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

STATE OF WASHINGTON

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DEPARTMENT OF HEALTH OF THE STATE OF  
WASHINGTON,

Appellant,

v.

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

Respondents.

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BRIEF OF RESPONDENTS THE POLYCLINIC AND  
SWEDISH HEALTH SERVICES

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Brian W. Grimm, WSBA #29619  
Attorneys for Swedish Health Services  
PERKINS COIE LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Tel: 206.359.6785/Fax: 206.359.7785

Donald W. Black, WSBA #25272  
Geoff J. M. Bridgman, WSBA #25242  
Aaron P. Riensche, WSBA #37202  
Attorneys for The Polyclinic  
OGDEN MURPHY WALLACE, P.L.L.C.  
901 Fifth Avenue, Suite 3500  
Seattle, WA 98164-2008  
Tel: 206.447.7000/Fax: 206.447.0215

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**A. INTRODUCTION**

When the legislature enacted the Administrative Procedure Act (“APA”), Chapter 34.05 RCW, it intended “to provide greater public and legislative access to administrative decision making.” RCW 34.05.001. The APA mandates a formal rulemaking procedure that any administrative agency must follow before it implements a “rule,” with additional procedures required for “significant legislative rules.” See RCW 34.05.010, .328. The purpose of these procedures is “to ensure that members of the public can participate meaningfully in the development of agency policies which affect them.” *Hillis v. State, Dep’t of Ecology*, 131 Wn.2d 373, 399, 932 P.2d 139 (1997) (citing *Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 119 Wn.2d 640, 649, 835 P.2d 1030 (1992)).

Appellant Department of Health (“Department”) is a state administrative agency that is subject to the APA’s requirements and thus bound to provide an opportunity for meaningful participation by members of the public that are affected by its policies. Such members of the public include the respondents in this appeal, The Polyclinic (“TPC”) and Swedish Health Services (“Swedish”). As healthcare providers, TPC and Swedish are directly affected by the State’s Certificate of Need (“CN” or “CON”) program.

The legislature has authorized the Department to require a CN for certain types of healthcare transactions. One such transaction is the “construction, development, or other establishment of a *new* health care facility.” RCW 70.38.105(4)(a) (emphasis added). Since the inception of the CN program, the Department has consistently ruled that the expansion and/or relocation of an existing Ambulatory Surgical Center (“ASC”)<sup>1</sup> does not transform it into a “new” facility for purposes of this statute. As such, the Department has consistently and uniformly allowed existing ASCs to expand and/or relocate without CN review.

TPC and Swedish have entered into an agreement to operate an existing, CN-approved ASC as a joint venture (the “JV ASC”). TPC currently owns and operates the JV ASC in the First Hill area of Seattle, Washington. The agreement contemplates increasing the number of operating rooms and moving the ASC less than two tenths of a mile away.

When TPC advised the Department of these plans, the Department announced—in an email message to TPC’s attorney—that it was changing its interpretation of RCW 70.38.105(4)(a). Effective immediately, the Department would require CN approval for the expansion of an ASC. This ruling would impose a costly burden on TPC and Swedish’s attempts

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<sup>1</sup> Also referred to in the regulations as an “Ambulatory Surgical Facility” or “ASF.” See WAC 246-310-010(5), (26).

to improve public access to affordable healthcare by moving the existing ASC to a superior location.

TPC and Swedish sued for a declaratory judgment that the Department's new directive was an invalid agency action. The trial court agreed, finding that the new directive was both a "rule" and a "significant legislative rule" to which APA rulemaking requirements applied. Because the Department undisputedly did not follow any rulemaking procedures, the trial court declared the new rule invalid as a matter of law.

The trial court was correct. The Department drastically changed the requirements—indeed imposed a new requirement—governing the expansion/relocation of an existing ASC. It did so without any public involvement and without any opportunity for healthcare organizations and other affected members of the public to participate in the formulation of a significant change in Department policy. This is precisely the type of burdensome regulatory action that the APA was designed to ameliorate.

The Department's new directive is clearly a rule. Just as clearly, the Department failed to follow the required statutory rulemaking procedures. In the alternative, the Department lacks authority to require CN review for the expansion/relocation of an existing ASC. As such, the new rule is invalid, and the declaratory judgment should be affirmed.

**B. COUNTERSTATEMENT OF THE ISSUES**

- 1) Under the APA, any agency directive that changes the requirements or qualifications for a license or benefit is a “rule” and thus invalid unless enacted through statutory rulemaking procedures. The Department imposed new requirements for the expansion/relocation of an existing, CN-approved ASC, without engaging in any rulemaking procedure whatsoever. Did the trial court correctly declare this new rule invalid under the APA?
  
- 2) In the alternative, under the Uniform Declaratory Judgments Act (“UDJA”), RCW Chapter 7.24, the Court may declare an agency’s action invalid if it exceeds the agency’s statutory authority. The reference to “new” healthcare facilities in RCW 70.38.105(4)(a) does not include the expansion/relocation of an existing facility. Should the Court declare the new directive invalid because the Department lacks authority to require CN review for the expansion/relocation of an existing ASC?

**C. STATEMENT OF THE CASE**

**1. The Parties and the JV ASC**

Swedish is a Washington nonprofit corporation that operates several healthcare facilities in King County, Washington. Clerk’s Papers (“CP”) 7, 43. TPC is a physician-owned healthcare provider, with several locations around the Puget Sound region, including the JV ASC. *Id.* The Department approved the establishment of the JV ASC, and granted CN No. 1046, on May 7, 1991. CP 8, 44. The JV ASC currently has three operating rooms and is located at 1145 Broadway, Seattle, Washington. CP 191.

CN No. 1046 mentions the number of operating rooms and the location, but imposes only one condition, a ban on certain procedures:

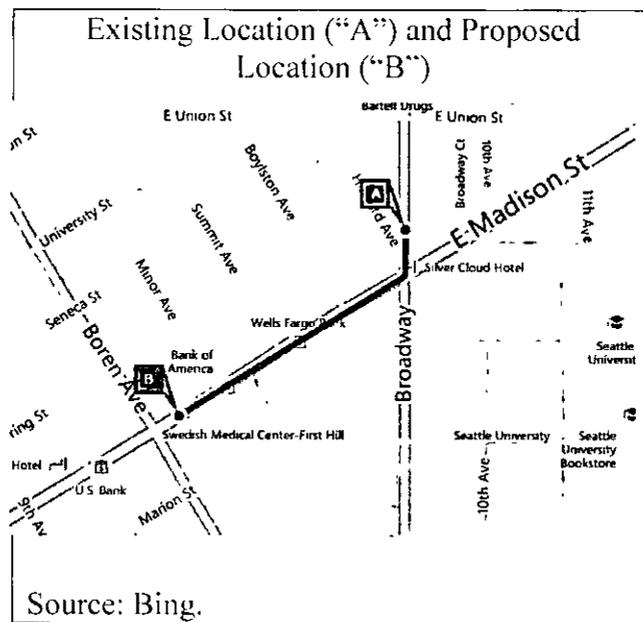
Establish a three suite Ambulatory Surgical Center *with the following condition:*

No cardiac Catheterization procedures are to be performed in the surgery suites.

There are no capital costs.

