

No. 72612-9-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SWEDISH HEALTH SERVICES,
a Washington nonprofit corporation,

Petitioner,

v.

DEPARTMENT OF HEALTH OF THE STATE OF
WASHINGTON,

Respondent.

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DIVISION ONE
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OPENING BRIEF OF SWEDISH HEALTH SERVICES

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I. INTRODUCTION

The Washington State Department of Health (the “Department”) may issue a Certificate of Need (“CON”) to a healthcare provider to provide a healthcare service regulated by the CON laws if (1) the provider’s request satisfies the regulatory criteria applicable to the type of service at issue, or (2) special circumstances warrant approval of a request that does not satisfy the applicable regulatory criteria.

Swedish Health Services (“Swedish”) asked the Department to issue a CON to Swedish to provide percutaneous coronary intervention (“PCI”) services at its First Hill campus in central Seattle, based on special circumstances. The Department determined, as a matter of law, that it does not have the authority to approve a CON application based on special circumstances, declined to consider Swedish’s evidence of special circumstances, and denied Swedish’s application.

The Department’s determination constituted legal error. In *King County Public Hospital District No. 2 v. Washington State Department of Health*, 178 Wn.2d 363, 309 P.3d 416 (2013) (the “*Odyssey*” case), the Washington Supreme Court confirmed the Department’s authority to approve, based on special circumstances, a CON application that does not satisfy all regulatory criteria. Swedish respectfully requests that the Court correct the Department’s legal error and remand this matter to the

Department to conduct a hearing and determine whether or not Swedish's application should be approved based on special circumstances.

II. ASSIGNMENTS OF ERROR

A. The Department erred by determining, as a matter of law, that a CON application may not be approved based on special circumstances.

B. The Department erred by failing to determine whether Swedish's CON application should be approved based on special circumstances.

C. The Department erred by denying Swedish's application.

III. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether the Department may approve a CON application that does not satisfy applicable CON regulatory criteria if approval of the application is warranted by special circumstances.

IV. STATEMENT OF THE CASE

A. Swedish operates two hospital campuses in central Seattle.

Swedish operates five hospitals, including two in central Seattle: its "First Hill" campus at 747 Broadway and its "Cherry Hill" campus at 500 – 17th Avenue. Application Record ("AR") 434. These two hospital campuses are located about eight blocks from each another. The reason Swedish operates two hospital campuses so close to each other is

historical. The hospital now known as First Hill has been operated by Swedish since 1912. The hospital now known as Cherry Hill formerly was Providence Seattle Medical Center, and was acquired by Swedish in 2000. Therefore, these two hospitals became part of the same system only fourteen years ago.

At that time, Swedish operated a cardiac surgery program at First Hill and Providence operated a cardiac surgery program at what is now Cherry Hill. After the acquisition, Swedish continued to provide cardiac surgery, and other interventional cardiac procedures, at both locations for another six years.

Swedish ultimately decided to consolidate cardiac care at one location, and chose Cherry Hill rather than First Hill to be that location. Accordingly, Swedish transitioned all cardiac surgery and other interventional cardiac procedures, including PCIs, to the Cherry Hill campus by 2006.

PCI refers to certain procedures performed by cardiologists for the revascularization of obstructed coronary arteries. *See* WAC 246-310-705(4). These include bare and drug-eluting stent implantation; percutaneous transluminal coronary angioplasty; cutting balloon atherectomy; rotational atherectomy; directional atherectomy; excimer laser angioplasty; and extractional thrombectomy. *See id.* PCIs are “invasive”

procedures, but are not considered to be “surgery.” *See id.* Annually, more than 14,000 such procedures are performed statewide. AR 431.

B. Swedish is a leading provider of cardiac care.

Swedish operates a world-class cardiology program. AR 730. Swedish’s cardiology program, now based at Cherry Hill, is also the largest in western Washington, whether measured in terms of cardiac surgery, invasive cardiac procedures, or PCIs specifically. AR 431. Indeed, approximately 1 in 12 PCIs performed statewide is performed at Cherry Hill. AR 431.

