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STATE OF WASHINGTON

Supreme Court No. \_\_\_\_\_  
Court of Appeals No. 66304-6-I

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a EVERGREEN  
HEALTHCARE, a Washington public hospital district, PROVIDENCE HOSPICE AND  
HOME CARE OF SNOHOMISH COUNTY, a Washington non-profit corporation, and  
HOSPICE OF SEATTLE, a Washington non-profit corporation,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH, a Washington governmental agency,  
SECRETARY MARY SELECKY, Secretary of Washington's Department of Health in her  
official and individual capacity, ODYSSEY HEALTHCARE OPERATING B, LP, a Delaware  
corporation, and ODYSSEY HEALTHCARE, INC., a Delaware corporation,

Respondents.

**PETITION FOR REVIEW**

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## **I. IDENTITY OF PETITIONER**

King County Public Hospital District No. 2, d/b/a Evergreen Healthcare (“Evergreen”) is a Washington public hospital district in Kirkland created and organized under Ch. 70.44 RCW. Evergreen operates Evergreen Hospice Services, which continues to serve the hospice needs for residents of both King and Snohomish Counties.

Providence Hospice and Home Care of Snohomish County and Hospice of Seattle (collectively “Providence”) are non-profit corporations organized and operated under the laws of the State of Washington. They are subsidiaries of Providence Health and Services, a health network system providing a wide array of health care services to residents of King and Snohomish Counties for more than 155 years.

## **II. IDENTIFICATION OF DECISION FOR REVIEW**

Evergreen and Providence respectfully request that the Washington Supreme Court review the Division I Court of Appeals’ opinion filed February 21, 2012, reversing the decision issued by Superior Court Judge Mary I. Yu following oral argument at a hearing. Attached are copies of (1) Judge Yu’s September 24, 2010 ruling as Appendix A; (2) Judge Yu’s October 29, 2010 Findings of Fact, Conclusions of Law and Judgment as Appendix B; and (3) the Court of Appeals’ opinion as Appendix C.

## **III. ISSUES PRESENTED FOR REVIEW**

### **A. The Petition Involves Issues of Substantial Public Interest, Which the Supreme Court Should Review.**

Is the Department of Health (the “Department”) permitted to disregard Washington’s established certificate of need (“CN”) laws, regulations, and longstanding departmental policy by approving a CN

application in 2009, which the Department evaluated and denied more than two years earlier, and disregard the legal rights of existing affected providers, for the sole purpose of settling a federal anti-trust and commerce clause money damages lawsuit filed by foreign corporations dissatisfied with the Department's original CN denials? As discussed in Section V.A below, all parties agree that this is an issue of substantial public importance affecting all CN regulated healthcare providers and the orderly CN health planning for Washington residents.

**B. The Court of Appeals' Opinion Conflicts with Another Decision of Washington's Supreme Court.**

Does the Court of Appeals' opinion, which held that there are "no substantive or evidentiary limitations on [CN] settlements" (and, therefore, that the Department could use data collected in December 2008 as *post-hoc* rationalization to grant a CN to Odyssey for King County) conflict with *Univ. of Washington Medical Ctr. v. Dept. of Health*, 164 Wn.2d 95, 103, 187 P.3d 243 (2008), which held that CN statutes and regulations contemplate evidence for a CN evaluation to be based upon "a snapshot of facts around the time an application is filed"?

**C. The Court of Appeals' Opinion Conflicts with Another Decision from Division II Court of Appeals.**

Does the Court of Appeals' opinion, which held that the Department could substantially depart from the well-established hospice CN methodology by using new data collected in December 2008 (more than two years after Odyssey's submission of its CN applications), conflict with *Odyssey Healthcare Operating B, LP v. Dep't of Health*, 145 Wn. App. 131, 146, 185 P.3d 652 (2008) (Odyssey I), where Division II Court

of Appeals upheld the Department's interpretation and application of the established hospice CN need methodology that consistently applied use data from around the time of the submission of the CN application?

**D. The Petition Involves a Significant Constitutional Question.**

Whether the Department violated Evergreen's and Providence's procedural due process rights under the Washington and United States Constitutions by disregarding their legal right to present oral or written testimony and argument in a hearing on the merits as authorized by RCW 70.38.115(10)(b)(iii); *St. Joseph Hosp. & Health Care Ctr. v. Department of Health*, 125 Wn.2d 733, 742, 887 P.2d 891 (1995) (finding affected providers have standing to present testimony and evidence in a hearing on the merits); and the longstanding departmental policy of recognizing the affected providers' rights to request an adjudicative hearing to correct errors of law and fact in the Department's CN evaluation?

**IV. STATEMENT OF THE CASE**

**A. The CN Laws Were Designed to Control Healthcare Costs by Implementing Established Health Planning Criteria and Promoting Greater Utilization of Existing Healthcare Services.**

The CN laws (Ch. 70.38 RCW) and regulations (Ch. 246-310 WAC) govern the Department's role of administering the orderly planning of healthcare services. The legislature enacted Ch. 70.38 RCW in response to a Congressional mandate for states to adopt health planning procedures to, *inter alia*, prevent "unnecessary duplication and fragmentation" of healthcare services. 1979 Wash. 1st Ex. Sess., ch. 161, § 1. The primary objective of CN regulation is to control health care costs by limiting the introduction of new healthcare providers, ensuring better

utilization of existing institutional health services and major medical equipment. *St. Joseph Hosp.*, 125 Wn.2d at 735-36 & 741.

**B. Certificate of Need Laws and Procedure.**

Ch. 70.38 RCW requires certain healthcare providers to obtain a CN from the Department before establishing a new health facility or service. One type of “health care facility” requiring a CN is a hospice agency. RCW 70.38.105(4)(a) and RCW 70.38.025(6).

A party interested in establishing a hospice agency must file a CN application. WAC 246-310-090. The Department then routinely conducts a public hearing for receiving community input. WAC 246-310-180. The Department evaluates the following four regulatory criteria to determine whether to grant or deny a CN application: (1) Need – WAC 246-310-210 and WAC 246-310-290; (2) Financial Feasibility – WAC 246-310-220; (3) Structure and Process of Care – WAC 246-310-230); and (4) Cost Containment – WAC 246-310-240. After a full evaluation, the Department issues written findings and conclusions on each of the four criteria to support its decision to approve or deny. WAC 246-310-490.

If the Department denies the application, the applicant has the right to an adjudicative proceeding under Ch. 34.05 RCW. RCW 70.38.115(10)(a). If the Department grants the application, an affected provider may request an adjudicative proceeding to challenge the merits. *See* RCW 70.38.115(10)(b)(iii); *St. Joseph Hosp.*, 125 Wn.2d at 744; and pursuant to longstanding policy of the Department.

Under the CN laws, existing providers like Evergreen and Providence have the right to present “oral or written testimony and argument” in all CN related adjudicative proceedings. RCW

70.38.115(10)(a) & (b)(iii). CN adjudicative proceedings are governed by RCW 34.05.410 – .494. *See* RCW 70.38.115(10)(a) & (b)(iii).

CN review is designed to allow existing providers like Evergreen and Providence to have meaningful participation in all aspects of the CN decision-making process, ensuring that each applicant meets the CN regulatory requirements. *See, e.g.*, WAC 246-310-180 (right of affected provider to request and participate in a public hearing); WAC 246-10-119 (right of affected provider to intervene in an adjudicative proceeding); WAC 246-310-610 (right of affected provider to present oral and written testimony and argument); and *St. Joseph Hosp.*, 125 Wn.2d at 742 (recognizing affected provider has standing to request review of the Department’s decision to grant a CN to an applicant).

A Health Law Judge (“HLJ”) conducts the adjudicative proceeding under Ch. 34.05 RCW and Ch. 246-10 WAC and issues a final order deciding whether the Department properly approved or denied the application. If dissatisfied, the applicant or competing provider may file a petition for judicial review in superior court. RCW 34.05.514. The court then decides to affirm, reverse, or remand the Department’s decision, under the standards set forth in the APA. RCW 34.05.574(1).

**C. The Department Applies an Established Regulatory Hospice Health Planning Methodology Developed by Industry Experts to Forecast the Future Demand.**

The hospice need methodology is a health planning forecasting analysis developed by industry experts. In 2003, the Department adopted WAC 246-310-290, a forecasting methodology used by the Department for assessing the need for a new hospice agency in a specific county.

Prior to the adoption, the Department established the Hospice

Methodology Advisory Committee to make recommendations. The Department selected 12 Committee members, with varied backgrounds, in consultation with the Washington State Hospice Organization and the Home Care Association of Washington. The Department adopted the Committee's recommendations in WAC 246-310-290.

The need methodology in WAC 246-310-290(7) is designed to forecast whether a surplus or shortage of hospice services exist in a given county. It uses past hospice utilization data and trends it forward. If the shortage is sufficient for the establishment of a new hospice agency, the "Need" element of WAC 246-310-270(7) is found to be met. The applicant, however, has the burden of demonstrating that its proposal also meets all the other CN regulatory criteria cited in Section IV.B above.

**D. In 2008, the Court of Appeals Upheld the Department's Interpretation and Application of the Hospice Health Planning Forecast Methodology (Odyssey I).**

In October 2003, Odyssey filed three CN applications to establish new hospice agencies in King, Snohomish, and Pierce Counties. The Department denied them because, *inter alia*, the hospice need regulatory methodology under WAC 246-310-290 demonstrated a surplus of hospice agencies. In October 2008, the Court of Appeals affirmed the Department's decision, holding that the Department correctly interpreted and applied the forecasting methodology. *Odyssey Healthcare Operating B, LP*, 145 Wn. App. at 146 (Odyssey I).

**E. In 2006 and 2007, Odyssey Filed Another Round of CN Applications and Appeals (Odyssey II).**

In October 2006, during the pendency of Odyssey I, Odyssey filed another set of CN applications to establish new hospice agencies in King,

Snohomish, and Pierce Counties. AR 2:16-17, 42:16-17; 81:16-17. Odyssey's 2006 King County application is at AR 385-404. A public hearing was held under WAC 246-310-180, and the public testimony was overwhelmingly against Odyssey's proposal. AR 1383, 1425-49.

In August 2007, the Department denied Odyssey's applications. AR 11-38. Applying the same methodology upheld in Odyssey I, the Department determined that the applications were "not consistent with the Certificate of Need review criteria ... Need ... Financial Feasibility ... Structure and Process of Care . . . [and] Cost Containment ...." AR 11. The Department's August 2007 evaluation of need is hereinafter referred to as the "2007 Methodology." The Department's analyst noted that the prior utilization data used for the forecast was even more complete and accurate than the data provided by Odyssey. AR 11-38.

In September 2007, Odyssey filed three applications for adjudicative proceedings, again arguing that the Department had misinterpreted and misapplied the need methodology (as in Odyssey I). AR 1-118. In October and November 2007, the HLJ granted Evergreen's request to fully intervene. AR 153, 158. The King, Snohomish, and Pierce County proceedings were consolidated and stayed until resolution of Odyssey I. AR 165-70, 177-78, 183-84.

In June 2008, in the course of its evaluation of a 2007 hospice CN application, the Department performed the "2008 Methodology" for King County. AR 1342. *The 2008 Methodology also showed no need for additional hospice agencies in King County through 2012. Id.* The Department used "2006 use data" for the 2008 Methodology. *Id.* In October 2008, Odyssey obtained another continuance. AR 195, 198-99.

In February 2009, shortly after the issuance of Odyssey I, Odyssey requested another stay to file a federal lawsuit. AR 251. Odyssey also asserted that it believed there would be sufficient need for a CN application filed in “October 2009” and that it might choose to apply for that CN rather than continuing to appeal. AR 253-54. Also in February 2009, Providence petitioned to intervene. AR 200-248.

In March 2009, the HLJ granted Odyssey’s request for a stay until September 2009. AR 252-55. Providence’s intervention request was also stayed pending Odyssey’s decision as to which action it would take. *Id.*

**F. Displeased With The Outcome, Odyssey Filed a Federal Lawsuit Against the Department.**

In April 2009, Odyssey filed a money damages lawsuit in federal court alleging violations of the Sherman Act under 15 U.S.C. § 1, the Commerce Clause of the United States Constitution under Article I, § 8, cl. 3, and liability under 42 U.S.C. § 1983. AR 257-78.

In June 2009, the Department filed an answer in federal court, *opposing Odyssey’s contention that its 2006 CN applications were improperly evaluated.* AR 1081-88. The Department denied Odyssey’s contention that, “[t]his projection, based on faulty Methodology and data, incorrectly resulted in Odyssey being denied its [2006] CN application.” AR 1069, 1085. The Department admitted that it “advised Odyssey that it could only consider Odyssey’s October 2006 CN application under the 2007 Methodology and therefore the 2007 Methodology’s projection of need in 2009, 2010, and 2011 applied.” AR 1074-75, 1086.

In addition, in its answer, the Department *admitted* Odyssey’s contention that it refused Odyssey’s request for a CN in King County,

stating that “even though the 2009 Methodology showed a projected need in King County in all three years for which Odyssey applied (2009, 2010, and 2011), the Department would not consider the 2009 Methodology in Odyssey’s appeal of its denied October 2006 applications.” AR 1074, 1086. The Department also *admitted* Odyssey’s contention that its “2008 Methodology” also showed no need through 2011.<sup>1</sup> AR 1073, 1086.

The Department’s own admissions are consistent with its position in the federal lawsuit prior to settlement with Odyssey. For example, in February 2009, in discussions about whether the Department could use the “2009 Methodology” to evaluate Odyssey’s 2006 CN application for King County, the Department’s counsel stated, “As you know, *we always look at the facts that existed during review. So, we can’t approve your application based on a Methodology run long after the record closed.* In such cases, applicants must reapply.” See Appendix D (Decl. Fitzgerald, dated August 31, 2010, at Ex. N) (emphasis added).<sup>2</sup>

**G. In 2009, the Department Settled the Federal Lawsuit by Agreeing to Grant a CN to Odyssey for King County.**

In September 2009, Odyssey asserted to the HLJ that it had engaged in settlement negotiations with the Department “on both the federal and administrative proceedings” and received another continuance until November 2009. AR 279-80. However, none of the Petitioners were ever advised of the negotiations despite the fact that Evergreen had been

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<sup>1</sup> The Department ran the hospice need methodology for King County in 2007, 2008, and 2009. The “2007 Methodology” (applicable to Odyssey’s 2006 application) and “2008 Methodology” both demonstrated a surplus of hospice agencies.

