the HLJ "erroneously interpreted or applied the law[.]" RCW 34.05.570(3)(d).⁹ Specifically, the Court should reverse the HLJ's dismissal order if the HLJ misinterpreted and misapplied RCW 70.38.115(10)(a) and WAC 246-310-610 in concluding that the statute and regulation do not allow for appeals of partial denials of CON applications.

The interpretation of a statute or regulation is an issue of law reviewed *de novo*. See *May v. Robertson*, 153 Wn. App. 57, 73, 218 P.3d 211 (2010). "Rules of statutory construction, which apply equally to administrative rules and regulations, require statutes to be given a rational, sensible construction." *Children's Hosp. and Med. Ctr. v. Wash. State Dep't of Health*, 95 Wn. App. 858, 864, 975 P.2d 567 (1999). Courts "generally give 'substantial weight ... to the agency's view of the law if it falls within the agency's expertise in that special field of law.' Nonetheless, [courts] have the 'ultimate responsibility to see that the rules are applied consistently with the policy underlying the statute'" or regulation. *Children's Hosp.*, 95 Wn. App. at 864-65 (citations omitted).

⁹ The Court also should reverse the HLJ's dismissal order if the HLJ "engaged in unlawful procedure"; "failed to follow a prescribed procedure"; or did not "decide[] all issues requiring resolution by the agency." RCW 34.05.570(3)(c) & (f). However, these grounds are corollary to whether the HLJ erroneously interpreted and applied the law.

Although some of the CON regulations relate to specialized issues of health facility planning on which the Department has expertise, that is not the case with respect to WAC 246-310-610, the regulation at issue here. That regulation relates only to an applicant's right to appeal an agency decision. The Department does not have specialized expertise regarding the right to appellate review, and certainly less expertise than the Court with respect to such issues. Therefore, the Court need not give any weight to the Department's interpretation of this regulation.

C. The Court should reverse the CON Program's denial of Kadlec's 114-bed request if the CON Program's use of OFM's medium population forecast, rather than the more-accurate OFM high population forecast, was arbitrary or capricious.

If the Court determines that Kadlec did not have the right to an adjudicative proceeding, then the only appellate review of the CON Program's decision available to Kadlec is judicial review by this Court. Under the APA, the Court should reverse the CON Program's denial of Kadlec's 114-bed request if the CON Program's action was "arbitrary or capricious." RCW 34.05.570(4)(c)(iii). Specifically, the Court should reverse the CON Program's decision if it was arbitrary or capricious for the CON Program to use the OFM medium projection (which results in projected need for only Kadlec's 55-bed alternative) instead of the more-accurate OFM high population projection (which results in projected need for Kadlec's 114-bed project).

VII. ARGUMENT

A. **The Court should reverse the HLJ's dismissal order, and remand to the Department to conduct an adjudicative proceeding.**

1. **Kadlec has the right to an adjudicative proceeding.**

Under the CON statute, “[a]n applicant denied a certificate of need ... has *the right* to an adjudicative proceeding.” RCW 70.38.115(10)(a) (emphasis added); *see also* WAC 246-310-610. On its face, this statute grants the right to an adjudicative proceeding to an applicant such as Kadlec whose application is denied in part. Specifically, Kadlec was “denied a certificate of need” for 114 additional beds; therefore it “has the right to an adjudicative proceeding” regarding the denial. WAC 246-310-610.

Moreover, this plain-language interpretation of the statute is supported by the Department’s regulations governing adjudicative proceedings generally, as well as by the APA. The Court may consider analogous statutes, regulations, and rules when interpreting a regulation. *See State v. Clark*, 129 Wn.2d 805, 811-12, 920 P.2d 187 (1996). Both the Department’s regulations and the APA contemplate “partial” appeals of agency decisions.

For example, the Department’s general regulations governing adjudicative proceedings state that an application for adjudicative proceeding must identify “the *portion or portions* of the initiating documents contested.” WAC 246-10-203 (emphasis added). This explicitly contemplates that an applicant dissatisfied with part of the

Department's decision may appeal that part of the decision, while not appealing the remainder of the decision. This is what Kadlec has done here.