CP 156 (emphasis added).

TPC and Swedish entered into an agreement to operate the JV ASC as a joint venture. CP 191. They propose to add seven operating rooms and relocate the ASC by less than two tenths of a mile, to 1101 Madison Street:



2. **The Department's Longstanding Position**

The Department has long taken the position that CN approval is not required for a previously CN-approved ASC either to add operating rooms or to relocate within the planning area. *See* CP 10–11, 19–34, 44. This position is illustrated by various “determinations of non-reviewability” issued by the Department over the years. The Department allows a provider, before applying for a CN, to request a formal determination of whether CN review is needed. *See* WAC 246-310-050(1). In response to such requests, regarding transactions virtually identical to the TPC/Swedish joint venture, the Department has consistently ruled that CN review is *not* required. *See* CP 19–34.

For example, in 1999, the Department analyzed a proposal to transfer Evergreen Surgical Center (“Evergreen”) from King County Public Hospital District #2 to a new entity. CP 20–24. The Department had issued a CN to Evergreen in 1981, specifying that the facility would have two operating rooms. CP 258. As here, the new entity would operate the ASC as a joint venture between private physicians and a hospital. CP 23.

In its written determination of reviewability, the Department highlighted that the proposal included relocating the ASC to a newly

constructed building within one mile of its existing location and expanding the number of operating rooms. *Id.* The Department noted that Evergreen had already expanded to four operating rooms from the two specified in its CN. *Id.* The Department ruled that a further expansion from four to six or eight operating rooms would not require CN review. *Id.*

Likewise, the Department ruled that no CN approval would be required for the expansion and relocation of North Kitsap Surgery Center. CP 26–27. The Department had previously issued a CN for a freestanding ASC with two operating rooms. CP 26. The proposal was to move the ASC to a new building and to increase the number of operating rooms to three. *Id.* The Department concluded that “the relocation and expansion of North Kitsap Surgery Center does not require Certificate of Need approval as the establishment of a new health care facility under the provisions of Washington Administrative Code WAC 246-310-020 and is not subject to Certificate of Need review.” *Id.*

The same result occurred with respect to the relocation and expansion of Good Samaritan Surgery Center. CP 29. The Department had issued a CN for this ASC, which specified that it would have three operating rooms. CP 260. The proposal was to move the ASC to a new

location and expand to six operating rooms. CP 29. Again, the Department ruled that no CN approval was required:

Based on this information, the relocation and expansion of Good Samaritan Surgery Center does not require Certificate of Need approval as the establishment of a new health care facility under the provisions of Washington Administrative Code WAC 246-310-020 and is not subject to Certificate of Need review.

*Id.*

Indeed, the Department has acknowledged in sworn testimony that it lacks authority to restrict the number of operating rooms in an ASC. *See* CP 238–40. Randy Huyck, a CN Program analyst, testified in a 2005 adjudicative proceeding that while establishment of an ASC requires CN approval, expansion does not:

We don't, the department doesn't have the authority to, once an ambulatory surgery center is approved, to necessarily restrict it to a certain number of operating rooms for the remainder of its life.

CP 34.

The Department has reiterated this position as recently as December 2012. CP 31–34. In November 2012, Symbion Healthcare requested a determination of reviewability regarding the consolidation and relocation of Bellingham Surgery Center and Northwest Ambulatory

Surgery Services, LLC. CP 31. This transaction involved the closure of one ASC and the expansion of another. CP 32. The Department again concluded that no CN approval was necessary. CP 33.

Notably, in each of these determinations, the Department stressed that prior review and approval may be required if the “scope of services” provided at the ASC were to change. CP 21, 24, 26, 29, 33. Thus, the Department has identified changes to an ASC that, in its view, would require CN approval. But it has consistently ruled that relocation and/or expansion of an ASC is not such a change. *See id.*

Given the Department’s longstanding position, some providers may have relied on it and expanded ASCs without requesting a determination of reviewability.<sup>2</sup> For example, the Department approved a CN for First Hill Surgery Center in 1989. CP 243–49. The Department observed at the time that the facility would contain two operating rooms. CP 243. The Department’s most recent survey, however, shows that this ASC, now called Scattle Surgery Center (CP 254), has seven operating rooms. CP 251. In 1992, the Department ruled that no CN review was required to move this ASC from Minor Avenue to Terry Street. CP 256.

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<sup>2</sup> The determination of reviewability is an optional procedure. *See* WAC 246-310-050(1).

There is no indication, however, that a determination of reviewability was even requested for the addition of operating rooms. *See id.*

3. **The Department's New Position**

TPC and Swedish exchanged correspondence and met in person with officials at the Department to discuss whether the Department will require a CN application for their proposed expansion and relocation of the JV ASC. CP 192. On June 12, 2014, in an email sent to TPC's attorney, the Department announced its new interpretation, stating "that when an ASC CN limits the number of operating rooms, additional operating [rooms] may not be added without CN review." CP 207. The Department stated further that to "the extent that past decisions have stated otherwise, those decisions were wrong under the law." *Id.*

This new position was "effective immediately." *Id.* As such, the Department refused to grant TPC and Swedish's request that they be allowed to add operating rooms without CN review. *Id.*

4. **The CN Application Process**

CN review is not a process that can be undertaken lightly. It is a costly, time-consuming, and burdensome venture. The CN application fee alone is \$20,427. *See* WAC 246-310-990(1)(b). This does not include the

cost to prepare the application materials,<sup>3</sup> the cost to participate in the public comment and public hearing process, or associated litigation costs which often occur following CN review.

5. **Procedural History**

After the Department announced its new directive, TPC and Swedish filed suit in Thurston County Superior Court. CP 6. They sought a declaration that the new directive was invalid on two alternative grounds. First, the new directive was a “rule,” and the Department had not followed the rulemaking procedures required by the APA. CP 12. Second, under the UDJA, the new directive exceeded the Department’s statutory authority because the expansion or relocation of an existing ASC is not the establishment of a “new” healthcare facility for which the Department can require CN review under RCW 70.38.105(4)(a). CP 14.

The Department admitted that its new directive is “a departure from its past interpretations of the law.” CP 44. The Department also admitted that, in changing this interpretation, it did not conduct formal rulemaking. *Id.* It argued that the old interpretation was “regretfully” incorrect. CP 143.

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<sup>3</sup> A Department survey conducted in 2013 showed that creating a CN application for a hospital costs on average more than \$63,000. CP 262–77. ASC-specific application estimates were not provided in the survey results.

The trial court granted the requested declaration on summary judgment. The court determined that the new directive was both a “rule” and a “significant legislative rule,” to which APA rulemaking applied:

The Department’s requirement that CON approval is required for an ASC to expand or relocate is a “rule” and a “significant legislative rule.” It is an agency directive of general applicability (i.e., to all ASCs) which alters the CON requirements (indeed, establishes a new CON requirement), such that an ASC operator must obtain CON approval before expanding or relocating the facility. . . . It is a new policy and significantly amends the existing CON regulatory program and policies.

CP 181. Because the Department adopted this new rule without rulemaking procedures, “the Department’s requirement that relocation of an ASC within the same planning area and/or adding ORs to an ASC are subject to CON review is invalid.” CP 183.