C. The number of PCI providers in Washington is controlled through Certificate of Need laws.

In Washington, healthcare providers must obtain CON approval from the Department before establishing certain types of healthcare facilities or providing certain types of healthcare services. *See* RCW 70.38.105(4); WAC 246-310-020(1). The Department generally will issue a CON only if it determines that the proposed facility or service is needed by the population to be served and satisfies certain cost and other criteria. *See* RCW 70.38.115(2); WAC 246-310-200.

The Department’s initial decisions on CON applications are made by the Department’s CON Program. If an application is denied, the unsuccessful applicant may obtain review of the decision in an adjudicative proceeding, in which a Health Law Judge, an administrative

law judge employed by the Department, serves as the presiding officer. *See* RCW 70.38.115(10)(a); WAC 246-310-610(1). If the presiding officer also denies the application, the applicant may obtain review of the presiding officer's decision by a review officer appointed by the Secretary of Health. *See* WAC 246-10-701(1). The review officer's order constitutes the Department's final decision on the application.

For purposes of CON review, the Department divides PCIs into two categories: "emergent" and "elective." The Department defines "emergent" to mean those situations in which "a patient needs immediate PCI because, in the treating physician's best clinical judgment, delay would result in undue harm or risk to the patient." WAC 246-310-705(3). The Department defines "elective" to mean "a PCI performed on a patient with cardiac function that has been stable in the days or weeks prior to the operation." WAC 246-310-705(2).

Hospitals with on-site cardiac surgery programs, like Cherry Hill, are permitted to perform both emergent and elective PCIs. Hospitals without on-site cardiac surgery programs, like First Hill following the consolidation of Swedish's cardiac program at Cherry Hill, are permitted to perform emergent PCIs, but are not permitted to perform elective PCIs unless they obtain CON approval to do so. *See* WAC 246-310-700.

D. Three hospital systems provide elective PCIs in western King County.

The Department evaluates “need” for new elective PCI programs within geographical “planning areas.” First Hill and Cherry Hill are in the “King West” planning area. *See* WAC 246-310-705(5). In addition to Swedish, two other hospital systems provide elective PCIs in the King West planning area: Virginia Mason and UW Medicine, which provides PCIs at both the University of Washington Medical Center and the UW-affiliated Northwest Hospital. Together, Swedish, Virginia Mason, and UW Medicine provide approximately 84% of the PCIs received by King West residents. AR 445. In other words, very few people choose to leave the planning area to obtain this care; instead, nearly all planning-area residents choose to remain within the planning area given the choice between three large PCI programs operated by three well-regarded health systems. Conversely, many residents of other planning areas “in-migrate” to King West for this care. More than half of the PCIs performed by Swedish, Virginia Mason, and UW Medicine are performed for residents of other planning areas. AR 445 & 658. Thus, there is great demand for PCI capacity in King West, given that these resources are heavily utilized both by residents of the planning area and residents of other planning areas.

E. Swedish seeks to provide elective PCIs at both First Hill and Cherry Hill.

Swedish has determined that its patients would be better served if Swedish were to again provide cardiac services at both First Hill and Cherry Hill, as it did until 2006. An important part of re-establishing a cardiac program at First Hill would be the ability to provide elective PCIs. Swedish accordingly filed a CON application to establish an elective PCI program at First Hill. AR 422-625. The First Hill program would be staffed by the same interventional cardiologists who staff the Cherry Hill program. AR 452; *see also* AR 729-30 (support letters from cardiologists).

F. A PCI program at First Hill would allow Swedish to better care for its patients.

Authorization to provide elective PCIs at First Hill as well as Cherry Hill would allow Swedish to better care for its patients. In particular, Swedish regularly has to transport patients from First Hill to Cherry Hill when they need cardiac care. During the year prior to Swedish's application, 387 such patients had to be transferred—an average of more than one per day. AR 430. All of these patients had to be transferred by ambulance. AR 657. Fifty-six of these patients needed PCIs. AR 430. Many others presumably were transferred based on the possibility they would need a PCI. AR at 442. If Swedish's interventional

cardiologists were permitted to perform elective PCIs at both First Hill and Cherry Hill, such transfers, and the costs associated with them, would be unnecessary. Allowing Swedish to perform PCIs at First Hill also would allow Swedish to better utilize its resources, including operating suites and equipment that could be used for elective PCIs but which are not used for such procedures due to the CON restrictions. AR 442-43.

