

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Sep 22, 2014, 4:35 pm
BY RONALD R. CARPENTER
CLERK

E
bjh

ELECTRONICALLY FILED

NO. 90486-3

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE HOSPITAL ASSOCIATION,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Appellant.

BRIEF OF APPELLANT

ROBERT W. FERGUSON

Attorney General

Laura J. Watson, WSBA 28452

Deputy Solicitor General

Joyce A. Roper, WSBA 11322

Senior Assistant Attorney General

Office ID No. 91087

PO Box 40100

Olympia, WA 98504-0100

360-664-0869

ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR.....	3
III.	ISSUES RELATED TO ASSIGNMENTS OF ERROR.....	3
IV.	STATEMENT OF THE CASE.....	4
V.	ARGUMENT	12
A.	Standard of Review.....	12
B.	The Terms “Sale” and “Purchase” Are Subject to More Than One Reasonable Interpretation.....	14
C.	The Department’s Definition Is a Reasonable Interpretation of the Undefined Statutory Terms “Sale” and “Purchase”	18
D.	The Department’s Rule Also Best Advances the Paramount Purpose of the Statute—To Promote Access to Health Care for All Citizens.....	21
E.	The Department is Entitled to Adopt a Definition of Undefined Statutory Terms in Response to Changes in the Health Care Industry	25
VI.	CONCLUSION.....	29

TABLE OF AUTHORITIES

Cases

<i>Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).....	18, 19
<i>Hillis v. Dep't of Ecology</i> 131 Wn.2d 373, 932 P.2d 139 (1997).....	28
<i>Hi-Starr, Inc. v. Liquor Control Bd.</i> 106 Wn.2d 455, 722 P.2d 808 (1986).....	13
<i>Hospice of Spokane v. Dep't of Health</i> 178 Wn. App. 442, 315 P.3d 556 (2013).....	24
<i>In re Am. Cont'l Corp./Lincoln Sav. & Loan Sec. Litig.</i> 49 F.3d 541 (9th Cir. 1995)	17
<i>In re First T.D. & Inv., Inc.</i> 253 F.3d 520 (9th Cir. 2001)	17
<i>Kern County Land Co. v. Occidental Petroleum Corp.</i> 411 U.S. 582, 93 S. Ct. 1736, 36 L. Ed. 2d 503 (1973).....	17
<i>Lake v. Woodcreek Homeowner's Ass'n</i> 169 Wn.2d 516, 243 P.3d 1283 (2010).....	14
<i>Lynott v. Nat'l Union Fire Ins. Co.</i> 123 Wn.2d 678, 871 P.2d 146 (1994).....	15
<i>McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.</i> 142 Wn.2d 316, 12 P.3d 144 (2000).....	28
<i>Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.</i> 545 U.S. 967, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005).....	27

<i>Odyssey Healthcare Operating B, LP v. Dep't of Health</i> 145 Wn. App. 131, 185 P.3d 652 (2008).....	24
<i>Overlake Hosp. Ass'n v. Dep't of Health</i> 170 Wn.2d 43, 239 P.3d 1095 (2010).....	18, 21, 24
<i>Phillips v. City of Seattle</i> 111 Wn.2d 903, 766 P.2d 1099 (1989).....	24
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> 151 Wn.2d 568, 90 P.3d 659 (2004).....	13, 18
<i>Puget Soundkeeper Alliance v. State</i> 102 Wn. App. 783, 9 P.3d 892 (2000).....	19
<i>Resident Councils of Washington v. Leavitt</i> 500 F.3d 1025 (9th Cir. 2007)	27
<i>Rust v. Sullivan</i> 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991).....	27
<i>Simpson Tacoma Kraft Co. v. Dep't of Ecology</i> 119 Wn.2d 640, 835 P.2d 1030 (1992).....	28
<i>St. Francis Extended Health Care v. Dep't of Soc. & Health Servs.</i> 115 Wn.2d 690, 801 P.2d 212 (1990).....	13
<i>Tapper v. Emp't Sec. Dep't</i> 122 Wn.2d 397, 858 P.2d 494 (1993).....	12
<i>Washington Pub. Ports Ass'n v. Dep't of Revenue</i> 148 Wn.2d 637, 62 P.3d 462 (2003).....	13, 18, 20
<i>Weyerhaeuser Co. v. Dep't of Ecology</i> 86 Wn.2d 310, 545 P.2d 5 (1976).....	14

Statutes

RCW 7.48.050(11)..... 16

RCW 7.48A.010(11)..... 16

RCW 15.36.012 16

RCW 15.53.901(28)..... 16

RCW 15.86.020(25)..... 16

RCW 34.05.570(1)(a) 13

RCW 34.05.570(2)(c) 13

RCW 39.26.010(21)..... 16

RCW 62A.1-201(29)..... 16

RCW 62A.2A-103(1)(v)..... 16

RCW 69.04.005 16

RCW 69.07.010(4)..... 16

RCW 69.25.020(15)..... 16

RCW 69.30.010(8)..... 16

RCW 70.106.050 16

RCW 70.38 4, 5, 19

RCW 70.38.015 21

RCW 70.38.015(1)..... 4, 23

RCW 70.38.105(1)..... 18

RCW 70.38.105(4)..... 4

RCW 70.38.105(4)(b)	1, 5
RCW 70.38.115(9).....	23
RCW 70.38.135(3)(c)	4, 18, 28
RCW 82.04.040(1).....	16
RCW 82.26.010(18)(a)	15