The Department appealed and moved to stay the declaratory judgment. In considering the Department’s request, Commissioner Bearer assumed that the Department could present a debatable issue on appeal, but also noted the strength of TPC and Swedish’s arguments on the merits:

For the purpose of this ruling, this court assumes that the Department presents a debatable issue on appeal in the most basic sense: no court has addressed whether expansion or relocation of an outpatient

facility requires a CN (likely because the Department has not required CNs for expansion or relocation until it determined to impose the CN requirement on these respondents). This court also notes, however, that at this preliminary stage, it appears that respondents have a strong argument that to change established CN procedures, the Department must engage in formal administrative rulemaking procedures, which it did not do here. See RCW 34.05.328(5)(c)(iii)(B) & (C).

Notation Ruling at 2 (Jan. 23, 2015). The Commissioner denied the motion, however, finding that preventing the project from going forward would cause “present and concrete harm” to TPC and Swedish. *Id.*

**D. SUMMARY OF ARGUMENT**

After two decades of consistently denying that it has authority to require CN review for the expansion and/or relocation of an ASC, the Department has suddenly decided to impose this requirement on TPC and Swedish. The trial court correctly ruled that this new directive is both a “rule” and a “significant legislative rule.” It meets the APA’s plain language definition of a “rule” because it establishes or alters the qualifications or standards for the issuance of a license to pursue a commercial activity, trade, or profession. RCW 34.05.010(16)(d). And it is a “significant legislative rule” under the APA because it “adopts a new,

or makes significant amendments to, a policy or regulatory program.” RCW 34.05.328(5)(c)(iii)(C). Because the Department admits that it implemented this directive without statutory rulemaking procedures, the trial court correctly declared the new rule invalid as a matter of law.

The trial court’s ruling can be affirmed on the alternative ground that the Department has exceeded its statutory authority. A relocated and/or expanded ASC is *not* a “new” healthcare facility under RCW 70.38.105(4)(a). The Department’s attempt to shoehorn the transaction at issue here into the meaning of “new” cannot be reconciled with the statute, which expressly subjects the expansion of certain types of healthcare facilities—but *not* of an ASC—to CN review. *See* RCW 70.38.105(4)(e), (h). These provisions would be superfluous if the expansion of any and all healthcare facilities were subject to CN review.

The Department’s arguments regarding relocation are equally devoid of merit. The plain statutory language does not support the notion that a facility is “new” simply because it moves. The Washington Supreme Court holds that ensuring public access to healthcare is the “overriding purpose” of the CN program. *Overlake Hosp. Ass’n v. Dep’t of Health of State of Washington*, 170 Wn.2d 43, 239 P.3d 1095 (2010), 239 P.3d 1095 (2010). For years, the Department upheld that policy by

correctly ruling that relocation of an ASC within the same planning area is not subject to CN review. The Department now seeks to adopt a new policy that *burdens* healthcare access. The Court should affirm the trial court's ruling that this attempt to rewrite the CN legislation is invalid.

**E. ARGUMENT**

The Civil Rules expressly provide for a declaratory judgment action to be decided on summary judgment. *See* CR 56(a). Where, as here, a summary judgment turns on statutory construction, it presents a question of law. *McIntyre v. State*, 135 Wn. App. 594, 599, 141 P. 3d 75 (2006). This Court reviews questions of law *de novo*. *Id.* (citing *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992)). The facts of this case are not in dispute, and the trial court's interpretation of the law was correct.

1. **The Department's authority to require CN review is limited by statute.**

"The CN program was created as part of Washington's health planning strategy 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, and recognize prevention as a high priority in health programs.'"

*Overlake*, 170 Wn.2d at 50 (quoting RCW 70.38.015(1)). The legislature enacted the first CN law in 1979, in response to encouragement from Congress, which “was concerned ‘that marketplace forces in [the healthcare] industry failed to produce efficient investment in facilities and [it wished] to minimize the costs of health care.’” *St. Joseph Hosp. & Health Ctr. v. Dep’t of Health*, 125 Wn.2d 733, 735-36, 887 P.2d 891 (1995) (quoting *National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 386, 101 S.Ct. 2415, 69 L.Ed.2d 89 (1981)). The legislature “intended the [CN] requirement to provide accessible health services and assure the health of all citizens in the state while controlling costs.” *King County Pub. Hosp. Dist. No. 2 v. Wash. State Dep’t of Health*, 178 Wn.2d 363, 366, 309 P.3d 416 (2013).

The CN laws require certain—but not all—healthcare providers and projects to obtain a CN before those providers may offer a service. RCW 70.38105(4); *King County*, 178 Wn.2d at 366. In particular, CN approval is required for “the construction, development, or other establishment of a *new* health care facility.” RCW 70.38.105(4)(a) (emphasis added). The CN statute identifies four criteria for the Department to consider in reviewing whether to grant CN applications: the “need for the proposed project, financial feasibility of the project, structure

and process of care, and containment of the costs of health care.” *King County*, 178 Wn.2d at 367; *see also* WAC 246-310-210 *et seq.*

The legislature authorized the Department to “implement the [CN] program pursuant to the provisions of this chapter.” RCW 70.38.105(1). The Department has authority “to charge fees for the review of [CN] applications and requests for exemptions from [CN] review.” RCW 70.38.105(5). “Certificates of need shall be issued, denied, suspended, or revoked by the designee of the secretary in accord with the provisions of this chapter and rules of the department which establish review procedures and criteria for the [CN] program.” RCW 70.38.115(1). “Health services and facilities requiring [a CN]” are defined in seven enumerated subsections found in RCW 70.38.105(4). The legislature has authorized the Department “to promulgate rules setting up the process for obtaining a CN.” *Overlake*, 170 Wn.2d at 50 (citing RCW 70.38.135(3)). It has *not*, however, authorized the Department to add to or subtract from the legislature’s exclusive list of facilities requiring a CN.

2. **The trial court correctly determined that the Department’s new directive is an invalid rule under the APA.**

The APA provides for judicial review of the validity of any rule, “when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal

rights or privileges of the petitioner.” RCW 34.05.570(2)(b)(i). Under such circumstances, a declaratory judgment “may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.” *Id.* Because the Department adopted a new rule that interferes with or impairs TPC and Swedish’s legal rights or privileges, the trial court had jurisdiction to hear this action. And because the new rule was implemented without statutory rulemaking procedures, it is invalid as a matter of law.

- a. The Department issued a new rule without formal rulemaking procedures.

An agency’s rules “are invalid unless adopted in compliance with the APA.” *Hillis*, 131 Wn.2d at 398 (citing *Simpson Tacoma*, 119 Wn.2d at 649). The Court “shall declare the rule invalid” if “the rule was adopted without compliance with statutory rule-making procedures.” RCW 34.05.570(2)(c).

“To meet the intent of providing greater public access to administrative rule making and to promote consensus among interested parties,” an agency must solicit public comments on the subject of any possible rulemaking. RCW 34.05.310(1)(a). The purpose of inviting public comment at the formative stage “is both (1) to allow the agency to benefit from the expertise and input of the parties who file comments with

regard to the proposed rule, and (2) to see to it that the agency maintains a flexible and open-minded attitude towards its own rules . . . .” *Nat’l Tour Brokers Ass’n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978). The agency must then conduct a formal rulemaking hearing, with notice published in the state register at least twenty days beforehand. RCW 34.05.320. If a rule is a “significant legislative rule,” additional requirements apply. RCW 34.05.328.

