

NO. 71258-6-I

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

SWEDISH HEALTH SERVICES, a Washington nonprofit corporation,

Petitioner,

v.

DEPARTMENT OF HEALTH OF THE STATE OF WASHINGTON,

Respondent.

**INTERVENOR EASTSIDE ENDOSCOPY CENTER AND
KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2
d/b/a EVERGREENHEALTH**

RESPONSE BRIEF

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I. INTRODUCTION

On May 26, 2006, Swedish Health Services (“Swedish”) obtained Certificate of Need #1330 (“CN #1330”) from the Washington State Department of Health (the “Department”) to establish a new ambulatory surgical facility (“ASF”) in Issaquah (the “Issaquah ASF”).¹ Prior to commencing the Issaquah ASF, Swedish obtained another certificate of need (“CN”) to build a hospital in Issaquah. Upon the opening of its hospital, Swedish shifted its physicians and staff from its existing outpatient medical campus in Issaquah and began directing its surgeries to the hospital.

Then, after a substantial delay, Swedish requested a six-month extension of the validity period of CN #1330R (the “Extension Request”) and concurrently filed an application to amend CN #1330R, seeking to implement its business decision to change the ASF project site to Redmond (the “Application for Site Change”). The Department denied the Extension Request and also denied the Application for Site Change because the validity period of CN #1330R had expired.

¹ This proceeding focuses on CN’s #1330 and #1330R, issued to Swedish on May 26, 2006 and May 7, 2008, respectively. CN #1330 approved the establishment of a three-operating room ambulatory surgical facility to be located in Issaquah, within the East King planning area. Subsequent to the issuance of CN #1330, Overlake Hospital Medical Center filed an adjudicative appeal of the approval. At the completion of the adjudicative appeal process, the Department issued CN #1330R confirming the approval of CN #1330.

In both the King County Superior Court and this Court, Swedish has contested the Department's decisions to deny its validity-period extension request and its application for a site change. The Superior Court affirmed the two challenged decisions under RCW 34.05.574(1) and ruled that CN #330R is expired and no longer valid.

Eastside Endoscopy Center, LLC ("EEC") and King County Public Hospital District No. 2, d/b/a EvergreenHealth ("Evergreen") respectfully submit that this Court should affirm that the Department acted properly in denying Swedish's Extension Request and Swedish's Application for Site Change. In addition to the arguments herein, EEC and Evergreen also join with the Department and incorporate by reference all arguments set forth in its Response Brief.

II. ISSUES PRESENTED

1. Whether the Department's denial of Swedish's Extension Request was proper in light of Swedish's failure to establish "substantial and continuing progress"?

2. Whether the Department's Denial of Swedish's Application for Site Change for relocation of the Issaquah ASF to Redmond was proper where (1) the validity period of CN #1330R expired prior to the Department's consideration of the Application for Site Change, and (2) the Application for Site Change was incomplete because there was no showing of need?

III. STATEMENT OF THE CASE

A. Swedish must establish need for additional outpatient operating room capacity in the East King planning area to establish an ASF.

In Washington, a health care provider that proposes to establish a new health care facility must first obtain a CN from the Department. *See* RCW 70.38.105(4); WAC 246-310-020(1). A CN evidences the Department's determination that the proposed health care facility is needed and satisfies certain other criteria, and it sets forth the terms and conditions pursuant to which the CN was issued, including the approved site for the health care facility. *See* RCW 70.38.115(2); WAC 246-310-200. Among the types of health care facilities requiring CN approval are ASFs. *See* RCW 70.38.105(4)(a); RCW 70.38.025(6); WAC 246-310-020(1)(a); WAC 246-310-010(26); WAC 246-310-010(5). An ASF is a freestanding entity where surgeries not requiring hospitalization may be performed. An ASF is reimbursed less than a hospital for the performance of the same surgical procedure.

Upon issuance of a CN, the health care provider must commence the project at the authorized site within two years, all in accordance with the terms and conditions of the CN. *See* RCW 70.38.125; WAC 246-310-580. One six-month extension of the validity period may be obtained, but only if the CN holder has made substantial and continuing progress

towards commencement of the project. *See* RCW 70.38.125(1); WAC 246-310-580(1).

The CN holder does not have a self-executing right to change the site of the project. Rather, if the provider makes a business decision to change the project site, it must first file an application with the Department to amend the existing CN pursuant to the applicable statutory and regulatory requirements. *See* RCW 70.38.115(11); WAC 246-310-570(1).