<sup>2</sup> On September 23, 2010, the trial court granted petitioners’ request to supplement the agency record. Sub No. 72. The supplemented records are attached as Appendix D, Sub. No. 55 (Decl. Fitzgerald, dated August 31, 2010, at Exhibits K, L, M, and N).

granted full intervention and Providence had filed for intervention.

On September 25, 2009, the Department and Odyssey agreed to settle the federal lawsuit, whereby the Department would grant Odyssey's 2006 CN application for King County based upon data obtained in 2008 (the 2009 Methodology). AR 1091-92. This is the same 2009 Methodology the Department said could not be used just three months prior (June 2009) in its answer to the federal lawsuit. AR 1074, 1086.

The federal settlement stated, "[t]he parties *will enter* into the attached Settlement and Stipulation in the pending adjudicative proceeding before the Department of Health." AR 1091. The federal settlement contained a "bad faith" provision to force the Department to submit the proposed settlement to the HLJ for approval. AR 1092 (*italics added*).

In an attempt to provide *post-hoc* rationale for its decision, the Department stated that it "conducted a survey of existing King County providers based on services offered in 2007 . . . the data shows a current need for two additional hospice agencies in King County . . . [and] [b]ased on this data showing need, the undersigned parties propose settlement under RCW 70.38.115(10)(c) approving Odyssey's [2006] application to establish a new hospice agency in King County . . . ." AR 353.

The stipulation indicated that the Department's need methodology for Odyssey's 2006 CN application was going to be based upon 2007 use data *obtained in December 2008* (the 2009 Methodology). AR 355-60. The stipulation also *did not include any findings* for the other CN criteria found unmet in the original evaluation (financial feasibility, structure and process of care, and cost containment). AR 355-60.

Documents later obtained in public disclosure demonstrate that the

grant of a CN to Odyssey for King County was central to the federal settlement. This is stated in correspondence between Department's and Odyssey's counsel. *See* Appendix D (Decl. Fitzgerald, Ex. L) (Odyssey's counsel: "As you know, the King County CN is central to Odyssey's willingness to settle and any added risks and hurdles [sic] making that less likely to occur correspondingly make Odyssey less willing to settle." In response, the Department's counsel stated, "Frankly, the idea that we are 'trying to avoid' giving Odyssey its CN, 'putting up hurdles,' and 'making additions' to the agreed settlement is simply ridiculous.").

**H. The Department issued a Notice of Proposed Settlement, Claiming a "Special Circumstance."**

On September 29, 2009, the Department issued a Notice of Proposed Settlement to Evergreen, Providence, Swedish Health Services d/b/a Swedish Visiting Nurse Services ("Swedish"), and Franciscan Health Systems ("Franciscan") and invited comments. AR 297-99; 348-51; 515-17. The proposed settlement stated, "[b]ased on this data showing need, the undersigned parties propose settlement under RCW 70.38.115(10)(c) approving Odyssey's [2006] application to establish a new hospice agency in King County . . . ."). AR 298. The Department asserted that "the proposed settlement of the adjudicative proceeding is part of the settlement between the parties *resolving the federal lawsuit*." AR 298 (italics added). The Department based its decision on a "special circumstance," which it described as follows:

In 2008, the Program conducted its survey of existing King County providers for 2007 use data. Applying the hospice need methodology to this data showed a current need for two additional hospice agencies. Due to a *special circumstance*, the Program will consider this new data in

deciding whether to approve Odyssey's [2006] King County application. *The special circumstance is that this new need data was not available to Odyssey by the deadline for applications in 2008.*<sup>3</sup>

AR 298 (internal footnote omitted, emphasis added).

Evergreen, Providence, Swedish, and Franciscan submitted comments on the "special circumstance." AR 1102-58; 1425-49. The comments included the fact that the Department had not complied with the CN laws or with its own longstanding policies regarding competent evidence to be used for CN applications. AR 1102-58; 1425-49.

Evergreen and Providence contended that the Department properly evaluated Odyssey's 2006 CN application in August 2007 using the same methodology upheld by the court in Odyssey I and that a deviation would require rulemaking. AR 1115-16; 1125-26; 1128. They further asserted that the Department could not use data obtained over two years after Odyssey's submission of its 2006 CN applications – such data, regardless of its accuracy, is contrary to longstanding departmental policy and wholly irrelevant to a 2006 CN application. AR 1116-21; 1123-24; 1128.

Evergreen and Providence also contended that the Department failed to include some approved hospice providers in its 2009 Methodology and artificially extended the forecast horizon applicable for the need methodology. AR 1104-1108; 1124-25. On October 20, 2009, the Department approved Kline Galland's proposal to establish a CN hospice agency in King County. AR 476, 478, 1138. The Department ignored Kline Galland in its 2009 Methodology. Likewise, as Providence explained, the Department also failed to include Providence ElderPlace in

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<sup>3</sup> Odyssey did not file a CN application in 2007, 2008, or 2009.

its 2009 Methodology. AR 1387. Finally, petitioners asserted that the Department failed to evaluate how Odyssey satisfied *all the other* CN criteria that the Department found unmet (financial feasibility, structure and process of care, and cost containment). AR 1434-43.

In October 2009, HLJ granted the petitions of Providence, Swedish, and Franciscan to intervene, but only for the limited purpose of commenting on the proposed settlement. AR 1001, 1008. He declined to permit them to intervene for a hearing on the merits. *Id.*

On October 30, 2009, the Department submitted its proposed settlement to the HLJ for approval. AR 1018-28. Both the Department and Odyssey asked the HLJ to approve their federal settlement and to reject Petitioners' request for a hearing on the merits. On November 10, 2009, Evergreen, Providence, Swedish, and Franciscan submitted responses to the Department's request to have the HLJ approve the settlement proposal with Odyssey. AR 1179-1527. They provided the legal basis for rejecting the Department's settlement of the federal lawsuit, reiterating their contention that the settlement contravenes well-established CN laws and longstanding departmental policy. *See id.*

On November 18, 2009, Odyssey and the Department submitted arguments in support of their settlement proposal. AR 1528-1681; 1682-1699. On November 30, 2009, Evergreen, Providence, Swedish, and Franciscan filed a joint reply brief in opposition to the federal settlement. On December 8, 2009, the HLJ signed the Department's proposed order granting Odyssey's 2006 CN application for King County and denying Petitioners' request for an adjudicative proceeding. AR 1721-24.

In its opinion, the Court of Appeals made a material factual error,

stating that, “[the HLJ] also conducted a hearing prior to its determination to approve the proposed settlement.” Opinion at 9. The agency record, however, demonstrates that the HLJ never conducted a hearing on the merits (and, refused to do so) before approving the federal settlement.

Evergreen, Providence, and Swedish sought judicial review of the Department’s final decision. Evergreen also filed for its own request for an adjudicative proceeding to address the merits.<sup>4</sup>

## V. AUTHORITY

### A. **The Petition Involves an Issue of Substantial Public Interest That Should Be Reviewed by the Supreme Court.**

The petition involves an issue of substantial public interest and importance affecting all CN regulated healthcare providers and the orderly CN health planning for Washington residents, which the Supreme Court should review. The threshold issue is whether the Department may disregard Washington’s well-established CN laws, regulations, and longstanding departmental policy by approving a CN application in 2009, *which the Department evaluated and denied more than two years earlier*, and disregard the legal rights of existing affected providers, for the sole purpose of settling a federal anti-trust and commerce clause money damages lawsuit filed by Odyssey, who was dissatisfied with the Department’s denials of its 2006 CN applications.

Both the Department and Odyssey have also asserted that this case presents an issue of substantial public interest and importance. *See*

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<sup>4</sup> On Jan. 29, 2010, Evergreen, the Department, and Odyssey stipulated to dismiss the adjudicative proceeding, agreeing this case controlled and reserving the right to reinstate if anyone argued failure to exhaust administrative remedies or later determined that a separate action was required. *See* Appendix D (Decl. Fitzgerald, at Ex. K).

Respondents' Motion to Publish, dated March 9, 2012, at 1, attached hereto as Appendix E (stating that, "the decision is of general interest and statewide importance to health care facilities, including hospitals and other health care providers subject to [CN] regulatory requirements.").

If the Department is allowed to ignore CN laws, regulations, longstanding departmental policy, and established statutory and regulatory rights of affected CN providers – *i.e.*, RCW 70.38.115(10)(b)(iii) – for the sole purpose of settling an unrelated federal money damages lawsuit, it will result in substantial uncertainty in the CN health planning process and will be contrary to the legislative purpose of promoting greater utilization of existing healthcare services and avoiding the fragmentation and duplication of healthcare resources. *See* Section IV. A above.

Healthcare providers rely upon established and consistent CN health planning criteria and methodologies, many of which hire their own CN health planning analysts to evaluate the projected need to support new healthcare facilities or the expansion of existing facilities. The Court of Appeals' opinion, if not reviewed by this Court, will make CN health planning highly unpredictable, which the legislature sought to prevent when it enacted the CN laws. *See* Section IV.A above. The issue is also inherently one of substantial public interest because few things are of greater importance than access to affordable, quality health care.

The legislature, in enacting the notice provision for settlement under RCW 70.38.115(10)(c), did not intend to dispense with all other regulatory criteria governing CN review and certainly did not intend to nullify all statutory and regulatory rights given to affected providers.

Subsection (10)(c) was added in July 1995, in response to *St. Joseph Hosp.*, 125 Wn.2d at 737 & 742-44, a case where the Supreme Court found that the Department had a legal obligation to notify affected providers of the terms of a stipulated settlement that reopened the CN review process. Subsection (10)(c) codified the Court's holding in *St. Joseph* by requiring the Department to notify affected providers of any plans to settle with an applicant prior to the conclusion of an adjudicative proceeding and to afford them an opportunity to comment in advance of any settlement. The legislature knew of the statutory and regulatory rights provided to existing providers, including those stated in subsection 10(b)(iii), and it did not eliminate any of them.

The Final Bill Report from the legislature states, [t]he interested party must *also* be afforded an opportunity to comment in advance of any proposed settlement.” See Appendix F (Supplemental Decl. Fitzgerald, dated September 21, 2010, at Ex. A) (emphasis added). The word “also” reflects an intention to confer *additional rights* to affected providers whose interests the CN laws were designed to protect.

Nothing in the legislative history suggests an intention to nullify the existing rights of affected CN providers. See *id.* If the Legislature intended such a significant change in the law, it would have said so. See *Kaiser Aluminum & Chem. Corp. v. Pollution Control Hearings Bd.*, 33 Wn. App. 352, 356, 654 P.2d 723 (1982). “The legislature is presumed to

know the law in the area in which it is legislating.” *Wynn v. Earin*, 163 Wn.2d 361, 371, 181 P.3d 806 (2008).

**B. The Court of Appeals’ Opinion is In Conflict With a Decision of Washington’s Supreme Court.**

Reading subsection (10)(c) in isolation and giving no effect to the statute as a whole, the Court of Appeals held there are “no substantive or evidentiary limitations on settlement.” Opinion at 12. It concluded without any principled reasoning that the Department can use whatever evidence it wants regardless of whether it was available at the time of the submission of the CN application; regardless of whether it was available to the Department during the course of its CN analysis and evaluation (or even around that time); and regardless of whether it conforms to the established regulatory hospice CN need methodology. *Id.*

The Court of Appeals’ opinion materially conflicts with this Court’s decision in *Univ. of Washington Medical Ctr. v. Dept. of Health*, 164 Wn.2d 95, 104, 187 P.3d 243 (2008). The issue in *Univ. of Wash. Medical Ctr.* was whether it was error for the HLJ to refuse to admit new evidence obtained more than five weeks after the public hearing. *Univ. of Washington Medical Ctr.*, 164 Wn.2d at 103. The Department argued that the decision to grant a CN is made on a “snapshot of facts around the time the application is filed.” *Id.* The Court agreed and stated:

Both the statutes and the administrative rules clearly contemplate that the decision will be made quickly; ideally, 90 days from the application's filing. RCW 70.38.115(8); WAC 246-310-160(1). Requiring the health law judge to admit evidence created long after this period of time *would undermine the statutory objective of expeditious decision making and prevent meaningful public input on that evidence.* A request for an adjudicative hearing does not begin the application process anew; the adjudicative

proceeding is part of the entire certificate of need petition process established by chapter 70.38 RCW.

*Id.* at 104 (emphasis added).

Based upon this recognition of the statutory intent of “expeditious decision making” and “meaningful public input on that evidence,” the Court held that *it was not an abuse of discretion for the Health Law Judge to restrict the evidence to five weeks after the public hearing. Id.*

Contrary to the “snapshot” position that the Department took in *Univ. of Wash. Medical Ctr.*, the Court of Appeals’ opinion permits the Department to use any data from any time period, even if the evidence is obtained more than two years after the submission of the application and the decision. The Court of Appeals’ opinion substantially conflicts with the statutory intent found by this Court in *Univ. of Wash. Medical Ctr.*

**C. The Court of Appeals’ Opinion Conflicts With *Odyssey Healthcare Operating B, LP*, 145 Wn. App. at 146.**

In 2008, Division II Court of Appeals held that the Department correctly interpreted and applied the hospice need forecasting methodology using 2000-2002 utilization data in the evaluation of Odyssey’s 2003 CN applications. *Odyssey Healthcare Operating B, LP*, 145 Wn. App. at 146 (“Odyssey I”). The court rejected Odyssey’s contention that the utilization data was improper. *Id.* at 145-46.

Using the same methodology upheld in Odyssey I, using 2003-2005 utilization data, the Department appropriately denied Odyssey’s 2006 CN applications. After admitting in June 2009 that it had accurately evaluated and denied Odyssey’s 2006 CN applications (in its answer to the federal lawsuit), the Department later materially departed from the methodology upheld in Odyssey I by using data collected in 2008. This is

not consistent with the methodology approved in Odyssey I.