G. A PCI program at First Hill would not affect any other hospital.

The Department typically must consider whether existing providers are meeting the Department's PCI volume standard before approving a new PCI program in the planning area. *See* WAC 246-310-720(2)(b). However, this consideration is irrelevant here, because Swedish would not be a new provider in the planning area. Swedish already provides elective PCIs in the planning area. This project simply would allow Swedish to split its PCI procedures between Cherry Hill and First Hill, rather than perform all such procedures at Cherry Hill.

As discussed above, elective PCIs are provided in the planning area at Swedish, Virginia Mason, and the UW-affiliated hospitals. By the time a patient obtains an elective PCI from a hospital in one of these systems, the patient already will be in the position of being cared for within one of these systems, and therefore where the patient obtains the PCI already will have been determined. AR 659.

For example, if a patient has a Virginia Mason primary-care physician, the patient will be referred to a Virginia Mason cardiologist, and the patient's PCI will be performed at Virginia Mason. The same would be true for a patient within the Swedish system or the UW system. AR 659.

It is impossible to imagine any circumstance in which a patient receiving an elective PCI at First Hill would have gone to Virginia Mason or one of the UW-affiliated hospitals if the First Hill program did not exist. If the First Hill program did not exist, that patient would have obtained the procedure at Cherry Hill, because the Swedish-affiliated cardiologist who would perform the procedure at First Hill if permitted to do so will instead have performed it at Cherry Hill. AR 659.

For a First Hill program to affect the volumes of Virginia Mason or one of the UW-affiliated hospitals would require that there are patients who *would* obtain PCIs at First Hill instead of Virginia Mason or the UW-affiliated hospitals, but who *would not* obtain PCIs at Cherry Hill instead of Virginia Mason or the UW-affiliated hospitals. No such patients exist. Patients choose between Swedish, Virginia Mason, and the UW. Those patients who choose Swedish are going to obtain their procedure at Swedish, irrespective of whether Swedish can perform them only at Cherry Hill, or also eight blocks away at First Hill. AR 659.

H. Swedish already provides a sufficient number of PCIs to sustain programs at both Cherry Hill and First Hill.

When evaluating a CON application to establish a new elective PCI program, the Department also typically must consider whether there will be a sufficient volume of PCIs needed in the planning area to sustain the new provider above the Department's volume standard. *See* WAC 246-310-720(2)(a). However, this consideration is irrelevant here, because Swedish would not be a new provider and already provides a sufficient number of PCIs at Cherry Hill to sustain programs at both Cherry Hill and First Hill well above the Department's volume standard. During the most recent year for which data is in the record, Swedish performed 1,172 PCIs at Cherry Hill. AR 658. This is more than enough volume to sustain programs at both Cherry Hill and First Hill above the Department's 300-PCI volume standard. *See* WAC 246-310-720(1).

I. Swedish's proposal is supported by special circumstances.

Swedish's application therefore presents a unique situation: a health system which already provides elective PCIs at one planning-area campus seeks to also provide them at another planning-area campus, eight blocks away, to better care for its patients, reduce patient transfers between the two facilities, and better utilize its resources. AR 659. Thus, Swedish's application to provide elective PCIs at its First Hill campus is fundamentally different from every other PCI application the Department

has considered or will consider. Because Swedish's application would not result in a new choice of provider within a planning area, it does not implicate the Department's usual concerns about the impact that another provider may have on existing providers' volumes or the need for another provider in the planning area. Swedish already is the largest provider of PCIs in the planning area. Swedish simply proposes to split these procedures between its Cherry Hill campus, where it currently performs them, and its First Hill campus.