B. On May 26, 2006, the Department issued CN #1330 approving the establishment of Swedish's Issaquah ASF.

On May 26, 2006, Swedish obtained CN #1330 from the Department approving the establishment of the Issaquah ASF. AR-II at 80-81.² Subsequent to the issuance of CN #1330, Overlake Hospital Medical Center filed an adjudicative appeal of the approval. *Id.* At the completion of the adjudicative appeal process, the Department issued CN #1330R confirming the approval of CN #1330. *Id.* The two-year validity period for CN #1330R began to run on October 1, 2010 and expired on October 1, 2012. *Id.*

C. Rather than developing the Issaquah ASF, Swedish develops a hospital in Issaquah.

On May 31, 2007, approximately one year after receiving CN #1330, Swedish obtained CN #1379 to build a 175-bed hospital in

² There are two Administrative Records in this case. AR-I is for the validity-period case, and AR-II is for the site-change case.

Issaquah (the “Issaquah Hospital”). Swedish obtained CN #1379 on May 31, 2007 to establish a 175-bed hospital in Issaquah. AR-II at 14, n. 2. From that point on, Swedish was well aware that significant changes in the East King planning area—which its own hospital, among other projects, caused—directly impacted the potential need for its ASF in Issaquah.

D. After a substantial delay, Swedish applies for a change of location of the Issaquah ASF project to Redmond.

Following the opening of Swedish’s Issaquah Hospital, it abandoned the Issaquah ASF project, shifted its physicians and staff from its existing outpatient medical campus in Issaquah to this hospital, and began directing its surgeries to the Issaquah Hospital. Then, five years after receiving the initial CN for the hospital and seven months after it had opened, Swedish filed its Extension Request, seeking a six-month extension of the validity period of CN #1330R, and concurrently filed its Application for Site Change, seeking to amend CN #1330R to change the site of the Issaquah ASF to Redmond. AR-II at 756-97; AR-I at 882-900. The Department denied the Extension Request. The validity period of CN #1330R expired on October 1, 2012.³ The Department denied Swedish’s Application for Site Change on October 22, 2012, because the validity period of CN #1330R had expired. AR-I at 961-63; AR-II at 1007-14.

³ The two-year validity period for CN #1330R was tolled while the legal proceedings discussed in note 1, *supra*, were pending, thereby extending the expiration date of the two-year validity period to October 1, 2012.

IV. STANDARD OF REVIEW

In a petition for review under RCW 34.05, this Court is in the same position as the superior court and reviews the validity of the contested administrative decision. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

Under the Administrative Procedure Act, agency decisions regarding CN's are "presumed correct and the challenger bears the burden of proof." *King County Public Hosp. Dist. No. 2 v. Washington State Dept. of Health*, 167 Wn. App. 740, 749, 275 P.3d 1141 (2012). Where the challenger alleges an error of law, the reviewing court must "accord substantial deference to the agency's interpretation, particularly in regard to the law involving the agency's special knowledge and expertise." *Id.* To find an agency's decision to be arbitrary and capricious, the reviewing court "must conclude that the decision is the result of willful and unreasoning disregard of the facts and circumstances." *Id.* A reviewing court will accept agency factual findings unless they are clearly erroneous, meaning a review of the record leaves it with "a definite and firm conviction that a mistake has been made." *Id.* Thus, the challenger of a CN determination has the "heavy burden" of showing the Department "misunderstood or violated the law, or made decisions without substantial evidence." *Id.*

V. ARGUMENT

A. The Court Should Not Order the Department to Amend CN #1330R, Because the Application for Site Change Could Not Be Approved After Expiration of the Validity Period.

1. The Department Properly Denied Swedish's Application for Extension of the Validity Period Because Swedish Had Made No Progress on the Issaquah ASF.

A CN is valid for two years. RCW 70.38.125(1). The Department is permitted to grant a single six-month extension to the validity period *if—within at least 120 days of the end of the validity period—the CN holder can demonstrate that it has made substantial and continuing progress toward commencement of the project*, as defined by the regulations. RCW 70.38.125(1) (emphasis added); see also WAC 246-310-580(1).

“Commencement of a project” means:

whichever of the following occurs first: In the case of a construction project, giving notice to proceed with construction to a contractor for a construction project provided applicable permits have been applied for or obtained within sixty days of the notice; beginning site preparation or development; excavating or starting the foundation for a construction project; or beginning alterations, modification, improvement, extension or expansion of an existing building. In the case of other projects, initiating a health service.