Regulations

WAC 246-310-010(54).....	2, 3, 13, 18, 19, 20, 25, 29
WAC 246-310-050(1).....	26
WAC 246-310-050(3).....	26
WAC 246-310-180.....	23
WAC 246-310-210(1)(a)	22
WAC 246-310-210(2).....	22
WAC 246-310-490(3).....	22

Other Authorities

<i>Black's Law Dictionary</i> (9th ed. 2009).....	20
<i>Webster's Third New International Dictionary</i> (2002)	15, 20
United States Conf. of Catholic Bishops, <i>Ethical and Religious Directives for Catholic Health Care Services</i> (5th ed. 2009) (<i>Directives</i>), available at http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf	2, 8, 10

[http://crosscut.com/2011/10/12/health-medicine/21408/
Will-Swedish-limit-choices-for-women-dying-under-P/.....](http://crosscut.com/2011/10/12/health-medicine/21408/Will-Swedish-limit-choices-for-women-dying-under-P/) 6

[http://seattletimes.com/html/localnews/2016503475_swedish
15m.html.....](http://seattletimes.com/html/localnews/2016503475_swedish15m.html) 6

I. INTRODUCTION

To ensure access to health care services and allow public input on changes to the care available in communities, the Legislature has directed the Department of Health to review health care transactions to decide whether they qualify for a “certificate of need.” Among those transactions are “[t]he sale, purchase, or lease of part or all of any existing hospital[.]” RCW 70.38.105(4)(b). In recent years, hospitals and hospital systems have evaded the certificate of need process by avoiding using the terms “sale, purchase, or lease” in their transactional documents. Instead, hospitals have engaged in “mergers,” “consolidations,” “affiliations,” and “system integrations.” Though these transactions have often involved a complete transfer of control of a hospital, they nonetheless evaded Department review. The Department was thus prevented from reviewing changes in services offered in affected communities.

This continuing trend threatens to leave many Washington communities without access to important services, including services protected by statute or the constitution. For example, if the only hospital in an area is governed by religious directives, it could refuse to follow certain terms in a patient’s living will, e.g., if the will specified that artificial hydration or feeding tubes be withdrawn if the patient were in a

persistent vegetative state.¹ Other important services, especially related to reproductive health and end-of-life care, could also be threatened.

To address this growing problem, in 2013 the Department for the first time issued a definition of “sale, purchase, or lease.” Applying dictionary definitions of these terms and acting within its broad discretion to further the statute’s goals, the Department defined these terms to include “any transaction in which the control . . . of part or all of any existing hospital changes to a different person” WAC 246-310-010(54).

The Washington State Hospital Association sued the Department, claiming that “purchase” and “sale” unambiguously cover only “a transfer of an asset for monetary consideration.” CP at 59. The superior court accepted this argument. The truth, however, is that these terms have multiple meanings that go beyond the Association’s crabbed reading. For example, the Legislature has defined “sale” in at least eleven different ways—including any “transfer” or “exchange”—and has defined “purchase” at least three different ways. And the dictionary definitions of these terms are far broader than the Association’s proposed reading. For these reasons, the Association cannot meet its burden of proving that the

¹ See United States Conf. of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* 31, ¶ 58 (5th ed. 2009) (*Directives*), available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf>.

Legislature unambiguously intended to preclude the definition the Department has adopted here. This is particularly clear because the Department's definition best accomplishes the Legislature's underlying goals in adopting the certificate of need statute—ensuring public deliberation on transactions that could impact access to health care services. Therefore, the Department respectfully asks that the Court reverse the superior court judgment and uphold its definition as within its statutory authority.

II. ASSIGNMENTS OF ERROR

The superior court erred in ruling in paragraph 2.3 of its order that WAC 246-310-010(54) is invalid because the rule exceeds the Department of Health's statutory authority.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Are the terms "sale" and "purchase" subject to more than one reasonable interpretation when these terms are defined multiple ways in the dictionary, state statutes, and case law?
2. Does the Department's definition of "sale, purchase, or lease," which includes a transfer of control from one hospital to another, constitute a reasonable interpretation of the undefined statutory terms?
3. Given that the primary goal of the certificate of need statute is to promote access to health care for all citizens, does the Department's

rule advance this purpose by ensuring that major health care transactions that could impair access to health care are first reviewed under the certificate of need program?

4. In light of changes in the health care marketplace and hospitals increasingly describing major transactions as something other than a “sale,” “purchase,” or “lease,” was the Department authorized to adopt a regulatory definition of the terms “sale, purchase, or lease” in response to changing circumstances?

IV. STATEMENT OF THE CASE

The Department of Health administers the certificate of need program under RCW 70.38. The purpose of the program is to implement health planning efforts to “promote, maintain, and assure the health of all citizens in the state, provide accessible health services, health manpower, health facilities, and other resources while controlling increases in costs[.]” RCW 70.38.015(1). The program is also intended to involve both consumers and healthcare providers throughout the state in health planning. RCW 70.38.015(1). The Department is authorized to adopt rules to implement the certificate of need statute. RCW 70.38.135(3)(c).

