

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF THE SECRETARY**

In the Matter of:

CERTIFICATE OF NEED #1580 ISSUED
TO US HEALTHVEST, LLC

PROVIDENCE HEALTH & SERVICES –
WASHINGTON D/B/A PROVIDENCE ST.
PETER HOSPITAL

Petitioner

Master Case No. M2016-876

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
FINAL ORDER

APPEARANCES:

Petitioner Providence Health & Services – Washington d/b/a Providence St. Peter Hospital (Providence), by
Perkins Coie LLP, per
Brian W. Grimm and Lauren W. Staniar, Attorneys-at-Law
and
Stephen I. Pentz PLLC, per
Stephen I. Pentz, Attorney-at-Law

Intervenors US HealthVest, LLC and Vest Thurston, LLC (HealthVest), by
Lane Powell PC, per
Barbara Duffy and Jonathon Bashford, Attorneys-at-Law

Department of Health Certificate of Need Program, by
Robert W. Ferguson, Attorney General, per
Jack Bucknell, Assistant Attorney General

PROCEDURAL HISTORY ON REVIEW

This matter has come before the Review Officer for administrative review of the Findings of Fact, Conclusions of Law, and Initial Order (Initial Order) dated May 8, 2017, of the

Presiding Officer, Matthew R. Herington. The Presiding Officer issued the Initial Order after a contested administrative hearing held on December 5-7, 2016, to address the certificate of need (CN) application filed by HealthVest to establish a new 75-bed psychiatric hospital in Thurston County, Washington. The Initial Order granted the CN to HealthVest over the objections of Providence.

PROVIDENCE'S PETITION FOR REVIEW

On May 30, 2017, Providence filed a Petition for Administrative Review (Petition). Providence does not dispute the need for new psychiatric beds in Thurston County. Rather, it claims HealthVest failed to demonstrate site control (legal control over the property where the facility will be built) because it produced only a draft lease instead of a fully executed lease. Providence further alleges HealthVest failed to meet other CN requirements such as:

- HealthVest failed to prove its project was financially feasible because it did not have sufficient cash reserves for all its concurrent projects at the time of evaluation;
- HealthVest failed to prove its facility will be accessible to all persons because it will not provide adequate charity care; and
- HealthVest failed to prove it chose the superior alternative for the facility's location.

HEALTHVEST'S RESPONSE

On June 19, 2017, HealthVest filed a Response to Petition for Administrative Review (HealthVest Response) in which it provided a succinct history of the project and litigation, and thoroughly addressed each of Providence's arguments. It contends HealthVest has met each of the requirements for a CN and the Initial Order should be affirmed.

THE PROGRAM'S RESPONSE

Also on June 19, 2017, the Program filed a Brief Opposing Providence's Petition for Administrative Review (Program's Response). The Program refutes each of Providence's exceptions to the Initial Order and requests the Review Officer deny Providence's request for relief and grant HealthVest's CN subject to the conditions identified by the Program.

PROVIDENCE'S REPLY

Reply briefs are not addressed in either chapter 34.05 RCW, the Administrative Procedures Act, or chapter 246-10 WAC, the Department's adjudicative proceedings rules. As such, replies are generally not permitted in administrative reviews. In this case, Providence made a timely request to file a reply brief and present oral argument. Pet. at 2-3. By order dated June 21, 2017, the Review Officer denied the request for oral argument but granted the request for Providence to file a reply brief.

On June 28, 2017, Providence filed a reply brief wherein it reiterates the arguments in its Petition. As in the Petition, Providence encourages the Review Officer to ensure the decision in this case is consistent with prior CN decisions, policy and practice, because this was a primary reason the role of a Review Officer was created by the Legislature in 2013. Reply at 1.

REVIEW OFFICER'S ANALYSIS

Site Control

Providence argues that because HealthVest submitted a draft (rather than fully executed) lease for the property wherein the new facility will be located, HealthVest has not proven site control. Pet. at 9 *et seq.* The Review Officer disagrees.