J. The Department denies Swedish's application.

The Department denied Swedish's application. AR 772-808. Swedish commenced an adjudicative proceeding. In that proceeding, Health Law Judge John F. Kuntz (the "Presiding Officer") affirmed the Department's decision on summary judgment. AR 254. The Presiding Officer denied Swedish's application because he determined that existing planning-area providers are not meeting the Department's volume standards (WAC 246-310-720(2)(b)) and there is not numeric need for an additional PCI program in the planning area (WAC 246-310-720(2)(a)). AR 249 & 251. The Presiding Officer concluded that he lacked the authority to approve Swedish's application based on special circumstances. AR 253-54.

Swedish sought review of the Presiding Officer's order, pursuant to WAC 246-10-701. Review Officer Kristin Peterson (the "Review Officer") affirmed the Presiding Officer's summary judgment order, on the same grounds relied upon by the Presiding Officer. AR 415-16 (existing providers' volumes) & 416 (need forecasting methodology). Like the Presiding Officer, the Review Officer concluded as a matter of law that she did not have the authority to approve Swedish's application, based on special circumstances, if these two regulatory requirements were not satisfied, and accordingly denied Swedish's application based on her determination that these two regulatory requirements were not satisfied. AR 416 & 418.¹

K. The Superior Court affirms the Department's decision.

Swedish sought judicial review of the Department's decision in King County Superior Court. CP 1-38. The Honorable Jean Rietschel affirmed the Department's decision. CP 40-41. Swedish now seeks judicial review by this Court. CP 42-46.

¹ Swedish disputes the Department's determination that there is not need in the planning area for Swedish's proposed program. However, the Court need not determine which party's need calculation is correct. Because it is undisputed that UWMC and Northwest each are performing fewer than 300 PCIs per year, Swedish's application may only be approved based on special circumstances, irrespective of whether or not there is a projected need for an additional PCI program in the planning area.

V. STANDARD OF REVIEW

The Court reviews the Department's action (i.e., the Review Officer's final order) pursuant to the judicial review standards set forth in the Administrative Procedure Act (the "APA"). The Court reviews the Department's decision directly, not the Superior Court's order. *See Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000).

Because the Department's decision was an agency order in an adjudicative proceeding, the Court reviews it pursuant to RCW 34.05.570(3), which provides that the Court may grant relief on, *inter alia*, the following grounds:

- The agency has erroneously interpreted or applied the law;
- or
- The agency has not decided all issues requiring resolution by the agency.

See RCW 34.05.570(3).

If the Court determines that relief should be granted from the Department's decision on either of these grounds, the Court may order, *inter alia*, the following relief:

- Order the agency to take action required by law;
- Order the agency to exercise discretion required by law;

- Set aside agency action;
- Enjoin or stay the agency action;
- Remand the matter for further proceedings; or
- Enter a declaratory judgment order.

See RCW 34.05.574(1)(b).

VI. RELIEF REQUESTED

Swedish respectfully requests that the Court determine that the Department may approve a CON application that does not satisfy applicable CON regulatory criteria, based on special circumstances, and remand this matter to the Department to determine whether special circumstances warrant approval of Swedish's application.

VII. ARGUMENT

A. Approval of non-conforming CON applications based on special circumstances is consistent with the purpose of CON laws.

Although CON applications typically must satisfy all regulatory criteria applicable to the type of project at issue, they need not always do so. Non-conforming CON applications may be approved in special circumstances, and doing so is consistent with the purpose of CON laws. The stated legislative intent underlying Washington's CON laws, for example, is 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 [to] recognize prevention as a high priority in health programs.” RCW 70.38.015(1). In certain cases, these goals may be better served by approving a non-conforming application than by treating all applicable CON regulations as absolute prerequisites for approval.

These principles can be illustrated by court decisions applying the CON laws of other states. In Illinois, the CON regulations contain a general statement that “[t]he failure of a project to meet one or more of the applicable review criteria shall not prohibit the issuance of a permit.” 77 Ill. Adm. Code § 1130.660(a). Illinois courts have interpreted this language to allow approval of CON applications that do not satisfy all applicable CON regulations, if special circumstances warrant doing so, even if the regulations applicable to the specific type of project at issue would suggest otherwise.