RCW 70.38.105(4) lists the transactions subject to certificate of need review. Relevant here, the Department is directed to review “[t]he sale, purchase, or lease of part or all of any existing hospital[.]”

RCW 70.38.105(4)(b). The terms sale, purchase, and lease are not defined in RCW 70.38, and the Department previously applied the terms somewhat restrictively. But increasingly, hospitals transfer control in a manner that avoids using the terms sale, purchase, or lease to describe the changed ownership. CP at 231, ¶ 3. For example, hospitals now more frequently use terms like “affiliation,” “strategic partnership,” and “system integration” to describe transactions that transfer control from one hospital to another. CP at 231, ¶ 3. As a result, an increasing number of transactions are evading certificate of need review. CP at 233, ¶ 6.

At the same time, there is increasing concern among members of the public over the loss of health care services resulting from these transactions. One aspect of this concern is that in recent years, religiously affiliated health systems have acquired control of many Washington hospitals—today managing over forty percent of Washington hospital beds—and such systems often restrict care based on their beliefs. Administrative Record (AR) at 264. A prominent example of this issue was an “affiliation” between Swedish Hospital and Providence Health. AR at 235, 249. The public was initially told that no change in services would occur, but then Swedish ceased providing elective abortions

because abortions violate the religious directives of Providence.²

Examples like this created public concern that the rapidity and volume of affiliations and similar transactions would affect access to an entire range of health care services. *See, e.g.*, AR at 264-66.

In response to these trends, Governor Inslee directed the Department to begin rulemaking to “consider how the structure of affiliations, corporate restructuring, mergers, and other arrangements among health care facilities results in outcomes similar to the traditional methods of sales, purchasing, and leasing of hospitals, particularly when control of part or all of an existing hospital changes from one party to another.” AR at 1. The Governor noted that implementation of health reform under the Affordable Care Act has changed the health care marketplace, but that the “Certificate of Need process . . . has not kept current with the changes in the health care delivery system[.]” AR at 1. The Governor concluded that the certificate of need process “should be applied based on the effect that these transactions have on the accessibility of health services, cost containment, and quality, rather than on the

² <http://crosscut.com/2011/10/12/health-medicine/21408/Will-Swedish-limit-choices-for-women-dying-under-P/>. Based on the resulting public outcry, it was agreed that Planned Parenthood would cover services that Swedish would no longer provide. http://seattletimes.com/html/localnews/2016503475_swedish15m.html.

terminology used in describing the transactions or the representations made in the preliminary documents.” AR at 1.

The Department subsequently initiated rulemaking to consider the concerns expressed by the Governor and others. AR at 75. Specifically, the Department proposed a rule defining “sale, purchase, or lease” as:

[A]ny transaction in which the control, either directly or indirectly, of part or all of any existing hospital changes to a different person including, but not limited to, by contract, affiliation, corporate membership restructuring, or any other transaction.

AR at 154 (now codified at WAC 246-310-010(54)).³

There was a great deal of public interest in the proposed rule, and the Department received over 1,000 written and oral comments on its proposal. AR at 1187. The vast majority of commenters were worried about how changes in hospital control have impacted or could impact access to healthcare services, especially reproductive and end-of-life services, such as compliance with the terms of a living will. AR at 162 to 1160.

Some of the comments fully endorsed the Department’s approach. For example, the Insurance Commissioner noted his strong interest “in ensuring that provider networks in each of our state’s service areas can

³ The Department also proposed, and ultimately adopted, a rule requiring every hospital to submit and post its policies on nondiscrimination, reproductive health care, and end-of-life care. AR at 89-90. This rule was not challenged and is not at issue here.

adequately support access to covered services for health plan enrollees.” AR at 183. The Commissioner remarked upon the recent growth in new types of health care provider relationships, and was concerned that, without careful monitoring through the certificate of need process, “some of these relationships have the potential to negatively impact access to health care services and resources in our state.” AR at 183.

Other commenters generally favored the Department’s approach, but felt that the Department’s proposed rule did not go far enough. Planned Parenthood noted that the rapid pace of affiliations in our state has resulted in over forty percent of Washington’s hospital beds being owned or controlled by religiously-affiliated health systems. AR at 264. Across the state, patients seeking medical information and treatment are facing restrictions on health care services, especially abortions, infertility treatment, birth control, and sterilization.⁴ AR at 264. Planned Parenthood identified a specific example where the community hospital intended to discontinue lab services for determining ectopic pregnancy and conducting post-surgery analyses for efficacy of vasectomies (AR at

⁴ For example, the Catholic health care directives describe abortion, euthanasia, assisted suicide, and sterilization as “intrinsically evil.” *Directives* at 42 n.44. Direct sterilization is prohibited and Catholic facilities may not promote or condone contraception. *Directives* at 27, ¶¶ 52-53. Certain types of infertility treatments are prohibited as are the use of surrogate mothers. *Directives* at 24; 25-26, ¶¶ 40-42. Abortion is prohibited in all instances, including after a rape and to treat an ectopic pregnancy. *Directives* at 21-22, ¶ 36; 26, ¶ 45; 27, ¶ 48.