*The Department’s new interpretation is a “rule,” requiring compliance with formal rulemaking procedures.*

The APA’s definitions of a “rule” include “any agency order, directive, or regulation of general applicability . . . which establishes, alters, or revokes any qualifications or standards for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession . . . .” RCW 34.05.010(16)(d). “A rule is one of ‘general applicability’ if it applies to individuals only as members of a class, regardless of the size of the class.” *Hunter v. Univ. of Washington*, 101 Wn. App. 283, 289, 2 P.3d 1022 (2000) (citing William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 54 Wash. L. Rev. 781, 790 n. 43 (1989)). Where “the challenge is to a policy applicable to all participants in a program, not its implementation under a single contract or assessment of individual benefits, the action is of

general applicability within the definition of a rule.” *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 495, 886 P.2d 147 (1994) (citing *Simpson Tacoma*, 119 Wn.2d at 648). A “license” is “a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law.” RCW 34.05.010(9)(a).

There can be no question that the Department directive at issue here is a “rule.” It is generally applicable because it applies to TPC and Swedish only as members of a class, i.e. providers that operate healthcare facilities subject to the CN program under RCW 70.38. *See* RCW 34.05.010(16)(d). TPC and Swedish challenge the decision not merely based on the denial of their request to expand and move the JV ASC without CN review, but on the basis of the Department’s articulation of a new policy that is applicable to any provider that attempts to relocate or expand an ASC. *See* CP 207. The new directive establishes or alters the qualifications or standards for the issuance of a CN, which is a permit, certification, or approval to operate a healthcare facility and is therefore a “license,” as that term is defined in RCW 34.05.010(9)(a).

A directive need not be a published amendment to the Washington Administrative Code to qualify as a “rule.” *See, e.g., Failor's Pharmacy*, 125 Wn.2d at 494 (holding that reimbursement schedules inserted into

Medicaid prescription providers' contracts with state were rules requiring adherence to rulemaking procedures). Our Supreme Court has been "vigilant in insisting that administrative agencies treat policies of general applicability as rules and comply with necessary APA procedures." *McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs. of State of Wash.*, 142 Wn.2d 316, 322, 12 P.3d 144 (2000) (citing *Simpson Tacoma*, 119 Wn.2d at 648). The directive here is a policy of general applicability and must therefore be treated as a rule.

*Because the Department's new interpretation was a "significant legislative rule," additional rulemaking procedures were required.*

The trial court found that this new rule is also a "significant legislative rule," which requires that "certain additional measures be taken" in its adoption. *Association of Washington Business v. State*, 155 Wn.2d 430, 438 n. 4, 120 P.3d 46 (2005) (citing RCW 34.05.328(1), (5)). The statutory definition of a "significant legislative rule" includes a rule that "establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit." RCW 34.05.328(5)(c)(iii)(B). The definition also includes a rule that "adopts a new, or makes significant amendments to, a policy or regulatory program." RCW 34.05.328(5)(c)(iii)(C).

By expanding the types of activities that require CN review, the Department has both made significant amendments to a regulatory program and established or altered the standards for the issuance of a license or permit. Until the Department announced this new rule, a provider could relocate an ASC and/or increase its number of operating rooms without CN review. Given the substantial cost and time inherent in the CN process, it would be difficult to imagine a more significant change to the Department's regulatory program than requiring CN approval for activities that had never previously been subject to CN review.

Because this new rule is a significant *legislative* rule, the standards governing its implementation are even more stringent. The requirements for adoption of a significant legislative rule include identifying the "general goals and specific objectives of the statute that the rule implements," conducting a cost-benefit analysis, and providing notice that a preliminary cost-benefit analysis is available. RCW 34.05.328(1). The Department acknowledges that it has not undertaken any formal rulemaking procedures with respect to the rule challenged here, let alone these heightened requirements. *See* CP 44.

*The Department's new rule is far more than a "rudimentary interpretation" of the CN legislation.*

The Department cannot reasonably dispute that its directive meets the definitions of both a "rule" and a "significant legislative rule" in RCW 34.05.010 and .328. Instead, the Department argues that rulemaking is not required for "rudimentary interpretations."<sup>4</sup> But the key to the cases cited by the Department was that "there were no additional requirements added to the [law] by the Department." *Budget Rent A Car Corp. v. State, Dep't of Licensing*, 144 Wn.2d 889, 897, 31 P.3d 1174 (2001). The *Budget* court acknowledged that rulemaking would be required had the agency "changed any qualifications for benefits." *Id.* (quoting *McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.*, 142 Wn.2d 316, 323, 12 P.3d 144 (2000)). Here, the Department *admits* it changed the qualifications for a CN-approved ASC to expand and relocate within the planning area. Formal rulemaking procedures were required.<sup>5</sup>

Indeed, the delineation of which types of transactions require CN review is precisely the kind of administrative decision-making that the Department has addressed through rulemaking. Earlier this year, the

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<sup>4</sup> Brief of Appellant at 13.

<sup>5</sup> The Department gave no formal notice whatsoever to the public or to healthcare providers that it now considers expansion or relocation of ASCs to be subject to CN review, notwithstanding its previous, published decisions to the contrary. It simply announced the policy shift in an email to TPC's counsel.

Department announced rulemaking regarding the scope of tertiary services to be covered by CN rules.<sup>6</sup> Further, a Department rule provides that the relocation of a kidney dialysis facility creates a “new” facility if the facility is moved to a new planning area. *See* WAC 246-310-289(1). The Department has thus recognized in the past that defining the term “new health care facility” is more than a rudimentary interpretation.

- b. Formal Rulemaking is especially necessary where the Department changes a longstanding interpretation.

The legislature enacted the APA “to provide greater public and legislative access to administrative decision making.” RCW 34.05.001. Its formal rulemaking procedures are designed “to ensure that members of the public can participate meaningfully in the development of agency policies which affect them.” *Hillis*, 131 Wn.2d at 399 (citing *Simpson Tacoma*, 119 Wn.2d at 649). As the cases discussed below illustrate, when an agency changes the qualifications for a benefit or a license, it must give the public the chance to participate in formulation of the new policy—either through the legislature or through APA rulemaking.

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<sup>6</sup> <http://www.doh.wa.gov/LicensesPermitsandCertificates/FacilitiesNewReneworUpdate/CertificateofNeed/RulemakingActivities/TertiaryHealthServicesReview> (last visited March 17, 2015).

*The Washington Supreme Court generally requires new legislation before an agency can change a longstanding interpretation.*

An agency's changes to a longstanding statutory interpretation are such a significant action that they often stray beyond the status of rulemaking and into the forbidden realm of legislation. *See Dot Foods, Inc. v. Washington Dep't of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009). In *Dot Foods*, for example, the Department of Revenue ("DOR") had consistently interpreted its enabling legislation in a way that allowed Dot Foods to claim a 100% exemption from state business and occupation tax. The DOR then revised its interpretation of the same legislation, to remove this exemption. *Id.* at 917. The trial court and this Court agreed with the new interpretation, but our Supreme Court reversed. *Id.* at 915. The Supreme Court explained that as "a general rule, where a statute has been left unchanged by the legislature for a significant period of time, the more appropriate method to change the interpretation or application of a statute is by amendment or revision of the statute, rather than a new agency interpretation." *Id.* at 921. Given that, as a general rule, legislative action is required before an agency can change its interpretation of a statute, it follows that—at the very least—such a change requires formal rulemaking procedures.