Using the same methodology upheld in Odyssey I, the Department properly used 2003-2005 utilization data in its evaluation and denial of Odyssey's 2006 CN applications. Although the December 2008 data would properly be used for a 2008 CN application, it is inapplicable to Odyssey's 2006 CN applications. Because of the material conflict between Odyssey I and II, this Court should grant review.

**D. The Petition Requests Supreme Court Review of a Significant Constitutional Question.**

Petitioners' Due Process rights were violated because the Department refused to provide a opportunity to present oral or written testimony and argument in a hearing on the merits, as required under RCW 70.38.115(10)(b)(iii). "Integrity of the fact finding process and basic fairness of the decision are principal due process considerations." *Parker v. United Airlines*, 32 Wn. App. 722, 728, 649 P.2d 181 (1982). The *sine qua non* of due process is notice and opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Existing providers have a statutory right "to present oral or written testimony and argument in [an adjudicative] proceeding." RCW 70.38.115(10)(b)(iii). CN adjudicative proceedings are governed by RCW 34.05.410 thru .494. See RCW 70.38.115(10)(a) & (10)(b)(iii).

The Department has also long permitted affected providers to challenge the grant of a CN in an adjudicative proceeding. This Court has recognized that affected providers have standing to correct errors of law and fact in the Department's CN evaluation process. *St. Joseph Hosp.*, 125 Wn.2d at 742 ("[w]hile an applicant who is denied a CN has both a

motive and a statutory right to seek review of the Department's determination, no comparable motivation or statutory authority to seek review exists when the Department grants a CN. Practically, this review can only be achieved if competitors have standing.”).

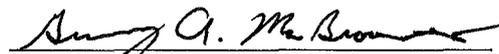
Evergreen and Providence both sought a hearing on the merits and their requests were repeatedly denied. As discussed in Section IV.H above, Evergreen even filed its own application for adjudication. The Department’s internal communications also show that it believed Petitioners were entitled to a review on the merits. *See* Appendix D (Decl. Fitzgerald, at Ex. M). Despite the statutory and regulatory rights provided to affected providers, the Department refused to provide a hearing on the merits. This refusal contravenes the legislative intent of the CN laws and, therefore, is a violation of Petitioners’ Due Process rights.

## VI. CONCLUSION

For the foregoing important reasons, Evergreen and Providence respectfully request that the Court accept review.

Dated this 1st day of June, 2012

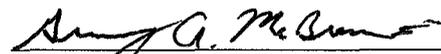
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PER EMAIL  
APPROVAL

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I filed and served the foregoing as follows:

Clerk of the Court of Appeals, Division I 600 University St. One Union Square Seattle, WA 98101-1176 Phone: (206) 464-7750	Messenger Service <input checked="" type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/>
Richard A. McCartan Office of the Attorney General PO Box 40109 7141 Cleanwater Drive SW, Bldg. 2 Olympia, WA 98504-0109	Messenger Service <input checked="" type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/>
Jeffrey Freimund Kathleen D. Benedict Freimund Jackson Tardif & Benedict Garrett, PLLC 711 Capitol Way S, Suite 605 Olympia, WA 98501	Messenger Service <input checked="" type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/>

DATED: June 1, 2012, at Kirkland, Washington

  
 \_\_\_\_\_  
 Karen H. Suggs

FILED  
 COURT OF APPEALS DIV 1  
 STATE OF WASHINGTON  
 2012 JUN -1 PM 4:34

# APPENDIX A

Ruling of King County Superior Court Judge Mary I. Yu  
issued on September 24, 2010

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF KING

KING COUNTY PUBLIC HOSPITAL  
DISTRICT NO. 2 d/b/a/ EVERGREEN  
HEALTHCARE, a Washington public hospital  
district, *et al.*,

Petitioners,

vs.

WASHINGTON STATE DEPARTMENT OF  
HEALTH, a Washington governmental agency,  
*et al.*,

Respondents.

No. 10-2-02490-5 SEA

SUMMARY DECISION GRANTING  
PETITIONERS' RELIEF

THIS MATTER came before the undersigned upon Petitioners' appeal of the Final Order Approving Settlement and Granting Odyssey's King County Hospice Application, dated December 8, 2008 (the "Final Order").

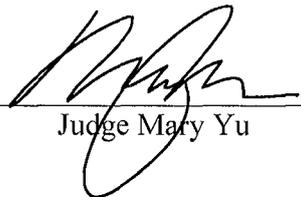
The court considered the entire record (including the supplementation), all briefs filed on appeal, and oral argument from counsel.

Having been duly advised, the court reverses the Final Order and remands the matter to the Health Law Judge for a determination, based on the applicable law and the relevant evidence available at the time the record was open, whether or not Odyssey's CN application satisfied all of the applicable criteria for approval of its application.

RCW 70.38.115(10)(c) authorizes the Department to settle with an applicant prior to the conclusion of the adjudicative proceeding. However, this court is not persuaded the intent of the Legislature in enacting this provision, would have been to allow a "settlement" to circumvent established procedures or to modify a decision of the Department without an adjudicative hearing, especially if the primary settlement arose from an entirely separate lawsuit and proceeding.<sup>1</sup> The Department's decision to settle the federal lawsuit by granting Odyssey a CN in King County under the guise of "special circumstance" and based upon its 2009 methodology long after the record was closed on a 2006 application, is arbitrary and capricious. The Health Law Judge's subsequent summary adoption of the settlement agreement without an adjudication or finding that Odyssey had actually met all of four of the criteria was similarly arbitrary and capricious and thus, error as a matter of law.

Given the summary nature of this order, the court directs Petitioner's to confer with opposing counsel and submit proposed findings of fact and conclusions of law consistent with this court's decision.

IT IS SO ORDERED this 24<sup>th</sup> day of September, 2010

  
\_\_\_\_\_  
Judge Mary Yu

<sup>1</sup> Contrary to assertions made at oral argument that settlement of the federal lawsuit was separate from the approval of the application, the Department represented to the HLJ that "as part of the resolution of Odyssey's federal lawsuit against the Department, the Department agreed to propose settlement of the adjudicative proceeding by approving the King County application. . ." AR 1683 and 710.

King County Superior Court  
Judicial Electronic Signature Page

Case Number: . 10-2-02490-5  
Case Title: . . KING COUNTY PUBLIC HOSPITAL DIST 2 DBA ET  
AL VS WA STATE OF HEALTH ET A  
Document Title: . ORDER  
Signed by Judge: Mary Yu  
Date: 9/24/2010 4:17:28 PM

digitally signed

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Judge Mary Yu

This document is signed in accordance with the provisions in GR 30.

Certificate Hash: 4764B5F5F0D4A5B6552C9BB0F84A5A936A7E50CF  
Certificate effective date: 4/26/2010 7:36:51 AM  
Certificate expiry date: 7/19/2012 7:36:51 AM  
Certificate Issued by: CN=Washington State CA B1, OU=State of Washington  
CA, O=State of Washington PKI, C=US

# APPENDIX B

Finding of Facts, Conclusion of Law and Judgment  
entered on October 29, 2010

FILED  
KING COUNTY, WASHINGTON

OCT 29 2010

SUPERIOR COURT CLERK  
ANGIE VILLALOVOS  
DEPUTY

Honorable Mary I. Yu  
Without Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

KING COUNTY PUBLIC HOSPITAL  
DISTRICT NO. 2 d/b/a EVERGREEN  
HEALTHCARE, a Washington public  
hospital district, *et al.*,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT  
OF HEALTH, a Washington governmental  
agency, *et al.*,

Respondents.

NO. 10-2-02490-5 SEA

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND JUDGMENT

[Proposed]

Clerk's Action Required

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came on for hearing with oral argument on September 24, 2010, before the Honorable Mary I. Yu of the above-titled Court upon the Petitioners' Petition for Judicial Review. The Court considered:

1. Petitioners' Opening Brief;
2. The Declaration of James S. Fitzgerald, dated August 31, 2010;
3. Department of Health Memorandum Opposing Petition for Judicial Review;
4. Odyssey Healthcare's Response to Petitioners' Opening Brief;
5. Petitioners' Reply Brief;

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND JUDGMENT - 1

ORIGINAL

LIVENGOOD, FITZGERALD & ALSKOG, PLLC  
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KIRKLAND, WASHINGTON 98083-0908  
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- 1 6. Supplemental Declaration of James S. Fitzgerald, dated September 21, 2010;
- 2 7. Swedish's Reply Brief;
- 3 8. The Administrative Record; and
- 4 9. The files and records herein.

5 Having considered the foregoing and the arguments of counsel, the Court makes and  
6 enters the following Findings of Fact:

7 **Findings of Fact**

8 **Odyssey I**

9 1. In October 2003, Odyssey filed three certificate of need ("CN") applications  
10 to establish new hospice agencies in King, Snohomish, and Pierce Counties ("Odyssey I").  
11 The Department of Health (the "Department") denied the applications because, *inter alia*,  
12 the need methodology under WAC 246-310-290 demonstrated a surplus of hospice agencies  
in the counties.

13 2. Odyssey challenged the decision, and the Court of Appeals affirmed the  
14 Department's decision, holding that the Department correctly interpreted and applied the  
15 forecasting methodology. *See Odyssey Healthcare Operating B, LP v. Dept. of Health*, 145  
16 Wn. App. 131, 185 P.3d 652 (2008)

17 **Odyssey II**

18 3. In October 2006, during the pendency of Odyssey I, Odyssey filed another  
19 set of CN applications to establish new hospice agencies in King, Snohomish, and Pierce  
20 Counties ("Odyssey II"). In August 2007, the Department denied Odyssey's application.  
21 Applying the same methodology upheld in Odyssey I, the Department determined that the  
22 applications were "not consistent with the Certificate of Need review criteria ... Need ...  
Financial Feasibility ... Structure and Process of Care ... [and] Cost Containment ..."

23 4. In September 2007, Odyssey filed three applications for adjudicative  
24

1 proceedings. In October and November 2007, the Health Law Judge granted the request of  
2 King County Public Hospital District No. 2 d/b/a Evergreen Healthcare to intervene in the  
3 King and Snohomish County adjudicative proceedings. The King, Snohomish, and Pierce  
4 County proceedings were later consolidated and stayed until resolution of Odyssey I.

5 5. In October 2008, Odyssey petitioned for rulemaking and obtained another  
6 continuance. In December 2008, the Department denied Odyssey's petition for rulemaking.

7 6. In February 2009, Providence Hospice and Home Care of Snohomish County  
8 and Hospice of Seattle petitioned to intervene in Odyssey II. That same month, Odyssey  
9 requested another stay because Odyssey planned to file a lawsuit in federal court. Odyssey  
10 also asserted as a basis for the continuance that it believed that there would be sufficient  
11 need for a CN application filed in October 2009 and that it might choose to apply for that  
12 need rather than continuing to appeal. In March 2009, the Health Law Judge granted  
13 Odyssey's request to stay the case until September 2009. The petition for intervention filed  
14 by Providence was also stayed pending Odyssey's decision as to which action it would take.

#### 14 **Odyssey's Federal Lawsuit**

15 7. In April 2009, Odyssey filed a lawsuit in federal court alleging violations of  
16 the Sherman Act under 15 U.S.C. § 1, the Commerce Clause of the United States  
17 Constitution under Article I, § 8, cl. 3, and liability under 42 U.S.C. § 1983 ("Federal  
18 Lawsuit").

19 8. In June 2009, the Department filed an answer to the Federal Lawsuit,  
20 continuing to oppose Odyssey's contention that its 2006 CN applications were improperly  
21 evaluated. In its answer, the Department denied (1) that it had failed to properly evaluate  
22 Odyssey's 2006 CN applications, (2) that the 2009 Methodology (i.e., using data obtained  
23 by the Department in 2008) could be used as the basis for granting Odyssey's 2006 CN  
24 application, and (3) that the 2008 Methodology (using data obtained by the Department in

1 2007, the year it denied Odyssey's application) showed need for additional hospice  
2 agencies.

### 3 The Settlement

4 9. In September 2009, Odyssey informed the Health Law Judge that it had  
5 engaged in settlement negotiations with the Department "on both the federal and  
6 administrative proceedings" and requested and received another continuance until  
7 November 2009. None of the Petitioners were ever advised of the negotiations (or  
8 participated in them) despite the fact that Evergreen was an intervenor and Providence had  
9 filed for intervention in the adjudicative proceeding.

10 10. On September 25, 2009, the Department and Odyssey agreed to settle the  
11 Federal Lawsuit if, *inter alia*, the Department agreed to grant Odyssey's 2006 CN  
12 application for King County based upon data obtained in 2008 (the "2009 Methodology").  
13 The Federal Lawsuit settlement stated, "[t]he parties will enter into the attached Settlement  
14 and Stipulation in the pending adjudicative proceeding before the Department of Health."

15 11. The Federal Lawsuit settlement also contained a specific "bad faith"  
16 provision to encourage the Department to submit the proposed settlement to the Health Law  
17 Judge for approval, which stated:

18 Odyssey is precluded from seeking damages, costs, or attorneys' fees related  
19 to any event allegedly occurring prior to the date of signing this settlement.  
20 *This preclusion will not apply if the Certificate of Need Program, pursuant to  
Paragraph 4 of the attached Stipulation and Settlement, makes a decision not  
to present the Stipulation and Settlement to the Health Law Judge for  
approval of the King County application, and in subsequent litigation,  
Odyssey proves that the decision was made in bad faith.*

21 12. The Department stated that it "conducted a survey of existing King County  
22 providers based on services offered in 2007 . . . [and] the data shows a current need for two  
23 additional hospice agencies in King County . . . [and] [b]ased on this data showing need, the  
24 undersigned parties propose settlement under RCW 70.38.115(10)(c) approving Odyssey's

1 [2006] application to establish a new hospice agency in King County . . . .” Odyssey also  
2 agreed to withdraw its 2006 CN applications for Snohomish and Pierce Counties.

3 13. The stipulation included an attachment showing the Department’s need  
4 calculation for Odyssey’s 2006 CN application was based upon the 2009 Methodology. The  
5 attachment did not include any re-evaluation of the other CN criteria found to be unmet in  
6 the original evaluation (financial feasibility, structure and process of care, and cost  
7 containment). The grant of a CN to Odyssey for King County was central to the settlement.