265), and noted that some hospitals prohibit physicians from making referrals for reproductive health services. AR at 264. Planned Parenthood also expressed concern about the denial of care to lesbian, gay, bisexual, and transgender individuals based on sexual orientation or gender identity. AR at 265.

The ACLU echoed these concerns, noting that a particular transaction in South King County resulted in a prohibition on information about and referrals for aid-in-dying and a range of reproductive health services. AR at 162-63. The Coalition on Health Care Access and Accountability noted that “[t]he lack of healthcare services in underserved communities is one of the primary causes of health inequity” and expressed specific concern about “loss of access to certain healthcare services, and loss of access for certain patient populations, such as the LGBTQ community.”⁵ AR at 1154-55. The National Women’s Law Center and MergerWatch identified several transactions where hospitals structured their agreements to avoid certificate of need review, and noted that religious directives ban many reproductive health services, including emergency care when a woman’s life is threatened by a pregnancy. AR at

⁵ The Coalition consists of Washington Community Action Network, SEIU Healthcare 1199NW, Northwest Health Law Advocates, OneAmerica, Washington State Nurses Association, UFCW Local 21, and NARAL Pro-Choice Washington. AR at 1155.

248-50. They also identified restrictions against honoring end-of-life advance directives, such as removal of artificial nutrition and hydration.⁶ AR at 249.

Several other individual and group commenters expressed similar concerns about loss of access to health care services if hospitals continue to affiliate without any kind of public review or approval process.⁷ One commenter testified about her experience as a college student after being admitted to an emergency room with a life-threatening ectopic pregnancy. Transcript of Rulemaking Hearing (Transcript) at 23-25. The hospital refused to provide any painkiller stronger than Children's Tylenol because the patient was technically pregnant. Transcript at 24. Without the twenty-two year old patient's consent, the doctor contacted the patient's mother and informed her of the pregnancy. Transcript at 24-25. The patient's fallopian tube ended up rupturing, resulting in the need for emergency surgery. Transcript at 24. This commenter noted that "[w]hen

⁶ For example, Catholic facilities are not permitted to honor advance directives that conflict with Catholic teachings. *Directives* at 19, ¶ 24.

⁷ See, e.g., AR at 187 (Secular Coalition for Washington concerned about religious directives that prohibit medical services such as abortions, removal of life support, contraception, transgender services, and infertility treatment); 220 (Legal Voice noting that hospitals can claim during the process that they won't limit access to services, but in reality often do); 271 (League of Women Voters expressing concern about services such as treatment of ectopic pregnancy and transgender surgical services); 180 (individual comment that recent affiliation impacted availability of on-site pediatric care); 235 (individual comment that affiliation resulted in discontinuation of abortion services); Transcript of Rulemaking Hearing (Transcript) at 15-16 (UFCW 21 comment about loss of emergency services and a mammography machine after affiliation); 48 (individual concern about whether hospital will follow end-of-life directives).

your life is in danger, you can't take time to consider the religious affiliation of the nearest emergency room." Transcript at 25. Commenters also noted that these types of problems are exacerbated in smaller communities where health care access is often limited to one facility. AR at 264-65, 271, 1154.

In contrast to the majority of commenters, hospitals were against the Department's proposed rule. They were concerned that the rule would impede their ability to respond quickly to changes brought about by the Affordable Care Act. *See, e.g.*, AR at 159. Some hospitals also acknowledged that they do not want to share information about these transactions with the public and that they would prefer to keep the process confidential. AR at 159, 215. Hospitals also cited cost concerns as a reason not to adopt the new rule. AR at 1162.

After considering all of the public comments, the Department decided to adopt the rule as proposed. AR at 1187, 1220, 1229. In its response to public comments, the Department reasoned that the purpose of the certificate of need statute is best advanced by examining the outcome of hospital transactions "regardless of the terms used in the transactional documents." AR at 1188. "To do otherwise, would elevate form over substance, permit evasion of the certificate of need processes, including the opportunity for public notice and comment, by clever drafting of

transactional documents, defeating the public policies advanced by the certificate of need law.” AR at 1188.

The Washington State Hospital Association challenged the rule in Thurston County Superior Court. The Association argued that the rule exceeded the Department’s statutory authority, was arbitrary and capricious, and was not adopted in compliance with procedural requirements of the Administrative Procedure Act (APA). CP at 11. The superior court agreed that the rule exceeded the Department’s authority and invalidated it on that ground without reaching the Association’s other arguments. CP 358. The Department appealed the court’s order and seeks direct review of that order in the Supreme Court. CP at 353-54.

V. ARGUMENT

A. Standard of Review

This case involves judicial review of an agency rule. The appellate court sits in the same position as the superior court, applying the APA standards of review directly to the record before the agency. *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

The case presents a pure issue of statutory interpretation. The Court interprets the meaning of statutes de novo but grants great weight to an agency’s interpretation of a statute within its expertise. *Port of Seattle*

v. Pollution Control Hearings Bd., 151 Wn.2d 568, 593, 90 P.3d 659 (2004).