*In an industry that relies on Department precedent, rulemaking helps to avoid unfair application of the law.*

There are practical reasons for requiring rulemaking here. As noted above, TPC and Swedish merely seek to do exactly what was done in the Evergreen transaction. *See* CP 20–24. As in the Evergreen case, TPC and Swedish propose a joint venture between a group of physicians and a hospital to jointly operate an ASC. And, as in the Evergreen case, that joint venture involves increasing the number of operating rooms and moving an ASC a short distance within the same planning area. The parties in the Evergreen transaction were allowed to do this without the delay and expense associated with CN review. The Department now seeks to deny TPC and Swedish this same flexibility in determining how best to care for their patients.

Notably, the Department’s rules do *not* require the requests for determination of reviewability that were submitted in the sample cases cited above. *See* CP 20–34. The regulation states that a “person wanting to know whether an action the person is considering is subject to [CN] requirements (chapter 246-310 WAC) *may* submit a written request to the [CN] program requesting a formal determination of applicability of the [CN] requirements to the action.” WAC 246-310-050(1) (emphasis added). Given the permissive nature of this process, it is possible that

other ASCs have increased their capacity and/or relocated, without requesting such a determination, in reliance on the Department's past precedent. Indeed, as noted above, this appears to have occurred in the Seattle Surgery Center case. *See* CP 243–51.

The possibility that the Department might have changed its position, through an unwritten rule, introduces two burdensome complications. First, providers who request a determination would be prejudiced and placed at a competitive disadvantage in relation to those who simply proceed with their ventures without notifying the Department. Second, as the Department argued to this Court in its Motion for Stay, a provider that proceeds with construction, and later learns that CN approval was required, may have invested in an unusable facility. According to the Department, this is an injury not just to the provider, but also to the public.<sup>7</sup> By requiring agencies to engage in a formal process before they change a longstanding interpretation, the courts can alleviate much of the prejudice potentially caused by reliance on past decisions.

The U.S. Supreme Court has recognized the unfairness that results from arbitrary changes in agency policy, as well as the important role of

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<sup>7</sup> *See* Department of Health's Motion for Stay at 14 (Dec. 23, 2014).

the administrative-rulemaking processes in ameliorating that unfairness.<sup>8</sup> See *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167, 183 L. Ed. 2d 153 (2012); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71, 127 S. Ct. 2339, 168 L. Ed. 2d 54 (2007). In *Christopher*, for example, the U.S. Supreme Court held that where an agency's interpretation conflicts with a prior interpretation, deference to the agency interpretation "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" *Christopher*, 132 S. Ct. at 2166 (quoting *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)). "Indeed, it would result in precisely the kind of 'unfair surprise' against which our cases have long warned." *Id.* at 2167 (citing *Long Island Care at Home*, 551 U.S. at 170-71). The U.S. Supreme Court further holds that an agency's "recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation" is an important tool in eliminating that unfair surprise. *Long Island Care at Home*, 551 U.S. at 170-71.

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<sup>8</sup> The APA provides "that the courts should interpret provisions of this chapter consistently with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts." RCW 34.05.001.

In short, Washington and federal courts are in accord that when an agency seeks to change its longstanding interpretation of a statute, something more than simply announcing the change is required. The agency must take its request to the legislature, or at the very least engage in formal rulemaking. Otherwise, the agency violates its statutory obligation to involve the public in the development of agency policies.

*Simply claiming that its prior interpretation was wrong does not excuse the Department from the APA's requirements.*

The Department argues that it is simply correcting a prior erroneous interpretation, relying on *State, Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 598, 957 P.2d 1241 (1998).<sup>9</sup> There, the appellant sought water rights for a residential development. *Id.* at 587. The Department of Ecology ("Ecology") initially approved the application in 1973. *Id.* The approval report entitled the appellant to a water certificate once a water-supply system was capable of delivering water, even though some or most of the development's lots were vacant. *Id.* Ecology quantified the scope of the permit based on the development's

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<sup>9</sup> The other case cited by the Department on this point adds little to the discussion because it did not involve a change in agency interpretation. *See Agrilink Foods, Inc v State, Dep't of Revenue*, 153 Wn.2d 392, 397-98, 103 P.3d 1226 (2005). The court simply held that the agency's ongoing interpretation was wrong. *Id.*

“system capacity,” i.e., the amount of water it was capable of using, rather than the amount it actually used. *Id.*

The project was delayed, and the appellant received several extensions. *Id.* at 587–88. The last extension, in 1992, was conditioned<sup>10</sup> on a change in the quantification method. *Id.* at 588. It provided that the vested water right would now be based on actual application of water to beneficial use, rather than on system capacity. *Id.*

The appellant argued that Ecology’s change in policy was arbitrary and capricious and barred by the doctrines of collateral and equitable estoppel. *Id.* at 598–99. The Washington Supreme Court first determined that Ecology’s old interpretation, quantifying water rights based on system capacity, was incorrect. *Id.* at 590–97. It then concluded that the doctrines raised by the appellant could not bind Ecology to an incorrect statement of law. *Id.* at 598–99.

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<sup>10</sup> The Department is mistaken when it argues that Ecology altered its interpretation to the licensee’s detriment after issuing a license. Brief of Appellant at 12. The initial approval required the appellant to complete the project by 1980 and provided that the appellant would not be entitled to a water certificate until this occurred. *Theodoratus*, 135 Wn.2d at 587. Ecology had discretion to grant or deny the appellant’s multiple extension requests and thus could have simply denied the extension in its entirety. *Id.* at 597–98. Granting the extension with conditions, when the appellant had not completed the project by 1992 and had let the file lie dormant for seven years, was to the appellant’s benefit.

Aside from the fact that the appellant did not raise the APA issue,<sup>11</sup> there are two key differences between *Theodoratus* and the case at bar. First, Ecology's action in *Theodoratus* did *not* change the qualifications for a benefit. *Cf. Budget*, 144 Wn.2d at 897 (rulemaking would be required had the agency "changed any qualifications for benefits"). In *Theodoratus*, the appellant was entitled to a water certificate under both the old and the new policies. The change affected only the scope, i.e. the amount of water to which the appellant could claim a vested right.