WAC 246-310-010(13).

In the case of a project involving construction, a CN holder demonstrates that it has made “substantial and continuing progress” toward commencement of the project by establishing:

- (a) When review and approval by the department of the final plans for construction is required, the submission of working drawings;
- (b) When plan approval is not required by the department, receipt of copies of the working drawings for construction; or
- (c) In the event working drawings have not been submitted, the applicant must demonstrate that he or she has made continuous progress toward commencement of the project.

WAC 246-310-580(2). Swedish did not make substantial or continuing progress toward the commencement of the Issaquah ASF project as shown by its own progress reports submitted to the Department, and therefore it was not entitled to a six-month extension of its CN validity period.

Swedish admits that it made no progress toward commencement of the Issaquah ASF project. Charles L. Salmon, Chief Executive at the Swedish Issaquah Medical Center, has testified that Swedish decided not to develop the Issaquah ASF:

We -- we did have a -- we do have an approved certificate of need for three operating rooms at our original Issaquah campus site ... [a]nd essentially we did not act on that ... we have not proceeded on constructing anything with that operation.

See December 21, 2012 Declaration of Emily R. Studebaker in Support of Motion of Eastside Endoscopy Center, LLC for Leave to Intervene Under

RCW 34.05.433, Ex. E (transcript of excerpts from November 27, 2012 Hearing), attached as Exhibit A to Intervenor Eastside Endoscopy Center's Response to Swedish's Opening Brief⁴ (hereafter "Exhibit A"), at p. 176, l. 20-5 and p. 177, l. 1-5. Mr. Salmon also testified that Swedish did not intend to develop the Issaquah ASF in the future:

Q. Is it your intention at some point, if allowed by the Department, to someday perhaps open that ASC or commence that project?

A. At the -- at the Lake Sammamish or the Issaquah facility?

Q. Yes.

A. I don't think so. I -- I -- it's hard for -- it's hard to speculate, I guess, at this point, but there would be a lot of capital expense required in developing a -- the actual functionality of a three-room ASC in that facility, and I can't foresee that in the immediate future. I really can't.

Id. at p. 185, l. 1-23.

Consistent with Mr. Salmon's testimony, Swedish's opening brief in this proceeding ("Swedish's Opening Brief") makes clear that Swedish did not make substantial and continuing progress on the Issaquah ASF project. *See* Swedish's Opening Brief at 8. In fact, rather than focus its efforts on commencing the Issaquah ASF, Swedish's efforts focused on developing an ASF in Redmond, a project for which it did not have a CN (or any other type of approval from the Department).

⁴ This document was previously filed with the King County Superior Court, Case No. 13-2-15721-7, on October 7, 2013, at Dkt. Sub. No. 31. For the Court's reference, a true and correct copy of the Declaration and relevant Exhibit are attached hereto.

Attempting to demonstrate that it made substantial and continuing progress toward commencement of the Issaquah ASF project, Swedish indicates in its opening brief that it (a) reevaluated the project's Issaquah site and decided to change the location of the project to a Redmond site; (b) communicated with the landlord at the Redmond site; (c) analyzed the Redmond site to ensure it met Swedish's specifications; and (d) applied to change the location from Issaquah site to Redmond site. Swedish's Opening Brief at 10, n. 4. As found by the Health Law Judge, these efforts do not establish progress toward commencement of the Issaquah ASF for which Swedish had received a CN. Instead, they further demonstrate Swedish's abandonment of the Issaquah ASF project.

2. **Swedish's Amendment Application for Site Change Could Not Be Approved After Expiration of the Validity Period of CR #1330R.**

On August 30, 2012, the CN Program denied Swedish's application for a six-month extension to the validity period of CN #1330. AR at 961-63. That denial meant the validity period for CN #1330R expired on October 1, 2012. The Application for Site Change could not be approved thereafter, because the validity period of the underlying CN had expired.

Swedish argues that its Application for Site Change should be approved because it could have been approved by the Program prior to the October 1, 2012, expiration of the validity period for CN #1330R.

Swedish's Opening Brief at 11-13. What Swedish fails to point out, however, is that Swedish's own delays made it impossible for the Department to approve the Application for Site Change prior to the October 1, 2012, expiration of the validity period for CN #1330R.