8 14. On September 29, 2009, the Department issued a Notice of Proposed  
9 Settlement, stating that a “special circumstance” existed for granting Odyssey’s 2006 CN  
10 application for King County and requested comments within 14 days.

11 15. The Department confirmed that “the proposed settlement of the adjudicative  
12 proceeding was part of the settlement between the parties resolving the federal lawsuit,” and  
13 included in the proposed settlement the following:

14 In 2008, the Program conducted its survey of existing King County providers  
15 for 2007 use data. Applying the hospice need methodology to this data  
16 showed a current need for two additional hospice agencies. Due to a *special  
17 circumstance*, the Program will consider this new data in deciding whether to  
18 approve Odyssey’s King County application. The special circumstance is  
19 that this new need data was not available to Odyssey by the deadline for  
20 applications in 2008.

21 16. The Department stated that it would make a decision within 7 days after  
22 receiving comments. The Notice of Proposed Settlement also stated: “Odyssey’s position  
23 regarding the law applicable to this settlement is not necessarily consistent with the  
24 Department’s position, but the parties had agreed that any disagreements over the  
interpretation of the applicable law do not affect this settlement.”

17. The Petitioners and Franciscan Health Systems submitted comments on the  
“special circumstance.” The comments included the fact that the Department had not

1 complied with the CN laws or with its own policies regarding competent information for the  
2 evaluation of CN applications.

3 18. The Petitioners contended that the Department properly evaluated Odyssey's  
4 2006 CN application in August 2007 using the same methodology upheld by the court in  
5 Odyssey I and that a deviation would require rulemaking. They further asserted that the  
6 Department could not use data obtained 15 months after its decision to grant Odyssey's  
7 2006 CN application.

8 19. The Petitioners also contended that the Department failed to include some  
9 approved hospice providers in the 2009 Methodology and artificially extended the forecast  
10 horizon applicable for the need methodology. Finally, they asserted that the Department  
11 failed to evaluate how Odyssey satisfied the other CN criteria that the Department had  
12 earlier found to be unmet (financial feasibility, structure and process of care, and cost  
13 containment).

14 20. In October 2009, Providence renewed its motion to intervene and Swedish  
15 Health Services d/b/a Swedish Visiting Nurse Services ("Swedish") and Franciscan also  
16 moved to intervene. Odyssey opposed intervention and, although the Department did not  
17 oppose, it argued that intervention must be limited to "commenting" on the proposed  
18 settlement, nothing more. The Health Law Judge granted the petitions to intervene, but only  
19 for the limited purpose of commenting on the proposed settlement under RCW  
20 70.38.115(10)(c). The Health Law Judge stated:

21 The only issue before the Presiding Officer is whether to accept the Proposed  
22 Settlement in the event it is offered by the program. There are no issues  
23 regarding discovery, cross-examination, or other participation in the  
24 adjudicative proceeding at this time. Limiting intervention to the submission  
of comments and argument on the Proposed Settlement is appropriate. The  
plain language of RCW 70.38.115(10)(c) requires nothing more.

1 **Presentment of Settlement to Health Law Judge**

2 21. On October 30, 2009, the Department submitted its proposed settlement to  
3 the Health Law Judge for approval. On November 10, 2009, the Petitioners and Franciscan  
4 submitted responses to the Department's request to have the Health Law Judge approve the  
5 settlement proposal with Odyssey. The Petitioners provided their legal bases for rejecting  
6 the Department's settlement of the Federal Lawsuit, reiterating their contention that the  
7 settlement contravenes well-established CN laws and longstanding departmental policy.

8 22. On November 18, 2009, Odyssey and the Department submitted arguments in  
9 support of their settlement proposal. On November 30, 2009, the Petitioners and Franciscan  
10 filed a joint reply brief in opposition to the settlement proposal. On December 8, 2009, the  
11 Health Law Judge approved the Department's proposed order to grant Odyssey's 2006 CN  
12 application for King County, finding, *inter alia*,

13 For reasons stated by the Program in its evaluation and settlement proposal:

- 14 (a) Odyssey's hospice application for King County meets the  
15 requirements of WAC 246-310-210, 246-310-220, 246-310-230, and  
16 246-310-240; and  
17 (b) In the exercise of discretion, the Program's 2008 WAC 246-310-290  
18 methodology – showing "need" for an additional hospice agency in  
19 King County in 2009 – may be used in deciding that need exists for  
20 Odyssey's proposed hospice in King County;

21 Final Order at 2:1-7.

22 23. On January 13, 2010, the Department issued a certificate of need (#1416) to  
23 Odyssey.

24 **Evergreen Files for Adjudicative Proceeding**

25 24. Evergreen timely filed in Thurston County Superior Court for an adjudicative  
26 proceeding to challenge the merits of the Department's December 8, 2009 decision. On  
27 January 29, 2010, Evergreen, the Department, and Odyssey stipulated to dismiss, agreeing

1 that this judicial review controlled whether Odyssey's 2006 CN application for King County  
2 should be granted and reserving the right to reinstate the adjudication if anyone argued  
3 failure to exhaust administrative remedies or if this Court determined that the Petitioners  
4 were first required to bring a separate action at the agency level. The parties agreed that  
5 having the Petitioners file separate applications for adjudication would be futile given the  
6 Department's December 8, 2009 final order.

7 Based on the foregoing Findings of Fact, the Court hereby makes the following  
8 Conclusions of Law:

9 **Conclusions of Law**

10 1. RCW 70.38.115(10)(c) authorizes the Department to settle with an applicant  
11 prior to the conclusion of the adjudicative proceeding. However, it is clear that the intent of  
12 the Legislature in enacting this provision was not to allow a "settlement" to circumvent  
13 established evaluation procedures or to modify a decision of the Department without an  
14 adjudicative hearing, especially if the primary settlement arose from an entirely separate  
15 lawsuit and proceeding.

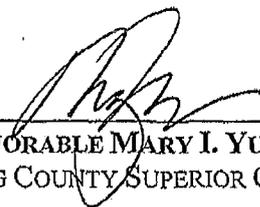
16 2. The Department's decision to settle the Federal Lawsuit by granting Odyssey  
17 a CN in King County under the guise of "special circumstance" and based upon its 2009  
18 methodology long after the record was closed on a 2006 application, was arbitrary and  
19 capricious.

20 3. The Health Law Judge's subsequent summary adoption of the settlement  
21 agreement without an adjudication or finding that Odyssey had actually met all four of the  
22 CN criteria was similarly arbitrary and capricious and thus, error as a matter of law.

23 4. The request on judicial review to reverse the Final Order Approving  
24 Settlement and Granting Odyssey's King County Hospice Application, dated December 8,  
2010 (the "Final Order") should be granted.

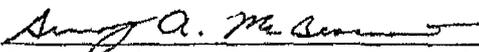


1 ENTERED this 29 day of October, 2010.

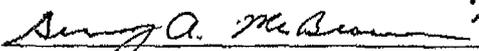
2  
3  
4   
5 HONORABLE MARY I. YU  
KING COUNTY SUPERIOR COURT JUDGE

6 **Presented and Approved By:**

7 LIVENGOOD FITZGERALD & ALSKOG, PLLC

8  
9   
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**APPENDIX C**  
Court of Appeals, Division I Opinion  
Issued on February 21, 2012

RICHARD D. JOHNSON,  
*Court Administrator/Clerk*

*The Court of Appeals*  
of the  
*State of Washington*  
*Seattle*

DIVISION I  
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February 21, 2012

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CASE #: 66304-6-I

King County Public Hospital #2, et al, Resps. vs. Odyssey Healthcare Operating B, et al, Apps.  
King County, Cause No. 10-2-02490-6.SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Reversed and remanded."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of \$200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

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Page 2

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

A handwritten signature in black ink, appearing to read 'R.D. Johnson', with a long horizontal flourish extending to the right.

Richard D. Johnson  
Court Administrator/Clerk

hek

c: The Honorable Mary I. Yu

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

KING COUNTY PUBLIC HOSPITAL )  
DISTRICT NO. 2, d/b/a EVERGREEN )  
HEALTHCARE, a Washington public )  
Hospital district; SWEDISH HEALTH )  
SERVICES, d/b/a SWEDISH VISITING )  
NURSE SERVICES, a Washington )  
non-profit corporation; PROVIDENCE )  
HOSPICE AND HOME CARE OF )  
SNOHOMISH COUNTY, a Washington )  
non-profit corporation; and HOSPICE )  
OF SEATTLE, a Washington non-profit )  
corporation, )

Respondents, )

v. )

WASHINGTON STATE DEPARTMENT )  
OF HEALTH, a Washington )  
Governmental agency; SECRETARY )  
MARY SELECKY, Secretary of )  
Washington's Department of Health in )  
her official and individual capacity; )  
ODYSSEY HEALTHCARE )  
OPERATING B, LP, a Delaware )  
Corporation; and ODYSSEY )  
HEALTHCARE, INC., a Delaware )  
Corporation )

Appellants. )

No. 66304-6-1

ORDER GRANTING MOTION TO  
PUBLISH

Appellants Department of Health ("Department") and Odyssey Healthcare Operating B, LP and Odyssey Healthcare, Inc. ("Odyssey") filed a motion to publish the opinion filed on February 12, 2012 in the above matter and respondents filed an answer to the motion.

No. 66304-6-1/2

A majority of the panel has determined the motion to publish the opinion should be granted. Now, therefore, it is hereby

ORDERED that appellants' motion to publish is granted.

DATED this 4<sup>th</sup> day of May, 2012.

FOR THE PANEL:

Spencer A.C.W.  
Acting Presiding Judge

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 MAY -4 PM 2:11

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON

2012 FEB 21 AM 9:41

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

KING COUNTY PUBLIC HOSPITAL )  
DISTRICT NO. 2, d/b/a EVERGREEN )  
HEALTHCARE, a Washington public )  
Hospital district; SWEDISH HEALTH )  
SERVICES, d/b/a SWEDISH VISITING )  
NURSE SERVICES, a Washington )  
non-profit corporation; PROVIDENCE )  
HOSPICE AND HOME CARE OF )  
SNOHOMISH COUNTY, a Washington )  
non-profit corporation; and HOSPICE )  
OF SEATTLE, a Washington non-profit )  
corporation, )

Respondents, )

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WASHINGTON STATE DEPARTMENT )  
OF HEALTH, a Washington )  
Governmental agency; SECRETARY )  
MARY SELECKY, Secretary of )  
Washington's Department of Health in )  
her official and individual capacity; )  
ODYSSEY HEALTHCARE )  
OPERATING B, LP, a Delaware )  
Corporation; and ODYSSEY )  
HEALTHCARE, INC., a Delaware )  
Corporation )

Appellants. )

No. 66304-6-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: February 21, 2012

SPEARMAN, J. — We are asked to determine whether a Health Law Judge (HLJ) acted arbitrarily and capriciously in entering a final order approving a settlement between the Department of Health (Department) and Odyssey Healthcare. The central component of the settlement was the Department's approval of Odyssey's 2006 Certificate of Need (CN) application to provide hospice care in King County. Evergreen and other competing providers filed a petition for review of the HLJ's order in superior court. The superior court reversed the HLJ's order on the grounds that (1) Evergreen had not received a full adjudicative hearing; (2) the Department acted arbitrarily and capriciously in settling Odyssey's federal lawsuit by granting Odyssey's 2006 CN application based on evidence obtained long after the record for that application was closed; and (3) the HLJ acted arbitrarily and capriciously in adopting the settlement without finding that Odyssey had met all four of the CN criteria. The court revoked the CN and remanded to the HLJ. Odyssey appeals. We hold that the HLJ's approval of the settlement was not arbitrary and capricious for the reasons asserted by Evergreen on appeal. We reverse and remand.

#### FACTS

In Washington, hospice care can be offered only by holders of CNs, which are nonexclusive licenses. RCW 70.38.025(6); RCW 70.38.105. To obtain a CN, a provider's proposal must meet four criteria: (1) need for the proposed program, (2) financial feasibility of the program, (3) structure and process of care, and (4) cost containment. WAC 246-310-210 through -240. The CN process involves an application by a provider; notification to certain interested parties, such as competitors, and an opportunity for public comment (including a hearing, if

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requested); and a decision by the Department. See RCW 70.38.115. An applicant denied a CN has the right to an adjudicative proceeding. RCW 70.38.115(10)(a). If the Department wishes to settle with an applicant prior to the conclusion of the adjudicative proceeding, the Department must inform competitors and afford them an opportunity to comment, in advance, on the proposed settlement. RCW 70.38.115(10)(c).

In October 2006, Odyssey filed CN applications to offer hospice services in King, Snohomish, and Pierce counties. This was Odyssey's second attempt to obtain CNs for these counties; its 2003 applications had been denied.<sup>1</sup> The Department denied the 2006 applications in August 2007. Odyssey requested adjudicative proceedings to appeal the denials before an HLJ. Evergreen's request to intervene was granted. The HLJ, John F. Kuntz, granted various stays, one due to Odyssey's plan to file a federal lawsuit. On April 7, 2009, Odyssey filed a lawsuit against the Department in federal district court, alleging violations

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<sup>1</sup> The Department had denied Odyssey's 2003 applications because, among other reasons, the methodology for the "need" criterion under WAC 246-310-290 showed a surplus of hospice agencies in those counties. Odyssey challenged the Department's decision, which was eventually affirmed by this court in Odyssey Healthcare Operating B, LP v. Dep't of Health, 145 Wn. App. 131, 185 P.3d 652 (2008). We stated in a footnote:

Odyssey's contention that the WAC 246-310-290(7) methodology contains significant flaws is not without merit. But because the methodology is ambiguous, we must defer to the interpretation of the Department as the agency responsible for the methodology's administration and enforcement. . . . The judicial appeal process is not the appropriate venue for addressing Odyssey's arguments about the inherent defects in WAC 246-310-290(7)'s methodology. Instead, Odyssey should raise its concerns through administrative rulemaking avenues.

Id. at 145 n.6. Accordingly, Odyssey petitioned for rulemaking in October 2008, requesting the Department to correct alleged flaws in the methodology for assessing need. The Department denied the petition.