Similarly, the APA provides that a presiding officer may “[a]pprove or deny the application, *in whole or in part*, on the basis of brief or emergency adjudicative proceedings[.]” RCW 34.05.419(1)(a) (emphasis added). By analogy, if a presiding officer may approve an application “in whole or in part,” it only makes sense that an applicant should be able to appeal an agency decision “in whole or in part.” This is precisely what Kadlec has done here. It has appealed the Department's decision “in part.”

Additionally, “partial” appeals are well-recognized in appellate practice generally. Under both state and federal court rules, a party may appeal a court's decision in part. *See, e.g.*, RAP 2.4(a) (“The appellate court will ... review the decision *or parts of the decision* designated in the notice of appeal ...”) (emphasis added); Fed. R. App. P. 3(c)(1)(B) (appealing party must “designate the judgment, order, *or part thereof* being appealed ...”) (emphasis added).

Kadlec is not suggesting that these analogous statutes, regulations, and rules *govern* Kadlec's application for an adjudicative proceeding. Rather, they simply demonstrate that if the Court were to interpret RCW 70.38.115(10)(a) and WAC 246-310-610 to only permit an appeal if the CON application is denied in its entirety, this would be an anomalous rule,

and inconsistent with the general principle that partial appeals should be permitted.

Finally, the HLJ's interpretation is not a "rational" or "sensible" interpretation of the regulation. The Department's goal should be to make sound health planning decisions, and adjudicative review of the Department's initial decisions by a Health Law Judge is part of the process which the Department has put in place to achieve that goal. *See Univ. of Wash. Med. Ctr. v. Wash. State Dep't of Health*, 164 Wn.2d 95, 104, 187 P.3d 243 (2008) (describing the role of the HLJ and the adjudicative proceeding as "part of the entire certificate of need petition process established by chapter 70.38 RCW"). The Department's regulations should be interpreted in a way which allows for such review, not in a way which precludes it.

Therefore, the HLJ's interpretation of RCW 70.38.115(10)(a) to mean that a CON applicant cannot appeal a partial denial of its application is inconsistent with the plain language of the statute, other analogous statutes and regulations, general principles of appellate practice, and the Department's own policies and practices. The Court should determine that Kadlec had the right to an adjudicative proceeding regarding the partial denial of its CON application, reverse the HLJ's dismissal order, and remand to the HLJ to conduct the adjudicative proceeding requested by Kadlec.

2. Kadlec's alternative requests do not preclude Kadlec from seeking approval for the full, 114-bed request.

Although this Court reviews the Department's decision, not the Superior Court's decision, we will address the Superior Court's statement that "Kadlec's Certificate of Need application requested approval for 55, 75, *or* 114 beds." CP 229 (emphasis added). This suggests that Kadlec was indifferent between the alternatives, which is not accurate. Kadlec plainly applied for 114 beds, which is the number of beds it believed were needed in the area and that Kadlec was in a position to add.

Kadlec describes its proposed project as a 114-bed expansion throughout its CON application. *See, e.g.*, AR 628 (cover page, identifying "Certificate of Need Application to Request 114 Additional Licensed Acute Care Beds"); 636-37 ("project overview," describing "a net addition of 114 acute care beds"); 644 ("project description," stating that "Kadlec is requesting approval for an additional 114 acute care beds"). Kadlec included alternative requests for 75 or 55 beds, in an abundance of caution, in the event the Department was to rely upon an overly-conservative need projection. *See, e.g.*, AR 701-09 (comparing 75 and 55 bed alternatives to 114-bed request, and concluding that 114-bed request is superior proposal). As discussed above, Kadlec could not risk an award of zero beds; given its occupancy levels, it needed some number of additional beds immediately.

In retrospect, this was a prudent decision by Kadlec, because it resulted in approval of an additional 55 beds to meet short-term need while Kadlec challenged the denial of the larger bed request. However,

the inclusion of such alternative requests did not mean that Kadlec was not applying for 114 beds, or that Kadlec's request for 114 beds was not denied, or that Kadlec should not be permitted to appeal that denial.

3. Kadlec has not waived its right to an adjudicative proceeding.

The HLJ suggested that even if Kadlec otherwise had a right to an adjudicative proceeding to appeal the denial of its 114-bed request, it waived that right by implementing the 55 beds which it was granted. This conclusion also is wrong as a matter of law.