3. **Swedish Delayed Filing the Application for Site Change, Despite Its Early Decision to Abandon the Issaquah ASF.**

Testimony from Mr. Salmon establishes that Swedish made its decision to abandon the Issaquah ASF project and instead to shift its physicians and staff and direct its surgeries to the Issaquah Hospital at least as early as October 27, 2011, the date on which the Issaquah Hospital became licensed and operational. AR-II at 14, n. 2. It is more likely that this decision was contemplated from the time Swedish received a CN for the Issaquah hospital. Despite this, Swedish did not file its Application for Site Change until May 29, 2012, a delay of at least seven months after the opening of the Issaquah hospital.

Mr. Salmon testified that, "as part of that prioritization of directing surgeries in the area of that hospital to the hospital environment," Swedish was "not focusing on making available to the community surgeries" at the Issaquah ASF. Exhibit A at p. 180, l. 19-24, p. 181, l. 1-3. Mr. Salmon explained Swedish's abandonment of the Issaquah ASF project as follows:

[I]t's very simple. We have -- we have a brand-new facility, state-of-the-art equipment, very customer-friendly processes

that essentially I think result in kind of a world-class care experience for the patients as well as for clinicians that would like to practice there relative to responding to their needs for rapid turnaround and essentially having a great experience from a surgery perspective, and we've got basically a lot of capacity for handling future demand from the standpoint of room availability and -- and we need to grow, and, quite honestly, I -- it's hard to imagine why we would need to create other new facilities in our immediate geographic area.

Id. at p. 179, l. 12-25. (Emphasis added).

Swedish admits that, rather than commencing the Issaquah ASF, it instead decided to build the Issaquah Hospital and to shift its physicians and staff and direct surgeries there. Despite Swedish's acknowledgment that it was "hard to imagine why [Swedish] would need to create other new facilities in [the Issaquah Hospital's] immediate geographic area," Swedish did not submit its Application to the Department until May 29, 2012. Due to Swedish's delay, the validity period of CN #1330R expired prior to the Department's consideration of the Application, and the Department therefore denied the Application.

B. This Court Should Not Order the Department to Amend CN #1330R Because the Application for Site Change Was Incomplete.

1. An Applicant for an Amended CN Is Required to Show Need at the Time the Application for the Amended CN Is Filed.

An applicant for an amended CN is required to show, and the Department is required to make a determination of, need at the time the application for an amended CN is submitted. This is consistent with the plain language of the applicable sections of chapter 246-310 of the Washington Administrative Code as well as the intent of the regulatory scheme pursuant to which the Department reviews applications and determines whether to issue CN's and CN amendments.

Under WAC 246-310-570, an amended CN is required for “[a] change in the approved site” of “a project for which a certificate of need was issued. . . .”⁵ An application for an amended CN must be “submitted in accordance with the provisions of WAC 246-310-090,” which sets forth the process for submitting CN applications, the required content of those applications, and the procedures related to the Department’s review of applications. WAC 246-310-570(3). Importantly, an application submitted in accordance with WAC 246-310-090 must include the

⁵ The regulations define a “project” as “all undertakings proposed in a single certificate of need application or for which a single certificate of need is issued.” WAC 246-310-010(46).

information “necessary to determine whether the proposed project meets applicable criteria and standards.” WAC 246-310-090(1)(a)(i).

By its terms, WAC 246-310-090 applies broadly to “[a] person proposing an undertaking subject to review” and is not limited to persons seeking an initial CN. WAC 246-310-090(1)(a). Accordingly, pursuant to WAC 246-310-570(3), WAC 246-310-090 applies the same content and procedural requirements to an application for an amended CN as to an application for an initial CN.

When reviewing applications, the Department “considers four criteria: 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 Public Hosp. Dist. No. 2 v. Dept. of Health*, 178 Wn.2d 363, 367 (2013) (citing WAC 246-310-200(1)). Accordingly, one of the “applicable criteria and standards” that the Department must consider when reviewing an application for an amended CN is “[w]hether the proposed project is needed.” WAC 246-310-200(1)(a). The criteria for determining need are set out in WAC 246-310-210, which applies to the “determination of need for *any project*.” WAC 246-310-210 (emphasis added).