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of the Sherman Anti-Trust Act, 15 U.S.C. § 1; the dormant commerce clause, U.S. Const. art. I, § 8, Cl. 3; and 42 U.S.C. § 1983.<sup>2</sup>

The Department and Odyssey entered into settlement negotiations to resolve the federal lawsuit and the adjudicative proceedings. On September 25, 2009 they reached an agreement, memorialized in two documents: (1) a settlement to resolve the federal lawsuit and (2) a proposed settlement and stipulation to resolve the adjudicative proceeding. The settlement in the federal lawsuit required the parties to enter into the settlement and stipulation in the adjudicative proceeding.<sup>3</sup> The settlement also contained a release provision to ensure that the Department would act in good faith in deciding whether to present the proposed settlement in the adjudicative proceeding to the HLJ and support the HLJ's approval of it.<sup>4</sup>

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<sup>2</sup> The complaint also named the secretary of health and three other Department of Health employees in their individual capacities.

<sup>3</sup> Other terms of the federal settlement were that (1) Odyssey would dismiss its federal lawsuit within two days of the parties' signing of the stipulation; (2) no later than May 1, 2010, the Department would initiate rule-making under chapter 34.05 RCW to consider whether to amend WAC 246-310-290, and allow Odyssey to participate in advising the Department on amending the rule; (3) the Department would pay Odyssey \$10,000 as consideration for all of its claims, to resolve the federal lawsuit without further litigation expense.

<sup>4</sup> The provision stated:

Nothing in this Agreement prohibits Odyssey from bringing a new lawsuit against the State of Washington, the Department of Health, or any of its employees or former employees, related to the denial of a Certificate of Need application, including a denial by the Health Law Judge of the King County Certificate of Need awarded under paragraph 2 of the proposed Settlement and Stipulation in the pending adjudicative proceeding before the Department of Health. However, in such case, with one exception, Odyssey is precluded from seeking damages, costs, or attorneys' fees related to any event allegedly occurring prior to the date of signing of this Settlement. This preclusion will not apply if the Certificate of Need Program, pursuant to Paragraph 4 of the attached Stipulation and Settlement, makes a decision not to present the Stipulation and Settlement to the Health Law Judge for approval of the King County application, and in subsequent litigation, Odyssey proves that the decision was made in bad faith. No showing of bad faith is required in order for Odyssey to seek prospective injunctive relief in any future lawsuit.

Under the proposed settlement in the adjudicative proceeding, the parties proposed approval of Odyssey's CN application based on more recent data showing that need now existed for a new hospice in King County (2008 methodology).<sup>5</sup> The Department agreed to provide appropriate entities notice and an opportunity to comment on the proposed settlement. The proposed settlement stated that the Department would then "(i) present the Stipulation to the Health Law Judge for entry of an Order approving the proposed settlement and granting the King County application . . . , or (ii) notify Odyssey of its decision not to present the Stipulation to the Health Law Judge . . . ." Odyssey agreed to withdraw its request for adjudicative proceedings to appeal the denials for CNs for Pierce and Snohomish counties.

On September 29, 2009, the Department issued a "Notice of Possible Settlement and Opportunity to Comment," announcing that the Department and Odyssey proposed a settlement that would approve of Odyssey's 2006 CN application for King County. The notice requested comment within 14 days. The Department received comments from several competing providers, including Evergreen and the other appellants, opposing approval of a CN for Odyssey. The competitors contested the Department's use of the 2008 methodology, arguing that the Department could not use data obtained 15 months after its decision in order to grant the 2006 application. They contended that the Department properly evaluated Odyssey's application in August 2007 using the same methodology upheld by this court in the appeal of Odyssey's 2003 CN application and that a

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<sup>5</sup> The proposed settlement stated that since Odyssey's King County CN application had been denied, the Department conducted in 2008 a survey of existing King County providers based on services offered in 2007. Applying the need methodology contained in WAC 246-310-290, the data showed a current need for two additional hospice agencies in King County.

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deviation would require rulemaking. They also claimed that the Department failed to include some approved hospice providers and artificially extended the forecast horizon applicable for the need methodology. Finally, they asserted that the Department failed to evaluate how Odyssey satisfied the non-need criteria.

Providence renewed its motion to intervene, and Swedish and Franciscan also filed motions to intervene. The HLJ granted the motions, but only for the limited purpose of submitting written evidence and legal argument on the proposed settlement. The HLJ stated:

The only issue currently before the Presiding Officer is whether to accept the Proposed Settlement in the event it is offered by the Program. There are no issues regarding discovery, cross-examination, or other participation in the adjudicative proceeding at this time. Limiting intervention to the submission of comments and argument on the September 2009 Proposed Settlement is appropriate at this time. The plain language of RCW 70.38.115(10)(c) requires nothing more.

On October 30, 2009, the Department submitted its proposed settlement to the HLJ and recommended approval of Odyssey's CN application. The Department noted that the need criterion was the only contested issue in the approval of Odyssey's 2006 CN application and that the competitors did not contest the non-need criteria. It stated that the application failed the three other criteria "only because Odyssey had not demonstrated need" and that "the Program would have approved the application had Odyssey demonstrated need." The Department then analyzed why the need criterion was met based on the 2008 methodology. The competitors filed responses opposing the proposed settlement, arguing that it contravened CN laws and departmental policy.

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The HLJ approved the proposed settlement and the Department's proposed order to grant Odyssey's CN application for King County, issuing a final order on December 8, 2009. The HLJ found:

For reasons stated by the Program in its evaluation and settlement proposal:

(a) Odyssey's hospice application for King County meets the requirements of WAC 246-310-210, 246-310-220, 246-310-230, and 246-310-240; and

(b) In the exercise of discretion, the Program's 2008 WAC 246-310-290 methodology – showing “need” for an additional hospice agency in King County in 2009 – may be used in deciding that need exists for Odyssey's proposed hospice in King County; . . .

The HLJ held: (1) there was proper notice and opportunity to comment on the proposed settlement and the proposed settlement was properly presented to the HLJ; (2) Odyssey's hospice application met all four criteria for the issuance of a CN under RCW 70.38.115(2) and WAC 246-310-210 through -240; (3) the Department, in an “exercise of discretion,” could use the 2008 methodology to decide “that need exists for Odyssey's proposed hospice in King County”; and (4) Odyssey's requests for adjudicative proceedings to challenge the denials for CNs in Pierce and Snohomish counties would be voluntarily dismissed. Id. The HLJ ordered that “[w]ith the stated conditions in the proposed settlement,” Odyssey's CN application for a hospice agency in King County was approved.

The competitors filed a petition for review of the HLJ's final order in superior court on January 7, 2010. On January 13, the Department issued a CN to Odyssey. On October 29, the superior court reversed the HLJ's final order, entering findings of fact and the following conclusions of law:

1. RCW 70.38.115(10)(c) authorizes the Department to settle with an applicant prior to the conclusion of the adjudicative proceeding. However, it is clear that the intent of the Legislature in enacting this provision was not to allow a "settlement" to circumvent established evaluation procedures or to modify a decision of the Department without an adjudicative hearing, especially if the primary settlement arose from an entirely separate lawsuit and proceeding.

2. The Department's decision to settle the Federal Lawsuit by granting Odyssey a CN in King County under the guise of "special circumstance" and based upon its 2009 methodology long after the record was closed on a 2006 application, was arbitrary and capricious.

3. The Health Law Judge's subsequent summary adoption of the settlement agreement without an adjudication or finding that Odyssey had actually met all four of the CN criteria was similarly arbitrary and capricious and thus, error as a matter of law.

4. The request on judicial review to reverse the Final Order Approving Settlement and Granting Odyssey's King County Hospice Application, dated December 8, 2010 (the "Final Order") should be granted.

5. The Department's issuance of Certificate of Need #1416 to Odyssey for establishing a hospice agency in King County based upon the Final Order and the Department's settlement should be revoked.

6. The matter should be remanded to the Department's Health Law Judge for a determination, based on the applicable law and the relevant evidence available at the time the record was open, whether or not Odyssey's CN application satisfied all of the applicable criteria for approval of its 2006 application.

Odyssey appeals, assigning error to all of the superior court's conclusions of law.

The Department submits briefing to defend its final order.<sup>6</sup>

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<sup>6</sup> The Department does not agree with all of Odyssey's arguments, but agrees that the superior court erred in overturning the approval of Odyssey's application for a CN.

## DISCUSSION<sup>7</sup>

In reviewing the HLJ's final order, we "sit in the same position as the superior court, applying [Washington's Administrative Procedure Act] to the record before the agency." DaVita, Inc. v. Wash. State Dep't of Health, 137 Wn. App. 174, 180, 151 P.3d 1095 (2007) (citing Towle v. Dep't of Fish and Wildlife, 94 Wn. App. 196, 203, 97 P.2d 591 (1999)). The standard of review for CN cases specifically is stated as follows:

1. We review the entire administrative record.
2. The agency decision is presumed correct and the challenger bears the burden of proof.
3. We do not retry factual issues and accept the administrative findings unless we determine them to be clearly erroneous, that is, the entire record leaves us with a definite and firm conviction that a mistake has been made. Important here is the corollary principle that the existence of credible evidence contrary to the agency's findings is not sufficient in itself to label those findings clearly erroneous.
4. The error of law standard permits this court to substitute its interpretation of the law for that of the agency, but we accord

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<sup>7</sup> The Department proposed to settle the adjudicative proceeding with Odyssey pursuant to RCW 70.38.115(10)(c), which provides:

If the department desires to settle with the applicant prior to the conclusion of the adjudicative proceeding, the department shall so inform the health care facility or health maintenance organization and afford them an opportunity to comment, in advance, on the proposed settlement.

The statute does not expressly require a proposed settlement to be approved by an HLJ. Nonetheless, the Department sought the HLJ's approval of the settlement agreement. Nor does the statute expressly require the HLJ to make findings that a proposed settlement agreement resulting in the issuance of a CN is in compliance with RCW 70.38.115(2) and WAC 246-310-210 through .240. Nonetheless, the Department requested the HLJ to make findings that the issuance of the CN was consistent with the statutory criteria and that the Department's use of the 2008 methodology was proper, which the HLJ did. The HLJ also conducted a hearing prior to its determination to approve the proposed settlement, although RCW 70.38.115(10) does not expressly require such a hearing. On appeal, neither party addresses these procedural issues or assigns error to them. We therefore limit our review to the HLJ's final order and the narrow questions of whether the HLJ's factual findings are clearly erroneous, whether the HLJ committed an error of law, and whether approval of the settlement agreement was arbitrary and capricious.

substantial deference to the agency's interpretation, particularly in regard to the law involving the agency's special knowledge and expertise.

5. To find an agency's decision to be arbitrary and capricious we must conclude that the decision is the result of willful and unreasoning disregard of the facts and circumstances.

Univ. of Wash. Med. Ctr. v. Dep't of Health, 164 Wn.2d 95, 102-03, 187 P.3d 243 (2008) (UWMC) (internal citations omitted). Thus, the challenger has the burden of showing the department misunderstood or violated the law, or made decisions without substantial evidence. We do not reweigh the evidence. Id.

The scope of review under the arbitrary and capricious standard "is very narrow," "highly deferential" to the agency and the party challenging an agency decision carries "a heavy burden." Alpha Kappa Lambda Fraternity v. Wash. St. Univ., 152 Wn. App. 401, 418-22, 216 P.3d 451 (2009) (citing Pierce County Sheriff v. Civil Serv. Comm'n, 98 Wn.2d 690, 695, 658 P.2d 648 (1983)).

"[W]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n, 148 Wn.2d 887, 904, 64 P.3d 606 (2003).

Evergreen contends the HLJ's final order was arbitrary and capricious because: (1) in approving Odyssey's 2006 CN application, the Department relied on evidence not available until long after the application was made; (2) notwithstanding the use of the 2008 methodology, the Department did not conduct any analysis of the three non-need criteria for a CN application; and (3)

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notwithstanding the use of the 2008 methodology, the need criterion was not met.<sup>8</sup> We consider these arguments in turn.

#### Considering 2008 methodology

Evergreen contends that, in approving Odyssey's CN application, the Department impermissibly relied on the 2008 methodology, evidence that was not available until two years after the original application was made and more than a year after the record closed. Evergreen claims this violated the Department's general policy—as explained in a memorandum from the Department's secretary and in the Department's answer in the federal lawsuit—and case law, citing UWMC.<sup>9</sup> It also argues that considering new data is contrary to the legislative goal, stated in RCW 70.38.015(2), of overseeing the development of health and medical resources in a planned, orderly fashion because providers would be unable to rely on the Department to apply CN rules in a planned, orderly fashion.

Odyssey argues that prohibiting consideration of the new evidence would thwart the Department's broad authority to settle under RCW 70.38.115(10)(c); improperly limit an HLJs' discretion to consider new evidence under UWMC;

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<sup>8</sup> While one of the bases of the superior court's reversal of the HLJ's order was that Evergreen was not accorded a full adjudicatory proceeding, Evergreen does not rely on this basis on appeal. Evergreen asserts in a footnote that, although the court need not reach the constitutional issue, the Department violated procedural due process by failing to solicit comments in advance of the federal settlement and depriving Evergreen of its right to challenge the decision in an adjudicative proceeding. We do not consider this de minimis briefing to constitute a due process challenge.

<sup>9</sup> In a October 22, 2007 memorandum issued by Department of Health Secretary Mary Selecky to HLJ Laura Farris, Selecky wrote that "[allowing] evidence to be submitted . . . that did not exist at the time the program made its decision . . . is contrary to the department's long practice of not allowing new evidence to come into the record at the adjudicative proceeding." Selecky wrote that "evidence that did not exist and was not part of the record at the time the Certificate of Need Program made its decision should not be admitted into the adjudicative proceeding." In the Department's answer to the federal lawsuit, the Department stated that the 2009 methodology could not be used as a basis for granting Odyssey's 2006 application.

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allow use of the Department's prior, incorrect projections of need; and preclude Odyssey from presenting evidence showing its need projections were accurate. Odyssey argues that neither the Secretary's memorandum nor the Department's denials of liability in an answer to the complaint have the force of law to overrule UWMC.