First of all, there was no dispute between Kadlec and the Department that *at least* 55 additional beds were needed. Moreover, as the Department knew, Kadlec had to accept these beds and quickly put them into service, given the *existing* shortage for hospital beds in the Tri-Cities.

Additionally, there was no reason, as a matter of law, why Kadlec was not permitted to accept the 55 beds approved by the Department (the “portion” of the decision which Kadlec *did not* appeal) while contesting the Department’s denial of the larger bed requests (the “portion” of the decision which Kadlec *did* appeal). The HLJ identified no legal authority or precedent supporting this statement in the dismissal order. AR 619 (order).

To the contrary, a CON applicant whose application is approved in part and denied in part plainly may accept the partial approval, and act on that partial approval, while simultaneously appealing that portion of the application which was denied. This is confirmed by the Department’s

general regulations discussed above. If an applicant is permitted to seek an adjudicative proceeding regarding a “portion or portions” of a decision, this contemplates that the applicant is *not* seeking review of the other “portions or portions” of the decision—and that those other portions take effect. WAC 246-10-203. Also as discussed above, this is consistent with the general principles of appellate practice allowing for partial appeals.

Kadlec filed its request for an adjudicative proceeding on December 1, 2010. AR 1-5 (request). Kadlec stated in that request that it was appealing only the Department’s “denials of Kadlec’s requests to add 114 beds or 75 beds” and that Kadlec was “not appealing the Department’s approval of 55 additional beds at Kadlec.” AR 2 (request). Kadlec then proceeded to add the 55 beds which the Department had approved, in order to meet the community's immediate need for additional hospital capacity. Six months later, on May 5, 2011, the Department moved to dismiss the adjudicative proceeding. AR 527-31 (motion).

Kadlec and the Department agreed that at least 55 additional beds should be approved at Kadlec. They only disagreed about whether more beds than this should be approved. Therefore, the second issue is the only one on which Kadlec appealed.

Kadlec had every right to implement the aspect of its project which was approved (55 beds) while challenging the aspect of its project which was denied (beds 56-114). The Department never told Kadlec that it was not permitted to do so.

4. The Department granted Kadlec an adjudicative proceeding with respect to the denial of Kadlec's 114-bed request.

Even if Kadlec did not have the *right* to an adjudicative proceeding, the Department *granted* Kadlec an adjudicative proceeding in this matter.

Under the APA, the Department “may commence an adjudicative proceeding at any time with respect to a matter within the agency’s jurisdiction.” RCW 34.05.413(1). In other words, HLJs have authority to conduct adjudicative proceedings regarding CON decisions even when they are not technically required to do so under RCW 70.38.115(10)(a) because the petitioner has the “right” to one.

In its cover letter to Kadlec accompanying its evaluation, the Department wrote as follows: “*You ... may request an adjudicative proceeding to contest this decision[.]*” AR 1605 (emphasis added). Obviously Kadlec would not be appealing the approval of 55 additional beds; the only adjudicative proceeding Kadlec would request would relate to the denial of the larger bed requests. Logically, therefore, when the Department told Kadlec that it “may request an adjudicative proceeding to contest this decision,” the denial of the larger bed requests would be the only “decision” the Department could have been referring to.

It was arbitrary, capricious, and unfair for the Department to tell Kadlec it had the right to request an adjudicative proceeding, and then, after Kadlec did so, dismiss that adjudicative proceeding on the ground that Kadlec did not have the right to request one. At minimum, the Court

should reverse the HLJ's dismissal order on this ground. *See* RCW 34.05.570(3)(i) (a court also may reverse agency order in adjudicative proceeding if it "is arbitrary or capricious").

In summary, the HLJ erred as a matter of law in interpreting RCW 70.38.115(10)(a) and WAC 246-310-610 to mean that CON applicants do not have the right to an adjudicative proceeding regarding partial denials of their applications, and in stating that a CON applicant waives any right to an adjudicative proceeding regarding a partial denial by implementing the partial approval. At minimum, it was arbitrary and capricious for the Department to dismiss the adjudicative proceeding commenced by Kadlec, because the Department explicitly told Kadlec that it had the right to an adjudicative proceeding in this matter, which Kadlec relied upon in commencing an adjudicative proceeding.