The plain language of these criteria establishes that the determination of whether the proposed project is needed must be made at the time of the Department’s consideration of the application. *See* WAC

246-310-210(1) (“The population served or to be served *has need* for the project and other services and facilities of the type proposed *are not or will not be* sufficiently available or accessible to meet that need.”); WAC 246-310-210(1)(b) (“In the case of health services or facilities proposed to be provided, the efficiency and appropriateness of the use of *existing services and facilities* similar to those proposed.”); WAC 246-310-210(2)(a) (“The extent to which medically underserved populations *currently use the applicant’s services . . .*.”); WAC 246-310-210(2)(b) (“The *past performance* of the applicant in meeting obligations”) (emphasis added throughout). It would be impossible for the Department to make an adequate determination of need with respect to these criteria simply by relying on a determination of need made in connection with the issuance of the original CN. These criteria all speak in the present tense and direct the Department to consider the relevant information in existence at the time the application for an amended CN is filed.

Relying on a stale need determination in connection with an application for an amended CN does not serve the policy goals of the CN program and is inconsistent with the legislative intent behind Chapter 70.38 of the Revised Code of Washington. *See King County Public Hosp. Dist. No. 2*, 178 Wn.2d at 367 ; RCW 70.38.015.

This is particularly apparent in the present case, where the initial CN was issued based on a need determination carried out more than seven

years ago. There can be no question that the information the Department is required to consider in its need analysis would be significantly different today from what it was in 2007. Swedish acknowledges as much in its opening brief. *See* Swedish's Opening Brief at 8 (describing "significant changes in the East King planning area" that have taken place since CN #1330R was issued).

2. **The 2006 Need Determination Is Inadequate to Support the Issuance of an Amended CN in 2014.**

The CN at issue in this proceeding, CN #1330R, was issued to Swedish on May 26, 2006—almost eight years ago. The Department's decision to issue CN #1330R was based on its determination of the need in 2006 for operating rooms in the East King health services planning area. Significant changes have occurred since that time, and even Swedish concedes that the need is different today. Swedish describes several "significant changes" in the East King planning area that have occurred since the issuance of the CN #1330R almost eight years ago. Swedish's Opening Brief at 8. Some of these changes are described below:

- Since CN #1330R was issued, an additional 175-bed acute care hospital has become licensed and operational.⁶ Swedish's Opening Brief at 8. The hospital added 14 operating rooms to the East King planning area. Exhibit A at p. 169, l. 3-25; p. 170, l. 1-20.

⁶ The CN Program issued CN #1379 to Swedish on May 31, 2007, approving the establishment of a 175-bed hospital in Issaquah. AR-II at 14, n. 2.

- Since CN #1330 was issued, there are “several” new ambulatory surgical facilities operating in the East King planning area. Swedish’s Opening Brief at 8.

The CN Program uses the numeric methodology outlined in WAC 246-310-270 for determining the need for an additional ASF in a health planning area. The numeric methodology estimates operating room need by using multiple steps defined in the regulation. It determines existing capacity of dedicated outpatient and mixed-use operating rooms in the planning area, subtracts this capacity from the forecast number of surgeries to be expected in the area for the third year of the proposed ASF’s operation, and examines the difference to determine whether a surplus or shortage of operating rooms is predicted. If a shortage of operating rooms is predicted, the shortage of dedicated outpatient and mixed-use rooms is calculated to determine the need.

Swedish’s establishment of the Issaquah Hospital and the establishment of several other ASFs are “significant changes” in the East King health planning area that have occurred since the issuance of CN #1330R in 2006. The parties agree the information the Department is required to consider in its need analysis would be significantly different today from what it was in 2006. Accordingly, because the Department did not conduct a need analysis with respect to Swedish’s Application for Site Change, which sought to amend CN #1330R in order to obtain a site change from Issaquah to Redmond based on a need analysis conducted

nearly eight years ago, this Court should deny Swedish's request to order the Department to amend CN #1330R to reflect Swedish's proposed site change.

VII. CONCLUSION

For the foregoing reasons, intervenor EEC and Evergreen respectfully request that this Court affirm the Department's denial of Swedish's Application for an Extension of the Validity Period and the Department's denial of Swedish's Application for Site Change.

RESPECTFULLY SUBMITTED this 18th day
of March, 2014.



ROGER HILLMAN



GREGORY A. MCBROOM *via telephone authorization*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury of the laws of the State of Washington that on the date signed below, she caused a copy of the document to which this certification is attached to be served on the following individuals as described below:

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SIGNED this 24 March 2014, at Seattle, Washington.


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