In one such case, *Marion Hospital Corp. v. Illinois Health Facilities Planning Board*, 753 N.E.2d 1104 (Ill. 2001), a CON was awarded to a hospital to provide open-heart surgery, even though it was undisputed that the hospital could not satisfy the volume requirements set forth in the regulations, and the regulations provided that the volume requirements “must” be satisfied for a hospital to be approved for open-heart surgery. *Marion Hosp.*, 753 N.E.2d at 1106; *see also* 77 Ill. Admin.

Code § 1110.1230(b) (“The applicant *must* document that a minimum of 200 open heart surgical procedures will be performed during the second year of operation or that 750 cardiac catheterizations were performed in the latest 12 month period for which data is available.”) (emphasis added); *Andrews v. Foxworthy*, 373 N.E.2d 1332, 1335 (Ill. 1978) (“The use of the words ‘shall’ or ‘must’ is generally regarded as mandatory.”). However, because no hospital in downstate Illinois would be able to satisfy the requirements, strict application of this requirement would mean that downstate residents would have to travel long distances or leave the state to obtain this care. Based on these special circumstances, the hospital’s CON application was approved, and this action was affirmed by the courts. *See Marion Hosp.*, 753 N.E.2d at 1109 (“It is a necessary function of the Board that it have the discretion to make these types of decisions. ... It could not have been the intent of the legislature that the result of requiring ‘necessary review criteria’ be that downstate patients travel long distances or in some cases leave the state to receive medical services.”).

Even absent a general statement in the CON laws regarding approval of non-confirming applications, courts in other states have found that a CON application may be approved notwithstanding a lack of numeric need, as measured by the applicable CON need-forecasting methodology, if approval is consistent with other CON goals. For

example, one Florida case, *University Community Hospital v. Department of Health and Rehabilitative Services*, 472 So.2d 756 (Fl. Ct. App. 1985), addressed the treatment, within that state’s need methodology, of a cardiac program that had been approved based not on numeric need, but rather based on “the existence of ‘special circumstances’ arising from the fact that [the] facility was intended to serve a substantial number of persons from Latin America” rather than from the planning area itself. *Id.* at 758. The court determined that a facility which had been approved based on such special circumstances should be excluded from capacity when evaluating need for another applicant in the same planning area. *Id.* at 758. Florida’s CON laws in effect at that time provided that among the criteria against which applications should be evaluated are the “[s]pecial needs and circumstances of those entities which provide a substantial portion of their services or resources, or both, to individuals not residing in the health service areas in which the entities are located or in adjacent health service areas”; although not specifically referenced in the court’s opinion, this standard presumably was the basis for the approval of the cardiac programs at issue in that case. *See Fla. Admin. Code, § 10-5.11(9) (1981).*²

² Swedish was unable to locate a copy of Florida’s regulations for 1985, the year of the *University Community Hospital* decision. A copy of the regulations in effect in 1981 was the closest that could be found.

These cases from other states illustrate that sometimes treatment of the applicable CON regulations as absolute prerequisites for approval may undermine, rather than promote, the goals of the CON laws, and that in certain cases approval of non-conforming applications may be warranted. In *Marion Hospital Corp.*, a cardiac program was approved that could not satisfy volume requirements, due to the special circumstances relating to the location of the hospital; *University Community Hospital* related to a cardiac program that was approved notwithstanding a lack of numeric need, due to the special circumstances relating to the patient population to be served by the program.

B. Washington’s CON regulations contain numerous exceptions, exemptions, and caveats consistent with approval of CON applications based on special circumstances.