An agency's rules are presumed valid. *St. Francis Extended Health Care v. Dep't of Soc. & Health Servs.*, 115 Wn.2d 690, 702, 801 P.2d 212 (1990). The Association bears the burden of proving otherwise. RCW 34.05.570(1)(a). In order to prevail, the Association must present compelling reasons why the rule is in conflict with the intent and purpose of the statute being implemented. *Hi-Starr, Inc. v. Liquor Control Bd.*, 106 Wn.2d 455, 459, 722 P.2d 808 (1986). The Court may declare the rule invalid "only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious." RCW 34.05.570(2)(c).

Here, the superior court concluded that WAC 246-310-010(54) exceeds the Department's authority. In deciding whether a rule "exceeds the statutory authority of the agency," a duly enacted rule will be upheld as long as it is "reasonably consistent" with the statute that it implements. *See Washington Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 646, 62 P.3d 462 (2003).

B. The Terms “Sale” and “Purchase” Are Subject to More Than One Reasonable Interpretation

“The Court’s fundamental objective in construing a statute is to ascertain and carry out the legislature’s intent.” *Lake v. Woodcreek Homeowner’s Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (internal quotation marks omitted). The Court begins with the plain meaning of a statute, which is derived from “the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Id.* (internal quotation mark omitted). When a statute is subject to more than one reasonable interpretation, “the interpretation which better advances the overall legislative purpose should be adopted[.]” *Weyerhaeuser Co. v. Dep’t of Ecology*, 86 Wn.2d 310, 321, 545 P.2d 5 (1976).

The Association’s challenge to the rule is based on its claim that the statute is subject to only one interpretation because the terms “sale” and “purchase” have only one meaning—“a transfer of an asset for monetary consideration.” CP at 59. But common dictionary definitions, statutory definitions, and case law all point to the opposite conclusion. “Sale” and “purchase” have been defined in multiple ways and are virtually never defined as narrowly as the Association advocates.

When interpreting statutorily undefined terms, courts typically use standard English dictionaries. *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 691, 871 P.2d 146 (1994). In the dictionary, “sale” is defined in relevant part as “the act of selling : a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money *or any other consideration*)[.]” *Webster's Third New International Dictionary 2003* (2002) (emphasis added). The noun “purchase” is “an act or instance of purchasing[.]” *Webster's* at 1844. The verb “purchase” is then defined as “to *get into one's possession* : GAIN ACQUIRE . . . : to acquire (real estate) *by any means other than descent or inheritance*[.]” *Webster's* at 1844 (emphases added). These dictionary definitions encompass any transaction in which a person transfers something of value or acquires something of value, usually in exchange for some consideration (but not necessarily monetary consideration).

Statutory definitions also demonstrate that the Legislature understands the terms “sale” and “purchase” to be susceptible to multiple interpretations and not limited to monetary transactions as the Association claims. There are at least eleven statutory definitions of “sale,” all of which encompass a greater range of transactions than the Association’s definition would allow. For example, RCW 82.26.010(18)(a) defines

“sale” as “any transfer, exchange, or barter, in any manner or by any means whatsoever, for a consideration, and includes and means all sales made by any person.” RCW 15.53.901(28) defines “sale” as an “exchange.” RCW 69.30.010(8) defines “sale” as “to sell, offer for sale, barter, trade, deliver, consign, hold for sale, consignment, barter, trade, or delivery, and/or possess with intent to sell or dispose of in any commercial manner.”⁸

“Purchase” is likewise defined at least three times in state statute and is in all instances broader than the Association’s cramped definition. RCW 62A.1-201(29), Washington’s enactment of the Uniform Commercial Code, defines “purchase” as “taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, *or any other voluntary transaction creating an interest in property.*” (Emphasis added.) RCW 62A.2A-103(1)(v) similarly defines the term as including “taking by sale, lease, mortgage, security interest, pledge, gift, or any other voluntary transaction creating an interest in goods.” *See also* RCW 39.26.010(21) (defining “purchase” as “the acquisition of goods or services”).

⁸ Other definitions of “sale” can be found in RCW 82.04.040(1), RCW 70.106.050, RCW 69.25.020(15), RCW 69.04.005, RCW 7.48A.010(11), RCW 7.48.050(11), RCW 69.07.010(4), RCW 15.86.020(25), and RCW 15.36.012.

The breadth of these terms is further supported by case law. In the context of the federal Securities Exchange Act, the United States Supreme Court noted that the terms “sale” and “purchase” have properly been applied to transactions that might not traditionally be deemed a sale or purchase, such as stock conversions, mergers, and corporate reorganizations. *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 593-94, n.24, 93 S. Ct. 1736, 36 L. Ed. 2d 503 (1973). In deciding whether an unorthodox transaction constitutes a sale or purchase, the proper inquiry is whether the transaction can give rise to the type of abuse that Congress sought to prevent through the Securities Exchange Act. *Id.* at 595. Because alternative constructions of the terms are feasible, courts adopted the construction that best serves the congressional purpose. *Id.* In short, courts look to the substance of the transaction rather than its form, and have been guided by the principle that the goals of the statute “should not be frustrated by the presence of ‘novel or atypical transactions.’” *In re Am. Cont’l Corp./Lincoln Sav. & Loan Sec. Litig.*, 49 F.3d 541, 544 (9th Cir. 1995); *see also In re First T.D. & Inv., Inc.*, 253 F.3d 520, 528-31 (9th Cir. 2001) (concluding that California Legislature intended broad definition of “sold” under statutory provision relating to perfection of security interest in transactions involving real estate brokers).