We conclude that the HLJ's order approving the settlement was not arbitrary and capricious on the ground that the Department agreed to consider the 2008 methodology. The critical fact is that the Department considered this new evidence in the context of a settlement.<sup>10</sup> Evergreen cites no authority precluding the Department, in a situation where it desires to settle a case, from deviating from its general policy in adjudicative proceedings of not considering evidence available after the review period. Furthermore, chapter 70.38 RCW, as we have noted, imposes no substantive or evidentiary limitations on settlements. Finally, the Department described, in its notice of possible settlement, the "special circumstances" that existed for considering the new evidence:

In 2008, the Program conducted its survey of existing King County providers for 2007 use data. Applying the hospice need methodology to this data showed a current need for two additional hospice agencies. Due to a special circumstance, the Program will consider this new data in deciding whether to approve the Odyssey's King County application. The special circumstance is that this new need data was not available to Odyssey by the deadline for applications in 2008. When the Department adopted the hospice need method, it had intended that current need data would be available to prospective applicants prior to the application

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<sup>10</sup> We note that while UWMC describes the "considerable discretion" of HLJs to "determine the scope of admissible evidence," including evidence that comes into existence after the close of the public comment period, UWMC, 164 Wn.2d at 104, that case is not precisely on point here because the HLJ in this case did not make the decision to admit or exclude evidence in the adjudicative proceeding. It was the Department that agreed, during settlement, to consider the new evidence in determining whether the CN criteria were met.

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deadline to provide them with guidance on whether to submit an application.

Given this explanation and the circumstances under which the new evidence was considered, Evergreen does not meet its burden of overcoming the presumption that the HLJ's approval of the settlement was correct.

#### Non-need criteria

Evergreen next contends that, notwithstanding the use of the 2008 methodology, the Department did not conduct any analysis of the three non-need criteria and the record does not support the HLJ's findings that those criteria were met. It contends the Department did not address the concerns it had about these criteria when it rejected Odyssey's applications in 2007 and, to the extent it articulated certain requirements in 2007, did not explain how they had since been met or no longer needed to be met.

Odyssey contends the HLJ found that its application met all four CN criteria. It contends that the Department's initial evaluation states that the non-need criteria were not satisfied solely because the need criterion had not been satisfied. The Department agrees with Odyssey.

We conclude the record supports Odyssey's (and the Department's) contention that the three non-need criteria were initially found to be unmet in 2007 because the need criterion was not met. Though the Department was required to make findings regarding Odyssey's CN application, there is no apparent requirement for how detailed the findings must be. WAC 246-310-490 states, "The findings of the department's review of a certificate of need application shall be stated in writing and include the basis for the decision of the

No. 66304-6-1/14

secretary's designee as to whether a certificate of need is to be issued or denied for the proposed project." Here, the HLJ found in his final order: "For reasons stated by the [CN] Program in its evaluation and settlement proposal . . .

Odyssey's hospice application for King County meets the requirements of WAC 246-310-210, 246-310-220, 246-310-230, and 246-310-240." The cited WAC provisions contain the four CN criteria. In its settlement proposal, the Department stated:

**"Need" is the only contested issue in the approval of the King County application.**

The Program failed Odyssey's King County application on the need criterion. The Program also failed the application on financial feasibility, structure and process of care, and cost containment, but only because Odyssey had not demonstrated need. In other words, the Program would have approved the application had Odyssey demonstrated need.

Intervenors maintain Odyssey cannot demonstrate need. They do not contest that Odyssey's application fails any of the three non-need criteria.<sup>11</sup>

The Department's written evaluation initially denying the CN in August 2007 supports the foregoing statement. In its evaluation, the Department first explained why the need criterion was not met. It then addressed the financial feasibility criterion, with its three sub-criteria: (1) the immediate and long-range capital and operating costs of the project can be met; (2) the costs of the project, including any construction costs, will probably not result in an unreasonable impact on the costs and charges for health services, (3) and the project can be appropriately financed. The evaluation found that the first and second of these

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<sup>11</sup> The Department's evaluation and settlement proposal did not analyze why the non-need criteria were met; rather, it focused on the need criterion.

sub-criteria were not met. The first was not met, the evaluation explained, because:

[I]n the need section of this evaluation the department concluded that need for an additional Medicare certified hospice agency has not been demonstrated. As a result,<sup>12</sup> the department concludes that Odyssey's projected number of patient days is not reliable and the department cannot conclude that sufficient revenue would be generated to meet the expenses of the proposed project.

As for the second sub-criterion, the evaluation explained:

The department concludes that, while the initial capital expenditure of \$45,000 proposed to establish this agency may be small, the applicant has not been able to show need for additional hospice services in King County except through significant modification of the department's need projection methodology. Absent sufficient unmet need to support a new hospice agency, the department concludes that any capital or operating expenditures incurred pursuing this project would be an unnecessary duplication of those made by existing providers and may result in an increase in the costs and charges for health services in the county.

Next, regarding the "structure and process (quality) of care" criterion, the Department's 2007 evaluation concluded that only the following sub-criterion, out of five, was not met: "The proposed project will promote continuity in the provision of health care, not result in an unwarranted fragmentation of services, and have an appropriate relationship to the service area's existing health care system." The evaluation explained:

Odyssey asserts that there is need for additional Medicare certified hospice agencies in King County. However, in the need section of this evaluation, the department concluded that the existing providers are both available and accessible to adequately provide current and future hospice need in the county through 2011. Additionally, a number of the existing providers indicated that they have capacity to serve the patients within the service area without adding staff.

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<sup>12</sup> Emphases in the Department's evaluation are ours.

Therefore, the department concludes that approval of this project has the potential of fragmentation of Medicare certified hospice services within the service area, and this sub-criterion is not met.

Finally, with respect to the cost containment criterion, the 2007 evaluation concluded:

The department concurs with the applicant's assertion that there has been no information available that would indicate any of the current hospices area available for acquisition. Further, approval of this project would allow an additional Medicare certified hospice agency in King County. However, as previously concluded in this evaluation, no need has been demonstrated for additional services.

On the basis of the information provided within this application, the department concludes that adding another hospice agency is not the best available alternative for King County. This sub-criterion is not met.

Evergreen does not show that the HLJ's approval of the settlement was arbitrary and capricious given that the record supports the Department's statement to the HLJ that had the need criterion been met in the initial evaluation, the other criteria would have been met as well.

#### Need criterion

Finally, Evergreen argues that, notwithstanding the consideration of the 2008 methodology, the Department's analysis of the need criterion was incomplete and faulty.<sup>13</sup> Odyssey and the Department disagree, claiming that Odyssey's application satisfied the need criteria under WAC 246-310-210 and

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<sup>13</sup> Specifically, it contends that (1) the Department did not include all hospice providers in evaluating current hospice capacity (by not including Kline Galland); (2) the Department arbitrarily extended the planning horizon by two years (it contends the planning horizon for 2009 should be 2009-2011, and if Kline Galland is included, the need for one more hospice agency disappears); and (3) the Department's 2008 methodology demonstrates no need in King County during the 2007-2009 planning horizon.

Regarding whether the need criterion was or was not met, we note that we do not retry factual issues but instead accept administrative findings “unless we determine them to be clearly erroneous, that is, the entire record leaves us with a definite and firm conviction that a mistake has been made.” UWMC, 164 Wn.2d at 102-03. The record reflects that the Department submitted to the HLJ an extensive analysis as to why the need criterion was met based on more recent data. Evergreen presented arguments as to why the criterion was not met to both the Department and the HLJ. Evergreen repeats those arguments on appeal but fails to meet its burden of showing that the Department’s finding of need for an additional hospice agency was clearly erroneous or that the HLJ acted arbitrarily and capriciously in finding that the need criterion had been met where the Department’s analysis showed that it was.

We conclude that the HLJ’s final order approving the settlement between the Department and Odyssey was not arbitrary and capricious for the reasons

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<sup>14</sup> Odyssey specifically argues that under RCW 70.38.111(9)(b), Kline Galland’s patient census could only be counted when calculating need for hospice CN applications submitted after October 2009; therefore, its future census was properly excluded for Odyssey’s 2006 application. Odyssey responds to Evergreen’s contention that the Department arbitrarily considered the corrected December 2008 calculation rather than prior calculations by arguing that the HLJ had discretion to consider any of the Department’s various need calculations.

The Department also responds to Evergreen’s specific arguments. It contends that, based on the record, Kline Galland is only a proposed King County hospice that may one day become a hospice exempt from CN review under RCW 70.38.111(9). The Department points out that the CN program presented three reasons for not counting Kline Galland in the adjudicative proceeding. It also disputes Evergreen’s contention that Odyssey cannot show need within the three-year planning horizon. It points out the HLJ approved the settlement in 2009, making 2012 the earliest possible third year of operation. For 2012, it contends, the methodology showed an unmet need of 64 ADC and therefore indicated a need for another hospice in King County. The Department notes that during the stay of the adjudicative proceeding, it performed an updated 2008 methodology that used new 2007 hospice-use data from existing providers. The 2008 methodology found, beginning in 2009, a projected unmet need of 37 “average daily census” (meaning the average number of persons actually receiving care by an agency on one day) in King County. Because the number was over 35, need existed for one additional hospice in King County.

No. 66304-6-1/18

asserted by Evergreen, and therefore reverse the trial court and remand for further proceedings.

Reversed and remanded.

WE CONCUR:

Speerman, J.

Appelwick, J.

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# APPENDIX D

Relevant Portions of the  
Decl. of James S. Fitzgerald, dated August 31, 2010  
(Exhibits K, L, M & N Only)

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Honorable Mary I. Yu

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

KING COUNTY PUBLIC HOSPITAL  
DISTRICT NO. 2 d/b/a EVERGREEN  
HEALTHCARE, a Washington public  
hospital district, *et al.*,  
  
                                Petitioners,  
  
                                v.  
  
WASHINGTON STATE DEPARTMENT  
OF HEALTH, a Washington governmental  
agency, *et al.*,  
  
                                Respondents.

NO. 10-2-02490-5 SEA  
  
DECLARATION OF  
JAMES S. FITZGERALD

JAMES S. FITZGERALD declares under penalty of perjury under the laws of the State of Washington as follows:

1. I am District General Counsel for King County Public Hospital District No. 2 d/b/a Evergreen Healthcare (“Evergreen”) and lead counsel for Evergreen in this case. I am competent to testify and make this declaration of my personal knowledge.

2. AR 11-38 — **Exhibit A** attached hereto is a true and accurate copy of the August 2007 decision of the Department of Health (the “Department”) denying Odyssey’s CN applications for King, Snohomish, and Pierce Counties. (AR 11-38)

3. AR 1059-80 — **Exhibit B** attached hereto is a true and accurate copy of the federal lawsuit filed by Odyssey in April 2009.

4. AR 1081-88 — **Exhibit C** attached hereto is a true and accurate copy of the

1 Department's answer to Odyssey's complaint in the federal lawsuit filed in June 2009.

2 5. AR 1091-92 — **Exhibit D** attached hereto is a true and accurate copy of the  
3 settlement agreement for the federal lawsuit executed on September 29, 2009.

4 6. AR 352-60 — **Exhibit E** attached hereto is a true and accurate copy of the  
5 Proposed Settlement and Stipulation that Odyssey and the Department executed on  
6 September 29, 2009. The 2009 Methodology is attached to this pleading.

7 7. AR 297-99 — **Exhibit F** attached hereto is a true and accurate copy of a  
8 representative letter from the Department to affected providers, dated September 29, 2009,  
9 providing notification of the decision to grant Odyssey's 2006 CN application for King  
County and requesting comment within 14 days.

10 8. AR 1721-23 — **Exhibit G** attached hereto is a true and accurate copy of the  
11 Final Order Approving Settlement and Granting Odyssey's King County Hospice  
12 Application issued by the Department's Health Law Judge on December 8, 2009.

13 9. AR 1328-42 — **Exhibit H** attached hereto is a true and accurate copy of the  
14 June 2008 decision of the Department relating to a certificate of need application submitted  
15 by Heart of Hospice, LLC, which contains the Department's 2008 Methodology, which also  
demonstrates a surplus of hospice agencies in King County.

16 10. AR 1104 — **Exhibit I** attached hereto is a true and accurate copy of a letter  
17 of the September 2009 letter of intent submitted by The Kline Galland Center, providing  
18 notification of its intent to establish a new hospice agency in King County.

19 11. AR 1191-92 — **Exhibit J** attached hereto is a true and accurate copy of the  
20 Department's' October 2009 letter to The Kline Galland Center, approving its request to  
establish an exempt hospice agency in King County.

21 12. **Exhibit K** attached hereto is a true and accurate copy of the Stipulation and  
22 Order of Dismissal Without Prejudice entered into by the Department, Evergreen, and  
23 Odyssey, and issued by the Department's Health Law Judge on January 29, 2010.

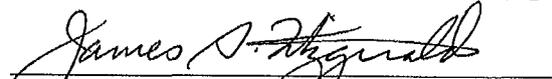
24 13. **Exhibit L** attached hereto is a true and accurate copy of an email exchange

1 on September 29, 2009 between the Department's and Odyssey's counsel concerning the  
2 federal settlement, evidencing that the grant of a CN to Odyssey in King County was central  
3 to the settlement of the federal lawsuit.

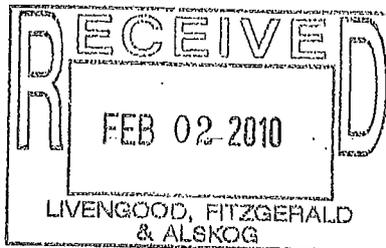
4 14. **Exhibit M** attached hereto is a true and accurate copy of the Department's  
5 March 2010 memo, which constitutes an admission that the Petitioners have the right to seek  
6 judicial review of the Department's decision to approve Odyssey's 2006 CN application.

7 15. **Exhibit N** attached hereto is a true and accurate copy of a February 19, 2009  
8 email from the Department's counsel to Odyssey's counsel, which constitutes and admission  
9 that the Department cannot use the 2009 Methodology and stating that Odyssey must re-  
10 apply for a certificate of need.