Moreover, the court stressed that, by statute, the appellant had an "inchoate right to water which has not yet been applied to a beneficial use." *Theodoratus*, 135 Wn.2d at 596. Thus, while he was prosecuting the application of water to a beneficial use, he had the right to "divert and use water." *Id.* (quoting RCW 90.03.460). This right would mature "into an appropriative right on completion of the last step provided by law." *Id.* (quoting I WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 226 (1971)). In short, the appellant still had a right, before putting the water to beneficial use, to as much water as he would

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<sup>11</sup> The *Theodoratus* court addressed an argument by amici curiae that the change in policy required APA rulemaking. *Id.* at 600. The Department has not cited to this portion of the opinion here, presumably because commentary on amici arguments is *obiter dicta* and thus not precedent. See *Bldg Indus. Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 749, 218 P.3d 196 (2009) (holding that arguments raised only by amici curiae need not be considered). In any event, as discussed herein, *Theodoratus* is distinguishable.

eventually use; the only change was that he could not have a vested right to more water than was put to use. *See id.*

Here, in contrast, the question is whether TPC and Swedish can or cannot move and expand an ASC. Under the Department's long-established policy, they could; under its new directive they cannot. This plainly changes the qualifications for a benefit and is therefore a rule. *Budget*, 144 Wn.2d at 897.

Second, there was no ambiguity in the statute at issue in *Theodoratus*. Before addressing the appellant's claim that the department should not be allowed to change its position, the court explained at length that the old interpretation was plainly wrong. *Theodoratus*, 135 Wn.2d at 590–97. Although the case involved a groundwater appropriation governed by Chapter 90.44, this chapter incorporated by reference the standards for permits and certificates under the surface water chapter, 90.03. *Id.* at 590 (citing RCW 90.44.060). Plain language in Chapter 90.03 required actual application of water to beneficial use in order to perfect a water right. *Id.* at 590–91 (citing RCW 90.03.260 *et seq.*). Further, the court cited cases going back as far as 1889 and a law review article from 1956 to establish that this limitation—that rights can vest only

in water that has actually been put to beneficial use—is a principle of “fundamental western water law.” *Id.* at 592.

This analysis contrasts sharply with what the Department attempts to characterize as correcting an erroneous interpretation here. There is no plain statutory language in Chapter 70.38 RCW applying the Department’s new interpretation. Nor has the Department cited a single case, anywhere in the country, holding that the expansion and/or relocation of an existing ASC, within the same planning area, transforms it into a “new” facility. In fact, the only precedents for interpreting this provision, cited by any party in this litigation, are the Department’s numerous determinations over many years that an expanded/relocated ASC is *not* a new facility and thus *not* subject to CN review.

As such, this case is more like the Supreme Court’s more recent decision in *Dot Foods*. There, as here, there was no prior legal precedent for the agency’s changed interpretation, and the agency’s argument turned on what it contended was a new reasonable interpretation of an ambiguous statute. *See Dot Foods*, 166 Wn.2d at 920–21. In rejecting this new interpretation, the Supreme Court announced its general rule that “where a statute has been left unchanged by the legislature for a significant period of time, the more appropriate method to change the interpretation or

application of a statute is by amendment or revision of the statute, rather than a new agency interpretation.” *Id.* at 920.

Other cases decided after *Theodoratus* have repeatedly held that an agency cannot simply change interpretations at its whim. *See Silverstreak, Inc. v. Wash. State Dep’t of Labor & Indus.*, 159 Wn.2d 868, 891, 154 P.3d 891 (2007) (Washington courts “will not sanction a government agency’s arbitrary decision to change its interpretation” of even its own rules); *Saben v. Skagit County*, 136 Wn. App. 869, 878, 152 P.3d 1034 (2006) (rejecting interpretation of ordinance as arbitrary and capricious where “county engaged in a remarkable series of mind changes”).

Thus, correcting an allegedly erroneous interpretation, as allowed in *Theodoratus*, involves much more than simply changing the Department’s mind about how a statute should be read. It requires a showing that the prior interpretation was clearly wrong. As will be explained in the following section, the Department has made no such showing here. It merely argues that its new interpretation is reasonable and consistent with a few Department regulations. This organizational mind change is a wholly inadequate justification for excluding the public from a drastic change in agency policy.

3. **In the alternative, TPC and Swedish are entitled to a declaration that the Department's new directive exceeds the Department's statutory authority.**

Because the trial court found the new directive to be invalid as an improperly promulgated rule, it did not address TPC and Swedish's alternative argument that the Department has misinterpreted the statute. The reference to a "new" healthcare facility, in RCW 70.38.105(4)(a), does *not* include expansions or relocations within the same planning area of existing ASCs. The trial court's judgment can thus be affirmed on the alternative ground that the Department does not have the authority to require CN review for such expansions and/or relocations. *See Skinner v. Holgate*, 141 Wn. App. 840, 849, 173 P.3d 300 (2007) ("We may affirm on any ground the record adequately supports.") (citing *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004)).

a. **The Department exceeds its authority by purporting to expand the scope of the CN statutes.**

Under the UDJA, the courts have the "power to declare rights, status and other legal relations whether or not further relief is or could be claimed." RCW 7.24.010. Any person "whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." RCW

7.24.020. Moreover, under the APA, a “court must declare an administrative rule invalid if it finds that ‘the rule exceeds the statutory authority of the agency.’” *Swinomish Indian Tribal Community v. Washington State Dept. of Ecology*, 178 Wn.2d 571, 580, 311 P.3d 6 (2013) (quoting RCW 34.05.570(2)(c)). Here, the Court should declare the Department’s new directive invalid because the Department seeks to expand the scope of the CN legislation to include activities that the legislature chose not to subject to CN review. *See Lummi Indian Nation v. State*, 170 Wn.2d 247, 262, 241 P.3d 1220 (2010) (noting that “it is wholly within the sphere of authority of the legislative branch to make policy, to pass laws, and to amend laws already in effect”).

The Department does not have power to expand the scope of this legislation. “Administrative agencies are creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication.” *State v. Munson*, 23 Wn. App. 522, 524, 597 P.2d 440 (1979) (citing *State v. Pierce*, 11 Wn. App. 577, 581, 523 P.2d 1201 (1974)). “If an enabling statute does not authorize a particular regulation, either expressly or by necessar[y] implication, ‘that regulation must be declared invalid despite its practical necessity or appropriateness.’” *In re Impoundment of*

*Chevrolet Truck*, 148 Wn.2d 145, 156-57, 60 P.3d 53 (2002) (quoting *Wash. Indep. Telephone Ass'n v. Telecomm. Ratepayers Ass'n*, 75 Wn. App. 356, 363, 880 P.2d 50 (1994)).

The Department's new directive purports to extend the scope of RCW 70.38.105(4). "Administrative rules which have the effect of extending or conflicting in any manner with the agency's enabling act do not represent a valid exercise of authorized power, but constitute an attempt by the administrative body to legislate." *Munson*, 23 Wn. App. at 525 (citing *State v. Miles*, 5 Wn.2d 322, 326, 105 P.2d 51 (1940)). As such, the Department's new rule is invalid.

- b. The Department's revised interpretation is entitled to no deference whatsoever.

As an initial matter, this is not a case in which the courts give deference to an agency's interpretation of its enabling legislation. Our Supreme Court rejected this same argument with respect to the agency's changed interpretation in *Dot Foods*. The Supreme Court observed that DOR's prior history of interpreting the same language differently deprived it of any deference that may have otherwise been due:

The Department's argument for deference is *a difficult one to accept, considering the Department's history interpreting the exemption*. Initially, and shortly after the statutory enactment, the Department adopted

an interpretation which is at odds with its current interpretation. One would think that the Department had some involvement or certainly awareness of the legislature's plans to enact this type of statute.

*Dot Foods*, 166 Wn.2d at 921. (emphasis added).