The Washington CON regulations do not contain a general statement providing for approval of a CON application notwithstanding an applicant’s failure to satisfy some of the CON criteria. However, the Washington CON regulatory scheme contains numerous exceptions, exemptions, and caveats which allow for approval of various types of projects which may not otherwise satisfy applicable criteria. *See, e.g.*, WAC 246-310-040 (Exemptions from requirements for a CON for health maintenance organizations); WAC 246-310-041 (Exemptions from requirements for a CON for continuing care retirement communities’

nursing home projects); WAC 246-310-042 (Rural hospital and rural health care facility exemptions from CON review); WAC 246-310-043 (Exemption from requirements for a CON for nursing home bed conversions to alternative use); WAC 246-310-044 (Exemptions from requirements for a CON for nursing home bed replacements); WAC 246-310-045 (Exemption from CON requirements for a change in bed capacity at a residential hospice care center); WAC 246-310-270(4) (ambulatory surgical facilities should “*ordinarily* not be approved” absent a showing of numeric need) (emphasis added); WAC 246-310-287 (Kidney disease treatment centers-Exceptions); WAC 246-310-360 (nursing home bed need methodology to “be used as a *guideline* and represent only one component of evaluating need”) (emphasis added).

To Swedish’s knowledge, the question whether these exceptions, exemptions, and caveats are exclusive, or whether the Department generally has the discretion to approve an application based on special circumstances, was never considered by a court prior to the *Odyssey* case. In *Odyssey*, the Supreme Court confirmed that the Department has discretion to approve an application which does not satisfy all applicable CON criteria, if special circumstances warrant doing so.

C. In *Odyssey*, the Washington Supreme Court confirmed that a non-conforming CON application may be approved based on special circumstances.

Odyssey Healthcare filed a CON application in 2006, to establish a new hospice agency in King County. Under the CON regulations relating to hospice agencies, Odyssey was required to demonstrate need for a new hospice agency based on actual data for the three years prior to the filing of the application (i.e., based on data from 2003, 2004, and 2005). *See* WAC 246-310-290(7). Odyssey was unable to demonstrate need for its facility based on this data, and the Department denied the application on this ground. *Odyssey*, 178 Wn.2d at 368; *see also* Supplemental Brief of Washington State Department of Health, *Odyssey*, 2012 WL 6827560, at *2 (Department acknowledging that when it evaluated Odyssey’s application based on this data, “[e]xisting services in King County exceeded projected future need, so Odyssey’s application failed to meet the need criterion.”). Odyssey appealed.

The *Odyssey* case had a protracted, complex procedural history, but in 2009, the Department ultimately approved Odyssey’s application, based on “special circumstances.” Specifically, the Department determined that had the applicant filed a new application two years later, need could have been shown based on an updated need forecast (i.e., based on data from years *after* Odyssey’s application, rather than based

solely on the data from the years *prior* to Odyssey's application, as required by the regulation). *Odyssey*, 178 Wn.2d at 369. In light of this, the Department concluded, the application should be approved. *See id.* at 371.

In other words, even though the application did not actually satisfy the specific regulatory requirements, the Department approved the application because the Department determined this was the correct healthcare-planning decision. The Department emphasized that Odyssey's application presented an "unusual" situation. Supplemental Brief of Washington State Department of Health, *Odyssey*, 2012 WL 6827560, at *11. Indeed, the Department argued, the circumstances were not only unusual, they were "unique to Odyssey's application[.]" Respondent State of Washington Department of Health's and Secretary Mary Selecky's Brief, *Odyssey*, 2011 WL 6099219, at *16.

Several existing providers sought judicial review of the Department's decision in King County Superior Court. They argued that Odyssey's application could only be approved if it satisfied all criteria set forth in the regulations, and could not be approved based on special circumstances. The Superior Court agreed, writing that "[t]he Department's decision to settle the Federal Lawsuit by granting Odyssey a CN in King County under the guise of 'special circumstance' and based

upon its 2009 methodology long after the record was closed on a 2006 application, was arbitrary and capricious.” Brief of Respondents, *Odyssey*, 2011 WL 6099220, at *28 (quoting order). Odyssey appealed.

Both this Court and the Supreme Court disagreed with the Superior Court, and affirmed the Department’s approval of Odyssey’s application. The Supreme Court specifically determined that the Department’s consideration of a need analysis based on data other than that required by the regulation was permissible “[i]n light of the special circumstances” relied upon by the Department. *See id.* at 374.