First, it makes little practical sense to require a fully executed lease at the time of a CN application. A CN project often involves large commercial spaces for extended periods of time. This can be a costly endeavor. In addition, there is no guarantee that a CN applicant will be successful, especially in a situation where competing applications are being reviewed to meet limited need in a particular planning area. It would not be logical to require an applicant to commit to thousands, if not millions, of dollars in rent for a project that may not be approved. To do so would have the effect of chilling establishment of needed healthcare facilities because few financially responsible entities would accept that level of potential loss. For this reason, accepting a draft (but complete) lease during the CN application and evaluation stage is acceptable as long as a successful CN is conditioned upon submission of a copy of an executed lease consistent with the draft reviewed by the Program.¹

Second, Providence expends much argument advancing the theory that a goal of the relatively new role of the Review Officer² is to provide consistency among agency decisions.³ In a Final Order dated October 24, 2016, the Review Officer addressed site control in a concurrent review of two CN applications to build a psychiatric hospital in Clark County, Washington.⁴ One party submitted a draft lease that did not identify the lease/rent costs. In response, the Program notified the party that a draft agreement would be acceptable if it

¹ Such condition was required in this case. AR 812-813.

² In 2013, the Washington State Legislature amended RCW 43.70.740 to make the decisions of Presiding Officers initial, rather than final, orders.

³ The Review Officer generally agrees with this concept although every case must be decided on its own merits rather than mechanically applied tenets.

⁴ Master Case Numbers M2015-126 and M2015-1417, *Certificate of Need Application of Springstone, a Delaware limited liability company, CN Application #15-20, and Commitment to or Issuance of Certificate of Need Regarding Same, and Certificate of Need Application of Signature Healthcare Services, LLC, to Establish a Psychiatric Hospital in Clark County*

identified all costs associated with the agreement. Because the party failed to provide a complete (*albeit* draft) lease identifying all costs associated with the agreement, the undersigned Review Officer found it failed to establish site control.

Financial Feasibility

Providence contends HealthVest did not prove financial feasibility for the project because Healthvest proposed to pay for the new facility using cash reserves but failed to consider concurrent commitments to other projects which would diminish those cash reserves. Pet. at 20 *et seq.*

Providence's argument is premised on a notion of stagnancy and neglects to consider potential revenue during the same period. HealthVest will have costs related to its healthcare facilities but will also receive income. Regardless, HealthVest did show it had sufficient cash reserves to adequately meet the capital costs of this project.⁵

Access

Providence further argues that HealthVest failed to prove its facility will be available to all persons because it expects it will provide less charity care than other hospitals in the region. Pet. at 27 *et seq.* Specifically, HealthVest estimates it will provide 2.20 percent of adjusted revenue in charity care whereas the regional average is 3.42 percent. AR 28, AR 783. HealthVest bases its lower projection on the belief that many formerly indigent people are now covered by Medicaid and do not require charity care due to the Affordable Care Act (ACA). AR 28, TR 191-192.

⁵ HealthVest, did show it had adequate cash reserves. AR 337 (\$23,569,490 in "cash and cash equivalents" as of January 31, 2016); TR 121 (HealthVest had "roughly 27.4 million dollars" in available cash as of May 16, 2016).

HealthVest's belief about the decreasing need for charity care after the ACA may or may not prove true in the long term, assuming the ACA in its current form remains in place. In any event, grant of the CN in this case was conditioned upon "budgeted charity care amounts of at least the regional average amount of charity care provided by hospitals in the Southwest Region." AR 810-814. Thus, HealthVest will be required to provide charity care at or above the regional level whether that level remains consistent, decreases as it projects, or increases for any reason.

Superior Alternatives

Finally, Providence argues that HealthVest failed to select the superior alternative for its project because none of the other sites it considered involved the same zoning challenges as the Woodland Square site. Pet. at 29 *et seq.*

WAC 246-310-310(1) requires a CN applicant to prove there are no superior alternatives to its proposed project in terms of cost, efficiency, or effectiveness. While HealthVest considered multiple sites for its project, it narrowed those choices down to two serious contenders: renovating an existing building (Woodland Square) or building a new building from the ground up (a "greenfield" site). AR 46. The greenfield site had "significant land use and wetland issues that have would delayed the project by about 9-12 months." *Id.* The Woodland Square site allowed for HealthVest's design elements to be fully incorporated and the location "is centrally located and easily accessible to much of the Service Area's population." AR 47. Dr. Richard Kresch, HeathVest's President and Chief Executive Officer, succinctly described renovating an existing building as being "less expensive and faster" than building a project from the ground up. TR 88.