In sum, the Association wrongly claims that the terms “sale” and “purchase” are subject to only one narrow interpretation. These terms are regularly defined to cover a range of transactions in which items of value are exchanged. It is against this existing backdrop that the definition in WAC 246-310-010(54) must be assessed.

C. The Department’s Definition Is a Reasonable Interpretation of the Undefined Statutory Terms “Sale” and “Purchase”

The Department is charged with implementing the certificate of need program. *Overlake Hosp. Ass’n v. Dep’t of Health*, 170 Wn.2d 43, 50, 239 P.3d 1095 (2010); RCW 70.38.105(1). To this end, the Department is granted broad authority to promulgate rules to implement the statute. RCW 70.38.135(3)(c). This includes authority to fill in any gaps in the statute by, for example, defining undefined statutory terms. *Washington Pub. Ports Ass’n*, 148 Wn.2d at 646 (agency rules can fill in the gaps in legislation in order to accomplish the statutory scheme).

When a statute is ambiguous, the question for the court is whether the agency’s interpretation is a permissible one. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). If so, a court should not substitute its own interpretation of a statutory provision for the agency’s. *Chevron*, 467 U.S. at 844; *Port of Seattle*, 151 Wn.2d at 593 (great weight given to an

agency's interpretation of a statute within its expertise). An agency's interpretation of a statute should be upheld as long as it reflects a "reasonable policy choice for the agency to make." *Chevron*, 467 U.S. at 845. The Court need not conclude that the agency's construction is the only permissible one or even that the Court would have reached the same conclusion if the issue had first arisen in a judicial proceeding.⁹ *Chevron*, 467 U.S. at 843 n.11.

Here, the Legislature chose not to define "sale" and "purchase" in RCW 70.38, thereby leaving it to the Department to define those terms in whatever reasonable manner best fulfills the statutory purpose of the certificate of need program. Consistent with how these terms have been defined in many other contexts, the Department defined the terms to include:

[A]ny transaction in which the control, either directly or indirectly, of part or all of any existing hospital changes to a different person including, but not limited to, by contract, affiliation, corporate membership restructuring, or any other transaction.

WAC 246-310-010(54).

Looking just to the dictionary definitions of these terms, "sale" means a transfer of ownership for "money or any other consideration,"

⁹ The standard of review in this state for reviewing an agency's interpretation of a statute is essentially the same as the federal law standard. *Puget Soundkeeper Alliance v. State*, 102 Wn. App. 783, 787 n.4, 9 P.3d 892 (2000).

and “purchase” means “to get into one’s possession : GAIN ACQUIRE.” See *Webster’s* at 2003, 1844 (emphases added). The transactions encompassed by WAC 246-310-010(54) fall within these definitions. Where control of part or all of a hospital has changed hands, something of value has necessarily been transferred for value, or at least gained or acquired. For example, a “merger” typically involves a transfer of assets from one entity to another. *Black’s Law Dictionary* 1078-79 (9th ed. 2009). A “consolidation” involves dissolution of two existing entities and creation of a single new entity, which necessarily involves acquisition of assets by the new entity. *Black’s* at 351. With an affiliation, or any transaction that results in a transfer of control, one entity receives something of value in the form of control of the existing hospital and the other entity receives a benefit in return, such as assumption of its bad debts or reduction in administrative costs. As these examples illustrate, WAC 246-310-010(54)’s definition of these terms is well within their ordinary meaning. At the very least, it is reasonably consistent with the statute being implemented, and should therefore be upheld. See *Washington Pub. Ports Ass’n*, 148 Wn.2d at 646.

D. The Department's Rule Also Best Advances the Paramount Purpose of the Statute—To Promote Access to Health Care for All Citizens

The overriding purpose of the certificate of need statute is promoting and maintaining access to health care services for all citizens. *Overlake Hosp. Ass'n*, 170 Wn.2d at 55. The certificate of need program is a key component of the health planning regulatory process and is critical in attaining this statutory policy goal. RCW 70.38.015.

The Department's definition of "sale, purchase, or lease" protects access to health care by ensuring that major hospital transactions in which control is transferred from one hospital to another undergo a public review and approval process. Increasingly, hospitals avoid review by creatively titling their transactions to avoid the terms "sale" or "purchase" even though control is ultimately transferred from one entity to another. In small and mid-sized communities, the consequences of this are evident. If a community supports only one or two hospitals and control is transferred, resulting in elimination of certain health care services, citizens in that community are deprived of any ability to conveniently access those services or even comment on their elimination. The end result is that access to health care for these citizens is severely compromised.