Swedish anticipates that the Department will argue that the issue in *Odyssey* simply was what *evidence* may be considered by the Department in evaluating a CON application, and therefore the Supreme Court was merely affirming an “evidentiary” decision. The salient point, however, is that the “evidence” considered by the Department in *Odyssey* was not evidence that Odyssey satisfied the CON regulations; rather, it was evidence of special circumstances. Odyssey’s application was approved not because it was found to have satisfied the CON regulations, but rather because doing so was warranted by special circumstances. The Department’s consideration of *evidence of special circumstances*, and approval of the application *based on special circumstances*, was found to be permissible by the Supreme Court.

The nature of the Supreme Court’s holding is underscored by Justice Johnson’s dissent, which criticized the majority for granting the Department discretion to approve a CON application which did not satisfy the regulatory criteria. Justice Johnson wrote that “[t]he ‘special’ circumstance relied on by both the agency and the majority ... is not actually special at all[.]” *id.* at 383, and that the Department’s “circumvention of the legal requirements” through reliance upon “an irrelevant ‘special circumstance’” should not stand. *Id.* at 386. Over Justice Johnson’s dissent, the Supreme Court held that the Department *does* have the authority to approve a CON application based on special circumstances.³

D. Approval of a CON application based on special circumstances also is consistent with the Administrative Procedure Act.

Although *Odyssey* resolved the specific legal issue presented in this matter, i.e., whether the Department may approve in special circumstances a CON application that does not satisfy the specific regulatory criteria, it is perhaps worth noting that this also is consistent with the judicial review standards set forth in the APA. The APA

³ Justice Johnson perceived that the actual “special circumstance” underlying the Department’s approval of *Odyssey*’s application was not *Odyssey*’s demonstration of need based on post-application data, but rather that it allowed the Department to resolve *Odyssey*’s separate federal lawsuit against the Department. *See id.* at 382. The connection between the federal lawsuit and approval of *Odyssey*’s application also was referenced in the Superior Court order discussed above. *See* Brief of Respondents, *Odyssey*, 2011 WL 6099220, at *28 (quoting order).

provides that a presiding officer's order in an adjudicative proceeding will be reversed if it is inconsistent with a rule of the agency, *unless* the presiding officer "explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency[.]" RCW 34.05.570(3)(h). This suggests that if the presiding officer *does* state facts and reasons to demonstrate a rational basis for the inconsistency, the presiding officer's order may be upheld. In other words, if the Review Officer had approved Swedish's application based on special circumstances, notwithstanding a determination that Swedish's application did not satisfy some of the regulatory criteria for approval, so long as this was a rational basis for approval the decision could have been affirmed by the courts under the APA.

E. Approval of Swedish's application is warranted by special circumstances.

As discussed above, Swedish's application presents a unique situation: a hospital system which already provides elective PCIs at one planning-area campus seeks to also provide them at another planning-area campus, eight blocks away, to reduce patient transfers between the two facilities and provide better care for its patients. With respect to each of the two grounds for denial of Swedish's application relied upon by the Review Officer, Swedish presented evidence that special circumstances

warranted approval of its application irrespective of whether the criterion at issue was satisfied.

- 1. The volumes of other planning-area providers are irrelevant because they will be unaffected by Swedish's proposed program.**

UW Medicine as a whole performs more than the 300 PCIs required under WAC 246-310-720(1). AR 658. Because these procedures are divided between two hospitals, however, each hospital is below the volume standard if considered in isolation. Specifically, the UW-affiliated cardiologists performed 272 PCIs at the University of Washington Medical Center and 244 PCIs at UW Medicine / Northwest Hospital, or 516 total, during the most recent year for which data is in the record. AR 658.⁴

WAC 246-310-720(2) theoretically protects existing PCI programs which are struggling to meet the volume standard, by not allowing a new PCI program to be approved, as it could further reduce the volumes of the existing programs. That rationale was not implicated by Swedish's application. First, UW Medicine *is* performing far more than the 300 PCIs required by the Department, if its locations are considered together. Second, and more importantly, a program at First Hill would have no effect whatsoever on the UW-affiliated hospitals. Those PCI patients who

⁴ The UW-affiliated cardiologists also performed PCIs at Harborview on an emergent basis. AR 436.

choose Swedish *already* are obtaining these procedures from Swedish— i.e., at Cherry Hill. Those PCI patients who choose UW Medicine will continue to obtain PCIs at the UW-affiliated hospitals regardless of whether Swedish is providing PCIs at First Hill or Cherry Hill.