11 SIGNED at Kirkland, Washington this 31st day of August, 2010.

12   
13 JAMES S. FITZGERALD

# **EXHIBIT K**



FILED  
JAN 25 2010  
Adjudicative Clerk

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STATE OF WASHINGTON  
DEPARTMENT OF HEALTH  
ADJUDICATIVE SERVICE UNIT

In Re:

CERTIFICATE OF NEED APPLICATION  
OF ODYSSEY HEALTHCARE  
OPERATING B, LP AND ITS PARENT  
COMPANY ODYSSEY HEALTHCARE,  
INC., TO ESTABLISH A HOSPICE  
AGENCY IN KING COUNTY,

NO. M2010-75

STIPULATION AND ORDER  
OF DISMISSAL WITHOUT  
PREJUDICE

King County Public Hospital District No. 2,  
d/b/a Evergreen Healthcare,

Clerk's Action Required

Petitioner.

I. STIPULATION

1. On December 8, 2009, the Honorable John F. Kuntz entered a final order dismissing the adjudicative proceeding filed by Odyssey Healthcare Operating B, LP and its parent company Odyssey Healthcare, Inc. (collectively "Odyssey") and approved a settlement between Odyssey and the CN Program that included the issuance of a CN to Odyssey for establishing hospice services in King County. A copy of the final order is attached hereto as **Exhibit A** (the "Final Order").

2. On December 29, 2009, King County Public Hospital District No. 2, d/b/a Evergreen Healthcare (Evergreen) filed a request for adjudicative proceeding, challenging

STIPULATED ORDER OF DISMISSAL - 1.

LIVENGOOD, FITZGERALD & ALSKOG, PLLC  
121 3<sup>RD</sup> AVENUE  
P.O. BOX 908  
KIRKLAND, WASHINGTON 98083-0908  
PHONE: (425) 822-9281 FAX (425) 828-0908

COPY MAILED TO CLIENT  
Week 2/2/10

1 the Final Order and the CN Program's issuance of a hospice CN to Odyssey for King  
2 County. A primary reason Evergreen filed this request for an adjudicative proceeding was  
3 to ensure that it exhausted administrative remedies (RCW 34.05.534) for purposes of  
4 seeking judicial review of the Final Order.

5 3. On January 7, 2010, Evergreen, Swedish Health Services, d/b/a Swedish  
6 Visiting Nurse Services ("Swedish"), Providence Hospice and Home Care of Snohomish  
7 County and Hospice of Seattle (collectively "Providence") filed a petition for judicial  
8 review in King County Superior Court to appeal the Final Order and the issuance of a CN  
9 to Odyssey for providing hospice services in King County. The petition for judicial review  
10 has been assigned to the Honorable Mary I. Yu of the King County Superior Court under  
11 Cause No. 10-2-02490-5 SEA (the "Judicial Action").

12 4. On January 13, 2010, the CN Program issued a CN to Odyssey for  
13 establishing a hospice agency for serving the residents of King County.

14 5. The Department, Odyssey, and Evergreen stipulate and agree for purposes of  
15 appealing the Final Order and the issuance of a CN to Odyssey for King County that  
16 Evergreen has exhausted administrative remedies under RCW 34.05.534, that any further  
17 review of the Final Order at the agency level would be futile, and that the Final Order has  
18 been properly appealed to King County Superior Court through the Judicial Action.

19 6. The Department and Odyssey waive any right to challenge the jurisdiction of  
20 the Judicial Action based upon a failure to exhaust administrative remedies or based upon  
21 Evergreen not being the party that applied for the adjudicative proceeding that resulted in  
22 the issuance of the Final Order. If the Judicial Action gets dismissed because the parties to  
23 the Judicial Action failed to exhaust administrative remedies or because the parties to the  
24 Judicial Action were required to first bring an action before the Department, the parties  
25 stipulate and agree that this request for adjudicative proceeding may be reinstated without  
any objection.

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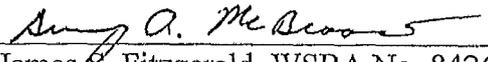
II. ORDER

Based on the above Stipulation, IT IS ORDERED that this matter is dismissed without prejudice. If the trial court dismisses the Judicial Action because the parties to the Judicial Action failed to exhaust administrative remedies or because the parties to the Judicial Action were required to first bring an action before the Department, Evergreen shall be entitled to reinstate this adjudicative proceeding without any objection.

DATED this 29<sup>th</sup> day of January, 2010.

  
HONORABLE JOHN F. KUNTZ  
HEALTH LAW JUDGE, WASHINGTON STATE  
DEPARTMENT OF HEALTH

Presented by:  
LIVENGOOD FITZGERALD & ALSKOG, PLLC

  
James S. Fitzgerald, WSBA No. 8426  
District General Counsel  
Gregory A. McBroom, WSBA No. 33133  
Attorneys for King County Public Hospital  
District No. 2, d/b/a Evergreen Healthcare

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Approved as to form:  
Notice of presentation waived by:

WASHINGTON STATE OFFICE OF  
THE ATTORNEY GENERAL

*per email*  
*Sammy A. McBeane* *APPROVAL*  
Robert M. McKenna, WSBA No. 18327

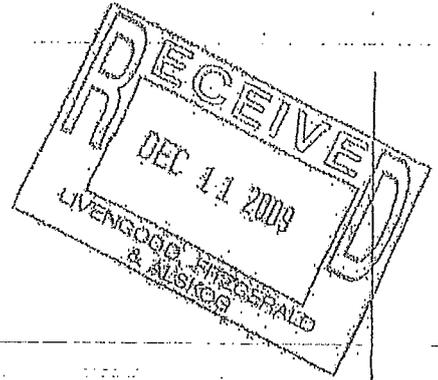
Washington Attorney General  
Richard A. McCartan, WSBA No. 8323  
Assistant Attorney General  
Attorneys for the Department of Health

FREIMUND JACKSON TARDIF &  
BENEDICT GARRATT, PLLC

*per email*  
*Sammy A. McBeane* *APPROVAL*  
Kathleen D. Benedict, WSBA No. 7763  
Attorneys for Odyssey Healthcare Operation B, LP  
and Odyssey Healthcare, Inc.

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EXHIBIT A



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STATE OF WASHINGTON  
DEPARTMENT OF HEALTH  
ADJUDICATIVE SERVICE UNIT

In re: Certificate of Need Decision  
Denying

CERTIFICATE OF NEED  
APPLICATION OF ODYSSEY  
HEALTHCARE OPERATING B, LP  
AND ITS PARENT COMPANY,  
ODYSSEY HEALTHCARE INC., TO  
ESTABLISH A MEDICARE CERTIFIED/  
MEDICAID ELIGIBLE HOSPICE  
AGENCY TO SERVE THE RESIDENTS  
OF KING, PIERCE, AND SNOHOMISH  
COUNTIES.

Petitioner.

Master Case Nos. M2008-117722,  
NM2008-117723, M-2008-117225

Docket Nos. 07-09-C-2007CN; 07-  
09-C-2204CN; 07-09-C-2008CN

FINAL ORDER APPROVING  
SETTLEMENT AND GRANTING  
ODYSSEY'S KING COUNTY  
HOSPICE APPLICATION.

THIS MATTER came before the Health Law Judge on a Presentation of Final Order  
Approving Settlement filed by the Certificate of Need Program under RCW 70.38.115(10)(c).  
Having reviewed the settlement proposal and the comments by Intervenor's, the Health Law  
Judge finds:

1. Under RCW 70.38.115(10)(c), there was proper notice and opportunity to  
comment on the proposed settlement, and the proposed settlement has been properly presented  
to the Health Law Judge;



# **EXHIBIT L**

Jeff Freimund  
Freimund Jackson Tardif & Benedict Garratt, PLLC  
(360) 534-9960

---

**From:** McCartan, Richard (ATG) [mailto:RichardM@ATG.WA.GOV]  
**Sent:** Thursday, September 10, 2009 2:24 PM  
**To:** Jeff Freimund  
**Cc:** Kathleen Benedict; Tribble, Michael (ATG)  
**Subject:** RE: Settlement

Jeff:

Frankly, the idea that we are "trying to avoid" giving Odyssey its CN, "putting up hurdles," and "making additions" to the agreed settlement is simply ridiculous.

In response to your settlement proposal, we spotted two procedural legal issues – what happens if Odyssey appeals & who gets notice of the settlement – that must be resolved. I can't believe you expected us to remain silent about our legal concerns over your proposal. The fact is that we have the right and duty to raise these concerns. Moreover, we quickly brought our concerns to your attention.

I have spent time reviewing your proposal, but I can't go further until we resolve these two legal issues – which we have appropriately raised.

I find it very surprising that you are talking about needing to get this done in two days, when Kathy was the one who proposed two months to complete settlement.

I would be available tomorrow to discuss this matter.

---

**From:** Jeff Freimund [mailto:JeffF@fjtlaw.com]  
**Sent:** Thursday, September 10, 2009 1:42 PM  
**To:** McCartan, Richard (ATG); Tribble, Michael (ATG)  
**Cc:** benedlctk@benedlctlaw.com  
**Subject:** RE: Settlement

We disagree with your position on this issue and would like another meeting with Mike and you to discuss this issue, as well as your position that the Department would not advocate in support of the settlement if the HLJ rejects the settlement and Odyssey has to seek judicial review of that rejection. With each additional hurdle you've added in the last few days, the likelihood of the King County CN actually being awarded to Odyssey pursuant to the terms of the settlement diminishes - - to the point where it looks like the Department is doing everything it can to avoid actually giving the CN to Odyssey under the settlement agreement. As you know, the King County CN is central to Odyssey's willingness to settle and any added risks and hurdles making that less likely to occur correspondingly make Odyssey less willing to settle. We have some ideas to address your latest additions to the proposed settlement terms that hopefully will satisfactorily resolve both parties' concerns on these issues. Additionally, at the meeting we hopefully can resolve any other disagreements you may have with the draft Settlement Agreement we sent you on Tuesday so we can get the agreement finalized in the next few days. We'd like to meet as soon as possible. Both Kathy and I are available to meet anytime tomorrow afternoon. Is there a time tomorrow afternoon when both of you are

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# **EXHIBIT M**

**From:** McCartan, Richard (ATG)  
**Sent:** Monday, March 22, 2010 10:25 AM  
**To:** 'Kathleen Benedict'; 'Jeff Freimund'; Eggen, Bart (DOH); Sigman, Janis (DOH); Tribble, Michael (ATG)  
**Subject:** Odyssey

Kathy:

Here's our response to your e-mail.

Mike and I would be available for a phone call, if you like to talk further about this.



Doc2 (7).docx

001590

## ODYSSEY

In St. Joseph, the Department denied a CN application, and then entered into a “settlement” with the applicant approving the CN, without providing competitors an opportunity to comment on the settlement.<sup>1</sup> In reversing the Department, the court held that since the statute allowed parties to comment on an original application, parties also had the right to comment on a settlement. 125 Wn.2d at 744.

Following the decision, the legislature enacted RCW 70.38.115(c), which allows competitors to comment on a proposed settlement.

Odyssey argues that St. Joseph means that a competitor’s sole right is to comment on a proposed settlement. Odyssey then states:

[The court] did not find that a competitor has the right to an administrative hearing to contest the CN issued upon remand or settlement to a competitor, which means that a competing provider clearly does not have the right to judicial review of a settlement which includes issuance of a CN following the public comment... Richard’s position that intervenors have the right to contest settlement through the administrative process was not the holding in St. Joseph’s – in fact the holding was the opposite. [Emphasis original.]

The Department cannot agree with Odyssey. First of all, with Odyssey’s consent, the competitors in this case were give the right to oppose settlement in the adjudicative proceeding, and the HLJ rejected their opposition. Moreover,, St. Joseph did not even address the issue of whether a competitor could seek judicial review of a CN settlement approval. We would argue that a settlement approval is subject to judicial review because:

1. The HLJ approved the settlement in a final order in an adjudicative proceeding, finding that the Odyssey application met the four CN criteria.

2. “Review of agency orders in adjudicative proceedings” is subject to judicial review. RCW 34.05.570(3).

3. Nothing in case law or rules/statutes purports to make CN settlement approvals exempt from judicial review. In fact, no agency action is exempt from judicial review. Under Odyssey’s argument, when the Department approves an application in its original decision, the approval is subject to judicial review, but when approval comes via settlement, there is no right to judicial review. This result simply makes no sense.

Odyssey attempts to refute (1) and (2) by arguing that the settlement was a “contract” between the Department and Odyssey, and therefore not subject to judicial review under RCW 34.05. We find no support for the argument that an HLJ’s final order in an adjudicative proceeding could ever be construed as a contract.

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<sup>1</sup> St. Joseph also held that competitors have standing to contest Department CN decisions. 125 Wn. 2d at 739-42.

Finally, Odyssey vaguely asserts that the Department should go along with its argument based on the fact that the settlement stemmed from the settlement of the federal lawsuit. However, in our opinion, the reviewability of the HLJ's final order is not affected by the federal lawsuit. As part of the federal settlement, the Department agreed to propose approval of Odyssey's application as meeting the four criteria. The HLJ agreed and entered a final order approving the settlement.

In settlement negotiation of the federal lawsuit, the Department consistently told Odyssey that the HLJ would need to approve the settlement. We consistently stated confidence that we could prevail on the merits either before the HLJ or the court. Odyssey expressed confidence that the competitors would not appeal. Never did Odyssey take the position that the HLJ's order would be exempt from judicial review.

Based on the foregoing, we believe that Odyssey's competitors have the right to challenge the settlement on judicial review. We believe that the issue will be whether the application met the four CN criteria, and that we have an excellent chance of prevailing on that issue.

**EXHIBIT N**

Would the Department be willing to conduct the survey and provide potential providers the results before the September letter of intent period, so that Odyssey, and others, could know whether there would still be the 2 agency need prior to submitting an application?

Kathy

---

**From:** McCartan, Richard (ATG) [mailto:RichardM@ATG.WA.GOV]  
**Sent:** Thursday, February 19, 2009 10:01 AM  
**To:** benedick@benedictlaw.com  
**Cc:** Eggen, Bart (DOH); Sigman, Janis (DOH)  
**Subject:** RE: Hospice Method

You were able to open it, so I assume I don't need to send it to you.

As you know, we always look at the facts that existed during review. So, we can't approve your application based on a Methodology run long after the record closed. In such cases, applicants must re-apply.