Although several members of the public specifically voiced concerns about affiliations between secular and religious hospitals, access

to health care can be impaired by any transfer of control. For example, the new controlling facility may decide to take cost-cutting measures such as eliminating pediatric services or a psychiatric wing. *See, e.g.*, AR at 180 (recent affiliation impacting availability of on-site pediatric care); Transcript at 15-16 (loss of emergency services and a mammography machine after affiliation). The certificate of need process can protect access by ensuring that the transaction does not eliminate or significantly diminish health care services within a community. Upon receiving a certificate of need application, the Department evaluates whether a proposed transaction would reduce or eliminate an existing service and, if so, whether patients could obtain the service elsewhere. WAC 246-310-210(1)(a). The Department also evaluates the effect on the elderly and on medically underserved populations, including racial and ethnic minorities, women, and the disabled.¹⁰ WAC 246-310-210(2). The Department can require the entity in control of the hospital to maintain patient access to health care services as a condition of a certificate of need. WAC 246-310-490(3). However, if these transactions do not undergo certificate of need review, there is no mechanism for preserving community access to needed services, which undermines the statute's paramount purpose.

¹⁰ For example, low-income and rural women are disproportionately affected by limited access to health care services. AR at 265.

Another important purpose of the certificate of need statute is to involve citizens and health care providers throughout the state in health planning. RCW 70.38.015(1). The certificate of need process furthers this goal by providing an opportunity for members of the public and health care providers to comment on materials submitted by the certificate of need applicant and to participate in public hearings on the application, including the right to make arguments, present evidence, and question witnesses. RCW 70.38.115(9); WAC 246-310-180. Without this process, the public usually has no idea that their community health care facilities are negotiating deals that could fundamentally impair patients' access to health care services. The first time they hear about these deals is when they are finalized and publicly announced. This backroom deal-making defeats the statutory purpose of involving citizens in the planning process. The Department's rule keeps this from happening.

Unlike the Department's rule, the Association urges a constricted definition of statutory terms that would frustrate the statute's paramount purpose because there would be no ability to ensure that major hospital transactions do not diminish access to health care services. The Association's definition also defeats the statutory purpose of including citizens in the health planning process. RCW 70.38.015(1). Indeed, it appears that some hospitals are opposed to the Department's rule for the

very reason that hospitals *want* to conceal these transactions from the public. Some hospitals complained that requiring certificate of need review for these major transactions would result in the filing of paperwork “that would be openly shared with the public” and that “[i]nformation about confidential transactions is not appropriate to share openly with the public and would provide no value to the community.” AR at 159, 215. Of course, the hundreds of members of the public that came out in support of the Department’s rule would not agree with the hospitals’ self-serving assessment that making this process more transparent “would provide no value to the community.” Nor is the hospitals’ interpretation consistent with the statutory goal of maximizing citizen involvement in the health planning process.

When faced with two possible interpretations of a statute, the “spirit or purpose of an enactment should prevail.” *Odyssey Healthcare Operating B, LP v. Dep’t of Health*, 145 Wn. App. 131, 144, 185 P.3d 652 (2008) (internal quotation marks omitted); *accord Hospice of Spokane v. Dep’t of Health*, 178 Wn. App. 442, 454-56, 315 P.3d 556 (2013). “Great deference” should be given to the Department’s interpretation because of the Department’s “expertise and insight” in this regulatory arena. *Overlake Hosp. Ass’n*, 170 Wn.2d at 56; *see also Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989) (agency’s definition of

undefined statutory term is given great weight when the agency is responsible for administering the statute). The Department's rule best advances the purposes of the certificate of need statute. It is therefore, at a minimum, "reasonably consistent" with the statute and should be upheld.

E. The Department is Entitled to Adopt a Definition of Undefined Statutory Terms in Response to Changes in the Health Care Industry

WAC 246-310-010(54) marks the Department's first regulatory definition of the term "sale, purchase, or lease." Previously, no definition was needed because most transactions resulting in a change of hospital control were being reviewed through the certificate of need program. However, around 2009, hospitals began to avoid using the terms "sale" or "purchase" in their transactional documents and instead used terms like "affiliation," "corporate reorganization," "strategic alliance or partnership," and "system integration." CP at 231, ¶ 3. In addition, an increased number of "affiliations" are occurring in response to the Affordable Care Act. AR at 1234. This trend is what prompted the Governor to conclude that the certificate of need process has not "kept current with the changes in the health care delivery system" and that the Department should engage in rulemaking to ensure that the key purposes of the certificate of need program are met. AR at 1.

Below, one of the Association's main arguments against the rule was that the Department previously applied the term "sale, purchase, or lease" to a narrower range of transactions and that the Department was not permitted to now apply the statute to a broader range. CP at 60-61. In support, the Association pointed to letters that the Department wrote in response to hospitals' requests for applicability determinations.¹¹ CP at 105-06, 113-15, 121-23, 136-38, 144-50, 158, 169, 184. The letters were written in the context of fact-specific situations and most of the letters contained little or no analysis explaining why the Department concluded that the transactions were not subject to certificate of need review.

The gist of the Association's argument is that the Department may not take into account changes in the health care industry when it applies the statutory language to health care transactions. But the Department's earlier application of the statute, in light of circumstances that existed at that time, does not prevent the Department from applying the statute in a way that is consistent with today's circumstances. Rather, the agency "must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances." *Rust v. Sullivan*, 500 U.S. 173, 187,

¹¹ Any person who wants to know whether an action being considered is subject to certificate of need review may request a determination of applicability from the Department. WAC 246-310-050(1). The Department will respond in writing within thirty days of receiving complete information from the requestor. WAC 246-310-050(3).