B. Alternatively, the Court should conduct a judicial review of the CON Program's underlying decision.

1. Adjudicative proceedings and judicial review are distinct types of appellate review.

The APA provides for two distinct types of appellate review of agency actions which are applicable to Department of Health decisions on CON applications: adjudicative proceedings (RCW 34.05.410 *et seq.*) and judicial review (RCW 34.05.510 *et seq.*).

a. Adjudicative proceedings:

A CON applicant denied a CON has the right to contest that denial in an adjudicative proceeding. *See* RCW 70.38.115(10)(a); WAC 246-310-610(1). In such an adjudicative proceeding, the HLJ reviews the Department's decision under a *de novo* standard of review. *See DaVita, Inc.*, 137 Wn. App. at 182.¹⁰

b. Judicial review:

A person aggrieved by agency action may seek judicial review by an appropriate court, pursuant to RCW 34.05.570(4) ("Review of other agency action"). A higher review standard is applied in such a judicial review than in a CON adjudicative proceeding. Rather than reviewing the Department's decision *de novo*, as the HLJ would do in a CON adjudicative proceeding, the reviewing court will only reverse the agency's action if it is unconstitutional; outside the agency's authority; arbitrary or capricious; or unlawful. *See* RCW 34.05.570(4)(c).

In light of the difference between the applicable standards of review, an unsuccessful CON applicant likely has a higher chance of obtaining relief in an adjudicative proceeding than in a judicial review. Moreover, given that a denied CON applicant has the right to an adjudicative proceeding (*see* RCW 70.38.115(10)(a)) and that the APA generally requires a party to exhaust its administrative remedies before seeking judicial review (*see* RCW 34.05.534), a denied CON applicant

¹⁰ The HLJ's decision in such an adjudicative proceeding is, in turn, subject to judicial review under RCW 34.05.570(3) ("Review of agency orders in adjudicative proceedings"). Thus, Kadlec has sought judicial review of HLJ Kuntz's dismissal order in this case pursuant to this APA provision.

must first seek review by the HLJ in an adjudicative proceeding before seeking judicial review by a court.

If, conversely, a party does not have the right to an adjudicative proceeding, that party's only recourse is to seek judicial review by an appropriate court. To have standing to do so, the party must satisfy three requirements: (1) the agency's action has prejudiced or is likely to prejudice that person; (2) that person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and (3) a judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action. *See* RCW 34.05.530.

Kadlec plainly satisfies all three standing requirements. First, the Department's denial of Kadlec's request for 114 beds prejudices Kadlec by limiting its ability to expand its facility to this extent. Second, the Department was required to consider the interests of Kadlec, the CON applicant, when evaluating Kadlec's application. Third, a judgment in favor of Kadlec that all 114 beds should have been approved would substantially eliminate the prejudice to Kadlec caused by the earlier denial.

2. A determination that Kadlec does not have the right to an adjudicative proceeding does not affect Kadlec's standing to obtain judicial review.

The threshold question before this Court is whether Kadlec has the right to an adjudicative proceeding with respect to the Department's decision on its CON application. The Department denied Kadlec's request

for 114 additional beds, but approved Kadlec’s alternative request for 55 additional beds. RCW 70.38.115(10)(a) and WAC 246-310-610(1) provide that a party “denied a certificate of need” has the right to an adjudicative proceeding. Does Kadlec have the right to an adjudicative proceeding because it was denied a certificate of need for 114 beds, as Kadlec argues? Or, does Kadlec not have the right to an adjudicative proceeding because it was granted a certificate of need for 55 beds, as the Department argues?

a. Remedy if Kadlec has the right to an adjudicative proceeding:

If the Court determines that Kadlec has the right to an adjudicative proceeding, the parties agree that the Court should reverse the HLJ’s dismissal order and remand to the HLJ to conduct the adjudicative proceeding requested by Kadlec.

b. Remedy if Kadlec does not have the right to an adjudicative proceeding:

If the Court determines that Kadlec does not have the right to an adjudicative proceeding, then the Court should conduct a judicial review of the Department’s decision on Kadlec’s CON application, pursuant to RCW 34.05.570(4) (“Review of other agency action”). Specifically, the Court should determine whether it was “arbitrary or capricious” for the Department to use the OFM medium population projection (which results in projected need for only Kadlec’s 55-bed proposal) instead of the more-accurate OFM high population projection (which results in projected need for Kadlec’s 114-bed proposal). If the Court determines that the

Department was required to use the OFM high population projection, because the Department's standards require use of the "most accurate" projection, then the Court should reverse the Department's denial of Kadlec's 114-bed request and remand to the Department to issue a CON to Kadlec for 114 beds.