The Supreme Court endorsed this same principle in *State Dep't of Transp. v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 461, 645 P.2d 1076 (1982). The question there was whether ferry system employees of the Department of Transportation (“DOT”) were state employees subject to the jurisdiction of the State Employees’ Insurance Board (“SEIB”). *Id.* at 456. The DOT had historically negotiated insurance plans with ferry system employees, under a statute giving it power to negotiate “provisions for health and welfare benefits for its employees.” *Id.* at 459 (citing RCW 47.64.030). This practice continued after the legislature, in 1970, established the SEIB and made the SEIB’s insurance plans mandatory for state agencies. *Id.* at 460 (citing RCW 41.05). In 1980, however, the Attorney General issued a letter opinion stating that the types of insurance plans offered by the DOT to ferry system employees must be determined by the SEIB. *Id.* at 460-61 (citing AG Letter Opinion 1980 No. 3).

The DOT and the ferry system employees (“appellants”) sued the SEIB for a declaration that the DOT could negotiate employer-supported

insurance coverage with the ferry system employees separately from the plans offered by the SEIB. *Id.* at 456. The trial court granted summary judgment for the SEIB, but the Supreme Court reversed with instructions to enter summary judgment in favor of the appellants. *Id.* at 463. In reaching this result, the Supreme Court highlighted that the SEIB had acted consistently with the appellants' interpretation since 1970 and that the legislature had never repudiated that construction. *Id.* at 461-62. The court concluded "that historically and chronologically, appellants' interpretation of the statutory interplay must prevail." *Id.* at 461.

These principles draw support from the doctrine of legislative acquiescence. See *Newschwander v. Bd. of Trustees of Washington State Teachers Ret. Sys.*, 94 Wn.2d 701, 710-11, 620 P.2d 88 (1980). The *Newschwander* court, in agreeing with an agency interpretation, noted that the regulation in question was adopted immediately after the enactment of the corresponding statute in 1963. *Id.* at 710. The Court then explained that great weight must be given to an agency's contemporaneous construction, where the legislature silently acquiesced over the intervening seventeen years. *Id.* at 711.

Likewise, here, the legislature's lengthy history of silently acquiescing in an interpretation, which the Department established shortly

after the CN legislation was enacted, suggests the legislature's agreement with this interpretation. To the extent any deference is in order, it should favor the original interpretation.

c. Expansion of an ASC does not create a "new" ASC.

The CN legislation does not subject the expansion of an ASC to CN review. The legislature listed seven types of activities to which CN review applies. *See* RCW 70.38.105(4). Nothing in this list describes an increase in the number of operating rooms.

The Department relies on the general language requiring CN review for "a new health care facility," under RCW 70.38.105(4)(a). This new interpretation conflicts with the plain language of the statute, the overall statutory scheme, the legislative purpose, and the Department's historical course of dealing. As such, in addition to being an improperly promulgated rule, the Department's new interpretation is simply wrong.

*The Department's new interpretation conflicts with the plain statutory language.*

Under the plain language, the statute refers to "new" health care facilities, *not* "expanded existing health care facilities." The courts will not "add words where the legislature has not included them." *Olympic Tug & Barge, Inc. v. Wash. State Dep't of Revenue*, 163 Wn. App. 298, 306, 259 P.3d 338 (2011). Instead, the Court "should assume that the

legislature means exactly what it says.” *Van Wolvelaere v. Weathervane Window Co.*, 143 Wn. App. 400, 405, 177 P.3d 750 (2008).

By definition, what is new is not existing. The ASC in question here, for example, has been operating under CN No. 1046 for more than twenty years. CP 8. 44. It will continue to exist—and thus not be “new”—if it adds operating rooms. Nothing in the plain language supports the Department’s assumption that any change in a facility makes it “new.”

Rather, this Court has held that the word “new” in RCW 70.38.105(4)(b) refers to the facility’s statutory identity. *Centennial Villas, Inc. v. State, Dep’t of Soc. & Health Servs.*, 47 Wn. App. 42, 48, 733 P.2d 564 (1987). The question in *Centennial Villas* was whether an existing, CN-approved nursing home or hospital needed a second CN to provide home health care services. *Id.* at 44. In analyzing whether this change involved a “new health care facility,” the Court looked to the definition of “health care facility” in RCW 70.38.025. *Centennial Villas*, 47 Wn. App. at 47. This definition included “hospitals, . . . nursing homes, . . . and home health agencies.” *Id.* (quoting RCW 70.38.025(7)). The Court concluded that if a provider was licensed to operate as one type of health care facility (a hospital or a nursing home) and sought to also operate as another type (a home health agency), then this “assumption of

an additional identity” would cause it “to become a ‘new health care facility’ within the meaning of RCW 70.38.105(4)(a).” *Id.* at 47–48.

Here, in contrast, TPC and Swedish do not seek to add an “additional identity.” The JV ASC is an ambulatory surgical facility under RCW 70.38.025(6) and will continue to be such, regardless of the number of operating rooms. The Department’s contention that increased capacity to provide the *same* services (i.e. ambulatory surgeries) somehow equates to a new facility has no merit.

*The Department’s new interpretation conflicts with the statutory scheme.*

This new interpretation is also inconsistent with the statutory scheme read as a whole. In construing a statute, the Court must accord meaning to each word because the drafters “are presumed to have used no superfluous words.” *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (quoting *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000)). Notably, in a separate subsection, the legislature expressly provides that a change in a hospital’s bed capacity, “which increases the total number of licensed beds,” is subject to CN review. RCW 70.38.105(4)(e). Likewise, the statute requires a CN for any “increase in the number of dialysis stations in a kidney disease center.” RCW 70.38.105(4)(h).

Thus, when the legislature has chosen to subject an increase in an existing facility's capacity to CN review, it has said so specifically. But the legislature chose *not* to subject an increase in the number of operating rooms to CN review. *See State v. Swanson*, 116 Wn. App. 67, 75, 65 P.3d 343 (2003) (under the doctrine of *expressio unius est exclusio alterius*, where a statute "specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature") (quoting *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969)). And, if any expansion of a facility's capacity transformed it into a "new" facility, subject to CN review under RCW 70.38.105(4)(a), then the separate provisions subjecting specific types of capacity increases to CN review would be rendered superfluous.

The Department claims that the new interpretation is consistent with its methodology for determining need in WAC 246-310-270. This discussion is inapposite. The legislature gave the Department authority over the expansion of hospital-bed capacity and the number of dialysis stations in a kidney disease center. RCW 70.38.105(4)(c), (h). It chose *not* to extend such authority to the expansion of an ASC. The fact that the Department may have promulgated regulations that are consistent with its

new interpretation does not allow it to assume powers that the legislature chose not to delegate.

*The Department's new interpretation conflicts with the legislative purpose.*

The Department also relies on its own regulation, WAC 246-310-270, to argue that the public policy at issue is to limit the supply of operating rooms to the future need. The legislative purpose is, of course, an important consideration. *See Whatcom Cnty. v. City of Bellingham*, 128 Wn.2d 537, 548, 909 P.2d 1303 (1996) (“We have never blindly applied a statute without considering the context of the statute’s language or the legislative purpose.”).