111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991) (alteration in original) (internal quotation marks omitted). Indeed, an agency “must consider varying interpretations and the wisdom of its policy on a continuing basis . . . for example, in response to changed factual circumstances[.]” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005) (internal quotation mark omitted) (quoting *Chevron*, 467 U.S. at 863-64).

The wisdom of this principle is perhaps most apparent when an agency adopts a formal rule that may vary from a statutory application that previously was communicated only in letters. In the case of *Resident Councils of Washington v. Leavitt*, 500 F.3d 1025 (9th Cir. 2007), the Ninth Circuit upheld a regulatory definition of “nursing-related services” that diverged from prior agency interpretations contained in letters. The court reasoned that letter interpretations are entitled to less deference, permitting an agency “to change course when both necessary and consistent with the governing statute.” *Id.* at 1037.

The federal agency in *Leavitt* explained that it adopted a new definition of “nursing-related services” because changed circumstances in the nursing home industry necessitated a reexamination of the agency’s prior interpretation. *Leavitt*, 500 F.3d at 1036. Here, changed circumstances in the health care industry necessitated a fresh look at the

types of transactions that hospitals now engage in. The Department determined that many of these transactions fall within a broad definition of “sale, purchase, or lease” because they transfer control from one entity to another. It is within the Department’s statutory authority to make this determination. RCW 70.38.135(3)(c).

To the extent that the Department is applying the law differently than it previously did, the Department properly went through the public rulemaking process before making any changes. Our Supreme Court has been vigilant in insisting that agencies adhere to the APA’s rulemaking process before adopting policies of general applicability. *McGee Guest Home, Inc. v. Dep’t of Soc. & Health Servs.*, 142 Wn.2d 316, 322, 12 P.3d 144 (2000). “The purpose of rule-making procedures is to ensure that members of the public can participate meaningfully in the development of agency policies which affect them.” *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 399, 932 P.2d 139 (1997). This public process allows all interested parties to voice their opinions before decisions are made. *Id.* at 400; *see also Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 119 Wn.2d 640, 648-49, 835 P.2d 1030 (1992).

The Department’s rulemaking process gave all interested parties the opportunity to express their opinions about the Department’s proposal and to try to influence the substantive outcome of the process. The

outcome of the rulemaking process is that all interested citizens may now learn about and weigh in on hospital transactions that can impair access to health care within their communities. The Association may not like this outcome, but it was the result of a fully vetted public process. WAC 246-310-010(54) is valid and should be upheld.

VI. CONCLUSION

Hospital transactions occurring across the state can monumentally impact public access to health care, thereby undermining the paramount purpose of the certificate of need statute. Numerous recent transactions have evaded any kind of public review or approval process. The Department's rule will fix that by bringing more hospital acquisitions and affiliations under the auspices of the certificate of need program. The rule is a reasonable interpretation of the certificate of need statute, and the superior court erred in striking it down. This Court should correct that error and uphold WAC 246-310-010(54).

RESPECTFULLY SUBMITTED this 22nd day of September 2014.

ROBERT W. FERGUSON
Attorney General



Laura J. Watson, WSBA 28452
Deputy Solicitor General

Joyce A. Roper, WSBA 11322
Senior Assistant Attorney General

Office ID No. 91087
PO Box 40100
Olympia, WA 98504-0100
360-664-0869

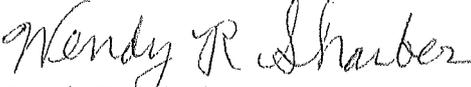
CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of Brief Of Appellant to be served on the following via e-mail:

Douglas C. Ross : douglasross@dwt.com
Brad Fisher : bradfisher@dwt.com
Rebecca Francis : rebeccafrancis@dwt.com
Davis Wright Tremaine LLP
1201 Third Avenue Suite 2200
Seattle, WA 98101-3045

Barbara A. Shickich : bshickich@riddellwilliams.com
Riddell Williams PS.
1001 4th Avenue Suite 4500
Seattle, WA 98154-1065

DATED at Olympia, Washington this 22nd day of September 2014.


Wendy R. Scharber
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Scharber, Wendy R. (ATG)
Cc: Watson, Laura (ATG); Jensen, Kristin (ATG)
Subject: RE: Washington State Hospital Association v. Washington State Department of Health

Received 9-22-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Scharber, Wendy R. (ATG) [mailto:WendyO@ATG.WA.GOV]
Sent: Monday, September 22, 2014 4:34 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Watson, Laura (ATG); Jensen, Kristin (ATG)
Subject: Washington State Hospital Association v. Washington State Department of Health

Sent on behalf of: Laura Watson, Deputy Solicitor General WSBA 28452
360-664-0869 : lauraw2@atg.wa.gov

Washington State Hospital Association, Cause No. 90486-3
Respondent,
v.
Washington State Department of Health
Appellant.

Brief Of Appellant

Wendy R. Scharber
360-753-3170 : wendyo@atg.wa.gov