3. The Superior Court erroneously conflated these two types of appellate review.

The Superior Court conflated these two distinct types of appellate review. The Superior Court determined that because, in the Superior Court's view, Kadlec does not have the right to an adjudicative proceeding, Kadlec also does not have the right to judicial review. CP 229. This was erroneous. Indeed, this approach, advocated by the Department and adopted by the Superior Court, would preclude *any* appellate review of the Department's decision on the merits. Neither an HLJ nor any court would have jurisdiction to review, on the merits, the Department's decision on Kadlec's application. Exempting the Department's decision from any appellate review on the merits would mean that it would be treated inconsistently from every other agency action subject to judicial review under RCW 34.05.570(4).

Whether Kadlec has standing (under RCW 34.05.530) to seek judicial review (under RCW 34.05.570(4)) of the Department's denial of its 114-bed request is completely distinct from whether Kadlec has the right (under RCW 70.38.115(10)(a)) to an adjudicative proceeding

(pursuant to RCW 34.05.410 *et seq.*) regarding the Department's denial of Kadlec's 114-bed request.

C. If the Court conducts a judicial review, it should reverse the Department's denial of Kadlec's larger bed request, and order the Department to approve additional beds at Kadlec.

1. The Court reviews the Department's decision under an arbitrary or capricious standard.

The Department's denial of Kadlec's 114-bed request is "other agency action" reviewable under the RCW 34.05.570(4) standards. *See Children's Hosp.*, 95 Wn. App. at 863, n.11. The Court should reverse these denials if they are "arbitrary or capricious." RCW 34.05.570(4)(c)(iii). "An agency action is arbitrary or capricious when the action is a 'willful and unreasoning action in disregard of facts and circumstances.'" *Children's Hosp.*, 95 Wn. App. at 864 (citation omitted).

2. The Department uses a statistical methodology to project need for additional acute care beds.

When evaluating a CON application to increase the bed capacity of a hospital, the Department applies a statistical methodology to project bed need within the hospital's "planning area," in this case Benton & Franklin Counties. AR 17 (evaluation). Although use of this methodology is not mandated by statute or rule, the Department has used it for many years and finds it to be a reliable tool for projecting acute care bed need. AR 17 (evaluation).

Through a series of calculations, the Department's methodology essentially compares the planning area's capacity of beds with the projected future need for beds of the planning area's population. The

result is the projected “net need” for additional beds. AR 18-28 (evaluation, describing calculations). The Department typically projects need at least seven years into the future when evaluating these applications, so that capacity will be available before the need arises, and bed shortages can be avoided. The Department used a 7-year forecast horizon for Kadlec’s application. AR 28 (evaluation, projecting need through 2016, the seventh year using a base year of 2009 actual data).¹¹

3. The Department’s methodology requires the Department to use the “most accurate” OFM population forecast.

One of the important factors in the Department’s methodology—and the only factor at issue here—is the population projection. This is important because the higher the population projection, the greater the projected need for additional acute care beds.

The Department’s methodology states that “[t]he *most accurate* population forecasts available at the time of forecasting should be used.” AR 1589 (quoting State Health Plan, Vol. II, p. C-30) (emphasis added). The Department’s methodology also states that “[p]opulation forecasts prepared by the Office of Financial Management (OFM) of the State of Washington ... should be the basic forecasts used.” AR 660 (quoting State Health Plan, Vol. II, p. C-30).