The Department should have approved Swedish's application irrespective of the volumes at UWMC and Northwest, due to the special circumstances of Swedish's application. Approval of Swedish's application would *not* result in a new choice of provider in the planning area that could impact the existing providers' volumes. Swedish already is a planning-area provider, and whether Swedish can perform PCIs only at Cherry Hill or also eight blocks away at First Hill will have no effect on the volumes of UWMC or Northwest.

2. The volume projections for the planning area are irrelevant because Swedish has adequate internal volume to support two programs.

Under the Department's need forecast, there is no need for another PCI program in the King West planning area. AR 251. WAC 246-310-720(2)(a) theoretically ensures that hospitals providing PCI services will be able to meet the 300-PCI volume standard, by only allowing additional programs if there are an additional 300 PCIs projected to be needed in the planning area above the existing providers' current capacity. That rationale was not implicated by Swedish's application. In the most recent

year for which data is in the record, Swedish performed 1,172 PCIs at Cherry Hill. AR 658. This is more than enough volume to sustain programs at both Cherry Hill and First Hill above the 300-PCI volume standard. Indeed, it is nearly *double* the volume required to do so. Because there is sufficient surplus volume *within Swedish* (i.e., at Cherry Hill) to sustain the proposed First Hill program, whether there is need for an additional provider *outside of Swedish* (i.e., in the planning area as a whole) is immaterial.

Because the Review Officer, and the Presiding Officer, decided this matter on summary judgment, they were required to view the facts in the light most favorable to Swedish. *See Garrison v. Sagepoint Financial, Inc.*, 182 Wn. App. 392, 333 P.3d 424, 432 (2014); *see also* AR 415 (Department applies CR 56 summary-judgment standard in adjudicative proceedings). At minimum, whether or not Swedish's program would impact existing providers and whether or not Swedish had a sufficient volume of PCI cases to sustain programs at both Cherry Hill and First Hill were genuine issues of material fact which should have precluded an award of summary judgment in favor of the Department. The Department cannot assert that Swedish's application should have been denied on summary judgment because it would impact existing providers or because

Swedish had insufficient volume to support two programs. It only was entitled to summary judgment if, as a matter of law, the Department was not permitted to approve Swedish's application based on special circumstances even if Swedish had, in fact, demonstrated that such special circumstances existed.

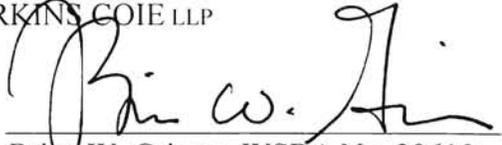
VIII. CONCLUSION

As a matter of law, the Department could have approved Swedish's application based on "special circumstances" if, as a factual matter, such circumstances existed. Accordingly, the Review Officer erred as a matter of law by granting summary judgment to the Department on the ground that special circumstances may not be considered. Swedish respectfully requests that the Court set aside the summary judgment order and remand this matter to the Department to conduct a hearing, consider Swedish's evidence of special circumstances, and determine whether special circumstances exist which warrant approval of an elective PCI program at First Hill.

Respectfully submitted this 5th day
of January 2015.

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CERTIFICATE OF SERVICE

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

Party	Service
Richard A. McCartan Senior Counsel Office of the Attorney General Agriculture & Health Division 7141 Cleanwater Drive SW Olympia, WA 98504 Attorney for Washington State Department of Health	First Class Mail, Postage Prepaid & E-mail to: RichardM@atg.wa.gov RebeccaM3@atg.wa.gov LindaH5@atg.wa.gov AhdOlyEF@atg.wa.gov

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 5th day of January, 2015, at Seattle, Washington.


Julie K. DeShaw, Legal Secretary

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