---

**From:** Kathy Benedict [mailto:benedick@benedictlaw.com]  
**Sent:** Wednesday, February 18, 2009 4:26 PM  
**To:** McCartan, Richard (ATG)  
**Subject:** RE: Hospice Method

Richard:

My secretary was just able to open the attachment. It looks like 2.08 agencies are now needed in King County. Why don't we settle the Odyssey appeals for a certificate of need in King County?

Kathy

---

**From:** McCartan, Richard (ATG) [mailto:RichardM@ATG.WA.GOV]  
**Sent:** Wednesday, February 18, 2009 3:30 PM  
**To:** benedick@benedictlaw.com  
**Subject:** FW: Hospice Method

Have you seen this?

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**From:** Thomas, Mark A (DOH)  
**Sent:** Wednesday, February 18, 2009 3:14 PM  
**To:** McCartan, Richard (ATG)  
**Cc:** Eggen, Bart (DOH); Sigman, Janis (DOH)  
**Subject:** Hospice Method

**Mark Thomas**

Analyst, Certificate of Need Program  
Health Professions & Facilities  
Washington State Department of Health  
Mail: P.O. Box 47852  
Olympia, WA 98504-7852

001847

# APPENDIX E

Respondents' Motion to Publish,  
dated March 9, 2012

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**COURT OF APPEALS FOR DIVISION I  
STATE OF WASHINGTON**

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KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a EVERGREEN HEALTHCARE, a Washington public hospital district, SWEDISH HEALTH SERVICES, d/b/a SWEDISH VISITING NURSE SERVICES, a Washington non-profit corporation, PROVIDENCE HOSPICE AND HOME CARE OF SNOHOMISH COUNTY, a Washington non-profit corporation, and HOSPICE OF SEATTLE, a Washington non-profit corporation,

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH, a Washington governmental agency, SECRETARY MARY SELECKY, Secretary of Washington's Department of Health in her official and individual capacity, ODYSSEY HEALTHCARE OPERATING B, LP, a Delaware corporation, and ODYSSEY HEALTHCARE, INC., a Delaware corporation,

Appellants.

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**APPELLANTS DEPARTMENT OF HEALTH'S AND ODYSSEY  
HEALTHCARE'S JOINT MOTION TO PUBLISH**

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RICHARD A. MCCARTAN, WSBA #8323  
Assistant Attorney General  
7141 Cleanwater Dr. SW / P.O. Box 40109  
Phone: (360) 664-4998  
Fax: (360) 586-3564  
Attorney for the Department of Health

### **I. IDENTITY OF MOVING PARTY**

Appellants Department of Health (“Department”) and Odyssey Healthcare Operating B, LP and Odyssey Healthcare, Inc. (“Odyssey”) respectfully request the following relief.

### **II. RELIEF REQUESTED**

Pursuant to RAP 12.3(e), the Department and Odyssey ask the Court of Appeals to publish its opinion in this case, which was filed on February 21, 2012.

### **III. STATEMENT OF GROUNDS FOR THE RELIEF SOUGHT**

The Court of Appeals’ opinion should be published for two reasons: (A) this is the first appellate decision interpreting RCW 70.38.115(10)(c) and resolving unsettled questions of law, including whether there are substantive or evidentiary limits on settling cases pursuant to RCW 70.38.115(10)(c); and (B) the decision is of general interest and statewide importance to health care facilities, including hospitals and other health care providers subject to Certificate of Need (“CN”) regulatory requirements.

No reported decision has interpreted RCW 70.38.115(10)(c) since its enactment in 1995. Also, no reported decision has addressed whether there are any substantive or evidentiary limits to settling cases pursuant to this statute. This decision is the first to do so.

This decision clarifies that in settlements pursuant to RCW 70.38.115(10)(c), the Department of Health may modify an initial decision denying a CN and may consider new evidence in the course of doing so when warranted by the circumstances. In so holding, the Court of Appeals resolved unsettled questions of law.

Settlements are a preferred method for resolving disputes. Publication of this decision will provide the Department and health care providers with needed guidance whenever the Department seeks to settle a case under RCW 70.38.115(10)(c). Additionally, publication will reduce the likelihood of future litigation regarding the substantive and evidentiary limits on the Department's authority to settle cases under RCW 70.38.115(10)(c).<sup>1</sup> Non-publication may discourage settlements due to concerns others may have to re-travel the same costly path Odyssey endured.

#### IV. CONCLUSION

Based on the foregoing reasons, the Department and Odyssey respectfully request publication of the Court's decision in this case.

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<sup>1</sup> Although the Court of Appeals was not squarely asked to determine the process for settling cases pursuant to RCW 70.38.115(10)(c), footnote 7 on page 9 of the Court's slip opinion provides guidance on the procedural limits of the statute as well.

RESPECTFULLY SUBMITTED this 9th day of March, 2012.

ROBERT M. MCKENNA  
Attorney General

*for Jeffrey A. O. Freimund #17384 per email approval*  
RICHARD A. MCCARTAN, WSBA No. 8323  
Attorneys for Appellants Washington State  
Department of Health and Mary E. Selecky

FREIMUND JACKSON TARDIF & BENEDICT  
GARRATT, PLLC

*Jeffrey A. O. Freimund*  
JEFFREY A.O. FREIMUND, WSBA No. 17384  
Attorneys for Appellants Odyssey Healthcare  
Operating B, LP and Odyssey Healthcare, Inc.

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

That on March 9<sup>th</sup>, 2012, I arranged for the service of the foregoing Motion for Publication, to all parties to this action as follows:

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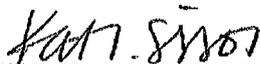
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KATHRINE SISSON

# APPENDIX F

Supplemental Declaration of James S. Fitzgerald,  
dated September 21, 2010

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Honorable Mary I. Yu

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

KING COUNTY PUBLIC HOSPITAL  
DISTRICT NO. 2 d/b/a EVERGREEN  
HEALTHCARE, a Washington public  
hospital district, *et al.*,  
  
Petitioners,  
  
v.  
  
WASHINGTON STATE DEPARTMENT  
OF HEALTH, a Washington governmental  
agency, *et al.*,  
  
Respondents.

NO. 10-2-02490-5 SEA  
  
SUPPLEMENTAL DECLARATION OF  
JAMES S. FITZGERALD

JAMES S. FITZGERALD declares under penalty of perjury under the laws of the  
State of Washington as follows:

1. I am District General Counsel for King County Public Hospital District No. 2  
d/b/a Evergreen Healthcare (“Evergreen”) and lead counsel for Evergreen in this case. I am  
competent to testify and make this declaration of my personal knowledge.
2. **Exhibit A** attached hereto is a true and accurate copy of relevant portions of  
the Final Bill Report for Second Engrossed Substitute House Bill (E2SHB) 1908, which  
explains the reasoning for adding Subsection (10)(c) of RCW 70.38.115. This additional  
provision was codified in the 1995 1st sp.s. c 18 § 72 amendment to the statute.
3. The amendment makes clear that the legislature’s inclusion of the right to  
comment, in advance, on a proposed settlement, was a right that *supplemented* the existing

1 rights of interested healthcare providers. Nothing in the legislative history indicates any  
2 intent by the legislature to eliminate any of the existing rights. As stated in the Final Bill  
3 Report, the legislature wanted to ensure that interested healthcare providers "also" had an  
4 opportunity to comment, in advance, on any proposed settlements.

5 SIGNED at Kirkland, Washington this 21st day of September, 2010.

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8 JAMES S. FITZGERALD

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# EXHIBIT A

## FINAL BILL REPORT

### E2SHB 1908

PARTIAL VETO

C 18 L 95 E 1

Synopsis as Enacted

**Brief Description:** Modifying long-term care provisions.

**Sponsors:** House Committee on Appropriations (originally sponsored by Representatives Dyer, Cooke, Ballasiotes, Stevens, Elliot, Talcott, Cairnes, Lambert, Pelesky, Hymes, Robertson, Mielke, Carrell, Backlund and L. Thomas).

House Committee on Health Care

House Committee on Appropriations

**Background:** The Aging and Adult Services Administration is the agency within the state Department of Social and Health Services (DSHS) that has management responsibility for publicly funded long-term care services such as nursing homes, chore services, Medicaid personal care, adult family homes, Community Options Program Entry System (COPEs), and boarding homes. In Washington state, approximately 17,000 clients receive care in a nursing home, while 6,000 persons with disabilities live in licensed adult family homes, and approximately 18,000 are receiving some form of long-term care in their own homes.

Expenditures in state-administered, long-term care programs have increased even more rapidly over the past 10 years than the number of persons needing care. In addition, every year the state purchases a higher portion of long-term care services. After controlling for inflation, Aging and Adult Services expenditures have doubled over the past decade and have grown twice as fast as the total state budget. Three-quarters of the growth in long-term care expenditures is due to higher costs per person served. State costs per resident have grown 63 percent in community care while the cost of care in nursing homes has grown 88 percent.

In 1994, the Legislature directed the DSHS to develop a plan for reviewing and reducing Aging and Adult Services expenditures to comply with the 10.3 percent growth rate permitted under Initiative 601. Without changes, the projected growth rate is approximately 28 percent.

Several factors contribute to this increase:

- As the nursing facility rate increases, more people are eligible for Medicaid.
- The federal government has protected Medicaid spouses from impoverishment.
- Creative estate planning use is increasing by seniors.
- There have been demographic increases in persons with disabilities.
- Nursing home payment rates have been increasing an average of 9 percent per year.

To address this rapid growth, it has been recommended that:

- Lower cost long-term care options be expanded.
- The manner in which services are utilized and accessed be reviewed.
- Regulatory reforms be developed.
- The extent to which people can pay for their own care be identified.
- The rate of increase in nursing home payment rates be reduced.

**Summary:**

**LONG-TERM CARE PROVISIONS**

**NURSING HOME CENSUS REDUCTION** - By June 30, 1997, the Department of

beneficiary who received long-term care services. The trustee and cemetery authority must then give notice of the beneficiary's death to the department's Office of Financial Recovery, who must then file this claim within 30 days. Prearranged funeral service contracts are required to contain language that informs the individual that any unused funds from the policy may be subject to claims by the state for long-term care services that the state had funded. The recovery procedure is outlined.

**NURSING HOME DISCHARGE** - The department is required to follow a notification and appeals process if a Medicaid resident is discharged and chooses to remain in a nursing facility.

**FINANCIAL RECOVERY UPON DEATH** - Any funds held by the nursing home facility on behalf of a resident who received long-term care paid for by the state must be sent to department's Office of Financial Recovery within 45 days of the recipient's death. The department is required to establish release for use for burial expenses. The department is allowed to recover against estates as soon as practicable, but recovery will not include property exempt from estate claims under federal law or treaty, including tribal artifacts. Church or religiously operated nursing facilities, which provide care exclusively to members of its convent, rectory monastery or other clergy members, are exempt from the operating standards for covered facilities.

**NURSING HOME COMPONENT RATES** - The DSHS is authorized to base initial nursing services, food, administrative, and operational rate components rates for the purpose of reimbursement on a formula using the median for facilities in the same county. This is applicable to any facilities receiving original Certificate of Need approval prior to June 30, 1988, and commencing operations on or after January 2, 1995.

**VOLUNTARY NURSING HOME BED CONVERSION** - A nursing home may "bank" or hold in reserve its nursing home beds for any purpose that enhances the quality of life for residents, in addition to those specified by law, without the requirement of a Certificate of Need.

A health facility or health maintenance organization that provides services similar to the services of an applicant for a Certificate of Need in the same service area, and who has testified as an interested party and submitted evidence at a public hearing on the application, may also present testimony and argument at any adjudicative proceeding of the application on appeal. The interested party must first have requested in writing to be informed of the DSHS's decision. The interested party must also be afforded an opportunity to comment in advance of any proposed settlement.

When a building owner has secured an interest in nursing home beds, a licensee, if different from the building owner, must obtain and submit to the department written approval from the building owner to reduce the number of beds in the facility. A building owner may complete a replacement project if a licensee is unable to complete the project.

A licensee may replace existing beds without a Certificate of Need if the licensee has operated the beds for at least one year. If a nursing home closes, the re-use of existing beds will require a Certificate of Need, but the determination of need will be deemed met if the applicant is the licensee.

**NURSING HOME CERTIFICATE OF NEED IN ECONOMICALLY DISTRESSED AREA** - Any nursing home is allowed an additional extension of up to 60

rates inflated by the HCFA nursing home inflation index, instead of inflated by the HCFA nursing home index times 1.5. It is specified that in fiscal year 1998, rates will be determined using fiscal year 1997 rates inflated by the HCFA index times 1.25, instead of rebasing rates using calendar year 1996 costs and inflated by the IPD.

REIMBURSEMENT RATE COMPONENT MODIFICATIONS - Nursing home payments for the food rate component are modified to specify that in fiscal year 1997, rates will be determined using fiscal year 1996 rates inflated by the (HCFA) nursing home inflation index, instead of by the HCFA nursing home index times 1.5. It is specified that in fiscal year 1998, rates will be determined using fiscal year 1997 rates inflated by the HCFA index times 1.25, instead of rebasing rates using calendar year 1996 costs and inflated by the (IPD). Nursing home payments for the administrative rate component are modified to specify that in fiscal year 1997, rates will be determined using fiscal year 1996 rates inflated by the HCFA nursing home inflation index, instead of inflated by the HCFA nursing home index times 1.5.

MULTIPLE YEAR CYCLES - Reference to multiple year cycles in the property rate component and applying the minimum occupancy level and to multiple year cycles in the return-on-investment rate component and applying the minimum occupancy level are eliminated.

MEDICAID OVERPAYMENTS - Provisions related to settlement of medicaid overpayments are removed. The DSHS and nursing homes are required to pay debts owed within 60 days of settlement. The department is authorized to obtain security on debts in excess of \$50,000 and to establish an appeals process for audits, rates, and settlements.

**Votes on Final Passage:**

First Special Session

House 90 0

Senate 45 0

Effective: July 1, 1995

Partial Veto Summary: The partial veto removes provisions requiring the Legislative Budget Committee to develop a working plan to reform and streamline the long-term care delivery system. The extension of 60 months to apply for a nursing home Certificate of Need and the extension, from 12 to 18 months, for nursing home inspections are also eliminated.