However, OFM does not prepare a single population forecast. Instead, OFM prepares “high,” “medium,” and “low” population

¹¹ The Department has used a bed-need forecast *longer* than seven years in some previous decisions, and could have done so here as well, which would have resulted in even greater projected acute care bed need.

projections on both a statewide and county-specific basis. AR 660-69 (application, explaining OFM population forecasts). The “medium” projection is intended by OFM to be the most likely. AR 660 (application). However, because the county projections are not based entirely on county-specific data, and are instead based in part on statewide data, the more similar a county’s demographics are to the state as a whole the more likely the medium projection will be accurate; conversely, the more different a county’s demographics are from the state as a whole the less likely the medium projection will be accurate.¹²

4. The OFM high population forecast is more accurate than the OFM medium population forecast for Benton and Franklin counties.

Benton and Franklin counties are *not* like the rest of the state with respect to population forecasts. As discussed above, Benton and Franklin counties have been growing substantially faster than the state as a whole for at least twenty years. Moreover, the 65+ age cohort in Benton and Franklin counties has been growing faster than the rest of the population, which means the planning area's future need for hospital infrastructure will be even greater than the population growth alone would suggest.

The OFM medium population projections for Benton and Franklin counties substantially underestimate population growth. For example, in 2002 the OFM medium projection was that the Benton County population would be 155,408 in 2007. The actual Benton County population in 2007

¹² Kadlec also presented, in its application, alternatives to the OFM population projections, which the Department could have relied upon in its evaluation. AR 660-77 (application).

was 162,900. AR 661 (application). Thus, the OFM medium projection underestimated the actual population by 5%.

Similarly, in 2002 the OFM medium projection for Franklin County was that the population would be 54,142 in 2007. The actual Franklin County population in 2007 was 67,400. AR 661 (application). Thus, the OFM medium projection underestimated the population by 25%.

For Benton and Franklin counties combined, the OFM medium projection was for a population of 209,550 in 2007; the actual population was 230,300 in 2007. Thus, looking only five years into the future, the OFM medium projection underestimated the Benton-Franklin population by 20,750 people, or 10%. Moreover, in the most recent years, the actual population growth for Benton and Franklin counties not only exceeded OFM's *medium* projection, it also exceeded OFM's *high* projection. AR 665 (application).

OFM's 2007 population projections, which were the most recent projections available when Kadlec filed its application, are based on *the same growth factors* as OFM's 2002 population projections. Therefore, the weakness in OFM's 2002 population projections for Benton and Franklin counties—that statewide data is not representative of Benton and Franklin counties—will also exist in OFM's 2007 population projections. AR 662 (application).

Therefore, the OFM high population projection is more *accurate* for Benton and Franklin counties than the OFM medium population projection for this planning area. Accordingly, the Department should

have used the OFM high population projection in this matter, because it was the “most accurate” OFM population projection available. AR 1589 (under the Department’s methodology, “[t]he *most accurate* population forecasts available at the time of forecasting should be used”) (emphasis added).

5. If the OFM high population projection is used, all 114 beds requested by Kadlec should be approved.

Whether the OFM high population projection or the OFM medium population projection is used has a substantial effect on the bed-need projection. Here is the difference in the population projection for the planning area:

**Table 1
Benton-Franklin Population Projection
OFM High vs. OFM Medium**

	2013	2014	2015	2016	2017	2018	2019
High	285,438	291,282	297,683	303,263	308,988	314,865	320,899
Medium	249,464	253,168	257,202	260,618	264,116	267,698	271,367

Source: AR 793-99.

As can be seen in the table above, if the OFM high projection is accurate, the Department’s use of the OFM medium projection would mean that there will be approximately 43,000 more people in the planning area by 2016 than Department would be taking into account when determining how many additional beds should be approved.

This difference in population projection translates into a difference in bed-need projection.

Table 2
Benton and Franklin Bed-Need Projection
OFM High vs. OFM Medium

	2013	2014	2015	2016	2017	2018	2019
High	97	110	126	141	156	161	187
Medium	35	43	51	61	70	79	88

Source: AR 793-99.¹³

As explained above, the Department used a 7-year forecast projection in its evaluation, through 2016. AR 28 (evaluation). As can be seen in the table above, using the OFM high population projection results in a projected bed need of 141 beds by 2016, whereas using the OFM medium population projection results in a projected bed need of 61 beds by 2016. In other words, Kadlec's 114-bed request should be approved if the OFM high population projection is used, but only Kadlec's 55-bed request was approved because the OFM medium population projection was used.¹⁴

6. The Department's use of the OFM medium population forecast for Benton and Franklin counties was arbitrary and capricious.