Contrary to the Department’s policy arguments, however, the Supreme Court has specifically examined the legislative intent underlying the CN statutes and held that the “promotion and maintenance of *access* to health care services for all citizens” is the “overriding purpose of the CN program.” *Overlake*, 170 Wn.2d at 55 (emphasis added). Notably, *Overlake* interpreted the Department’s regulations governing ASCs. *See id.* The court held that while “controlling the costs of medical care and promoting prevention are also priorities,” these goals have “secondary significance because, to a large extent, they would be realized by promotion and maintenance of *access* to health care services for all

citizens.” *Id.* (emphasis added). The Department’s interpretation of RCW 70.38.105(4)(a), to preclude expansion of a CN-approved ASC to meet changing community needs, undermines this overriding policy.

*The Department’s new interpretation conflicts with its historical course of dealing.*

Finally, while the Department argues that its new interpretation is consistent with its own regulations, it ignores its historical practice of omitting operating rooms from its capacity-control measures. The Department does *not* control, for example, the expansion of operating-room capacity in hospitals. *See* CP 36–41. The Department also exempts operating rooms in the offices of private physicians or dentists from the CN requirement. *See* WAC 246-310-010(5) . And, of course, for many years the Department did not purport to control increases in ASC operating-room capacity. *See* CP 20–34.

That longstanding interpretation is consistent with the plain language and with the goal of *access*, which our Supreme Court holds is the CN program’s “overriding purpose.” *Overlake*, 170 Wn.2d at 55. With its new interpretation, the Department seeks to relegate that overriding purpose, in favor of goals that the Supreme Court has described as “secondary.” *Id.* Simply put, the Department had it right initially, and the Court should reject this recent attempt to rewrite the CN legislation.

d. A relocated ASC is not a “new” facility.

For these same reasons, the relocation within the same planning area of an ASC is likewise not subject to CN review. Again, nothing in the plain language of RCW 70.38.105(4)(a) equates “new” with “at a different location.” Nor has any reported Washington case held that a relocated healthcare facility qualifies as “new,” where it remained in its original planning area. *Cf. MultiCare Health System v. Department of Health*, 118 Wn. App. 597, 77 P.3d 363 (2003) (requiring CN review where hospital sought to move a portion of its licensed bed capacity to establish a new hospital facility, as a satellite campus of the main hospital, in a different planning area).

The distinction between moving a facility within the planning area and moving it to a new planning area is consistent with the Department’s rules regarding the relocation of kidney disease treatment centers. The Department has determined that such a facility becomes a “new” facility if it is transferred to another planning area or if it moves only a portion of its stations to a new location, while still operating the rest of the original facility, within the planning area. WAC 246-310-289(1), (2). But, if the entire existing facility ceases operation and the relocation is within the

same planning area, no “new” facility is created, provided certain other criteria are met.<sup>12</sup> WAC 246-310-289(3).

Here, however, the Department argues that the only option for relocating an ASC without CN approval is by obtaining an “amended” CN under WAC 246-310-570(1)(f), but a CN can be amended only for two years after issuance and ninety days after project completion. Therefore the only way the ASC at issue here can be moved is by obtaining a new CN.<sup>13</sup> This argument proves too much.

According to the Department, a CN application will be approved only if all CN criteria are satisfied. And, as the Department acknowledges, these criteria include showing that there is a need for “*additional* operating rooms” in the planning area.<sup>14</sup> What this would mean is that a provider must show need for *additional* operating rooms just to move its existing operating rooms to a new location.

The logical result of the Department’s position is nonsensical. Once the initial ninety-day window has expired, the facility can *never*

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<sup>12</sup> The Court may note that one of the criteria is that no new stations are added. WAC 246-310-289(3)(b). This is because the legislature has, *by statute*, expressly empowered the Department to require CN review for any “increase in the number of dialysis stations in a kidney disease center.” RCW 70.38.105(4)(h). As explained above, the legislature has not granted the same control over the number of operating rooms in an ASC

<sup>13</sup> Brief of Appellant at 9–10.

<sup>14</sup> Brief of Appellant at 6.

relocate—no matter how ideal the public access offered by the new location, no matter how outdated the current space might be, no matter how much more conducive the move may be for controlling costs— until the planning area’s demographics have changed such that in the Department’s view there is need for additional operating rooms, even if the relocation does not involve adding operating rooms. This cannot be what the legislature intended when it enacted a program designed to ensure public access to affordable, quality healthcare.

The Department overlooks as well that, since WAC 246-310-570 was adopted in 1996, the Department has repeatedly ruled that relocation of an existing ASC within the planning area does not require CN review. CP 20–34, 256. The Department has thus historically recognized a distinction between the requirements applicable to an established facility and those applicable to a facility that is in development, which the Department regulates under WAC 246-310-570. Again, the Court should give greater weight to the historical interpretation. *See Dot Foods*, 166 Wn.2d at 921; *Silverstreak*, 159 Wn.2d at 891; *State Dep’t of Transp.*, 97 Wn.2d at 461. CN review is not required for TPC and Swedish’s proposal to move the ASC by two city blocks.

**F. CONCLUSION**

For years, the Department interpreted the CN statute consistently with its plain language, correctly determining that CN approval was not required for the relocation of or addition of operating rooms to an ASC. The Department's new rule is invalid because it was promulgated without formal rulemaking procedures. In the alternative, the rule exceeds the Department's statutory authority because the activities in question do not create a "new" health care facility within the contemplation of RCW 70.38.105(4)(a). Accordingly, the Court should affirm the trial court's declaration that the Department's new rule is invalid.

RESPECTFULLY SUBMITTED this 20th day of March, 2015.

OGDEN MURPHY WALLACE, P.L.L.C.

By   
Donald W. Black, WSBA #25272  
Geoff J. M. Bridgman, WSBA #25242  
Aaron P. Riensche, WSBA #37202  
Attorneys for The Polyclinic

PERKINS COIE LLP

By   
for  
Brian W. Grimm, WSBA #29619  
Attorneys for Swedish Health Services

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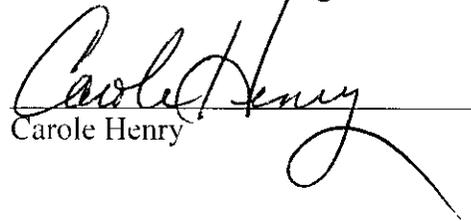
PROOF OF SERVICE

I, Carole Henry, certify that I caused a copy of the foregoing document to be served on the parties listed below on March 20, 2015, as follows:

Brian W. Grimm Perkins Coie 1201 Third Avenue Suite 4900 Seattle, WA 98101 bgrimm@perkinscoie.com jdeshaw@perkinscoie.com Attorneys for Swedish Health Services	Via e-mail
Richard A. McCartan Senior Counsel P.O. Box 40100 Olympia, WA 98504 richardm@atg.wa.gov Attorneys for Department of Health	Via e-mail
Emily Studebaker Garvey Schubert 1191 Second Avenue Floor 18 Seattle, WA 98101 estudebaker@gsblaw.com Attorneys for Amicus Curiae Washington Ambulatory Surgery Center Association	Via e-mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 20<sup>th</sup> day of March, 2015 at Seattle, Washington.

  
Carole Henry