The OFM high population projection is demonstrably more accurate for Benton and Franklin counties than the OFM medium

¹³ The bed-need projection using the OFM medium population assumption is taken from the Department's evaluation. AR 141-42. The bed-need projection using the OFM high population assumption is taken from Kadlec's application. AR 837-38. The bed-need projections in this table are 22 beds higher than the bed-need projections at AR 837-38, because the Department determined planning-area capacity to be 22 beds less than Kadlec assumed in its application (thus making Kadlec's bed-need forecast low by approximately 22 beds).

¹⁴ Even using the OFM medium population projection, there is a projected need for more than 75 beds (Kadlec's intermediate request) within ten years. AR 58. Ten years would be a reasonable forecast horizon and therefore the Department should have at minimum approved Kadlec's 75-bed request.

population projection, and the Department is required to use the “most accurate” projection under its own standards. The Department’s use of the OFM medium population projection was a “willful and unreasoning action in disregard of facts and circumstances” and therefore “arbitrary and capricious” agency action. *Children’s Hosp.*, 95 Wn. App. at 864.

If the Department were supposed to *always* use the OFM medium population projection, the language in the methodology (to use the “most accurate” projection) would be meaningless. The methodology would instead direct the Department simply to use the OFM medium population projection. Instead, the methodology directs the Department to use the “most accurate” projection, which implies that the high population projection must sometimes be appropriate. And it *is* more accurate for Benton and Franklin counties. Indeed, even the high projection has underestimated population growth in this planning area in recent years.

Moreover, the Supreme Court has held that Washington’s CON regulations should be interpreted to promote access to care, as this is the principal goal of the CON regulatory system. *See Overlake Hosp. Ass’n v. Wash. State Dep’t of Health*, 170 Wn.2d 43, 55, 239 P.3d 1095 (2010). Application of that principal here supports use of the high population projection, as this will result in more approved beds, and therefore more available beds, and therefore greater access for Benton-Franklin residents.

Accordingly, the Court should reverse the Department’s denial of Kadlec’s 114-bed request pursuant to RCW 34.05.570(4)(c)(iii), and remand to the Department to issue a CON to Kadlec for all 114 beds

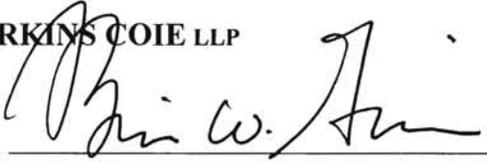
requested by Kadlec, which are projected to be needed if the OFM high population projection is used.

VIII. CONCLUSION

Kadlec is a non-profit healthcare organization which is a careful steward of its resources. Kadlec is not seeking to add 114 beds on a whim. It is doing so because it has determined that these beds will be needed in the planning area in a relatively short timeframe, and Kadlec is not only in a position to add this bed capacity, it believes that it has a duty to do so given its mission to provide healthcare services to this community. The Department's initial decision limiting Kadlec's expansion to 55 beds was overly conservative. Kadlec respectfully requests that the Court either remand to the HLJ to determine whether additional beds are needed, or to determine itself, based on the Administrative Record, that these beds are needed and order the Department to issue a CON to Kadlec to add them.

Respectfully submitted this 29th
day of May 2012.

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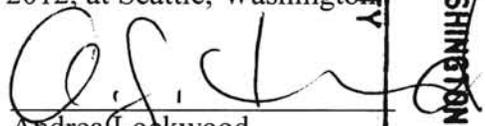
CERTIFICATE OF SERVICE

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

Party	Service
Richard A. McCartan Assistant Attorney General Office of the Attorney General Agriculture & Health Division 7141 Cleanwater Drive SW PO Box 40109 Olympia, WA 98504 Attorney for Washington State Department of Health	First Class Mail, Postage Prepaid (with a courtesy copy also sent via e-mail)
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 29th day of May, 2012, at Seattle, Washington


 Andrea Lockwood

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