The evidence showed that both proposed sites had some potential zoning issues. However, the Woodland Square site would likely be operational sooner than a greenfield site. Given the urgent need for psychiatric beds in the service area, the Woodland Square location is at least equal, if not superior, to the greenfield site.

ISSUE

Does HealthVest's application to establish a 75-bed psychiatric hospital in Thurston County, Washington meet each of the required certificate of need criteria in WAC 246-310-210, WAC 246-310-220, WAC 246-310-230, and WAC 246-310-240?

I. PROCEDURAL HISTORY AND SUMMARY OF PROCEEDINGS

1.1 On December 8, 2015, HealthVest submitted a letter of intent to establish a 75-bed psychiatric hospital in Thurston County, Washington. On January 14, 2016, HealthVest formally applied for a CN to establish a 75-bed psychiatric hospital in Thurston County, Washington.

1.2 On July 5, 2016, the Program issued a letter to HealthVest indicating that it was prepared to issue a CN to HealthVest pursuant to certain conditions. After HealthVest accepted the conditions, the Program awarded the CN to HealthVest on July 13, 2016. On July 25, 2016, Providence timely filed a petition for adjudicative proceeding. On August 2, 2016, HealthVest filed a Motion to Intervene, which was granted on August 24, 2016.

1.3 On September 15, 2016, the Program filed a Motion for Summary Judgment. On November 4, 2016, the Presiding Officer granted partial summary judgment. Specifically, the Presiding Officer found that: HealthVest met the need criteria outlined in WAC 246-310-210(1); the Program properly conducted a second screening of HealthVest's application pursuant to

WAC 246-310-090(2)(a); the Program properly allowed HealthVest's rebuttal to public comments pursuant to WAC 246-310-160(1)(a); the Program was not required to consider HealthVest's rebuttal comments to be an amended application pursuant to WAC 246-310-100(1); the Program was not required to remove HealthVest's rebuttal comments from the application record; and that the Program properly relied on information in HealthVest's rebuttal comments. See Prehearing Order No. 4.

Subsequently, Providence requested reconsideration of Prehearing Order No. 4 due to the fact that the Program had provided a new need projection in discovery. The Motion for Reconsideration was granted to the extent that Prehearing Order No. 4 found that HealthVest met the need criteria outlined in WAC 246-310-210(1). The remainder of Prehearing Order No. 4 remained intact. See Prehearing Order No. 7.

1.4 The adjudicative hearing was held December 5-7, 2016.

1.5 At the hearing, HealthVest presented the testimony of Richard Kresch, President and CEO, HealthVest, LLC; Jody Carona, Principal and Owner, Health Facilities Planning & Development; Richard Ordos, Supervisor, Disease Control and Health Statistics, Washington State Department of Health; and Lisa Klein, Associate Principal and Land Use Planner, AHBL.

1.6 Providence presented the testimony of Carl Halsan, Principal, Halsan Frey LLC; and Frank Fox, Ph.D., Principal, Health Trends.

1.7 The Program presented the testimony of Janis Sigman, Director, Certificate of Need Program, Washington State Department of Health.

1.8 The following exhibits were admitted as numbered:

The Program

- Exhibit D-1: Application Record; and
- Exhibit D-2: Supplement to Application Record (901-937).

Providence

- Exhibit P-1: Application Record;
- Exhibit P-2: City of Lacey Woodland District Strategic Plan (July 25, 2013);
- Exhibit P-3: City of Lacey Ordinance 1487;
- Exhibit P-4: City of Lacey Municipal Code, Chapter 16, Title 24;
- Exhibit P-5: Department of Health's Evaluation, dated January 14, 2014, of the Certificate of Need Application, Submitted by US HealthVest Proposing to Establish a 75-Bed Psychiatric Hospital in Snohomish County & Certificate of Need #1518;
- Exhibit P-6: Department of Health's Evaluation, dated September 2, 2015, of the Certificate of Need Application Submitted by US HealthVest Proposing to Add 50 Psychiatric Beds to the January 21, 2014, Certificate of Need Approval Psychiatric Hospital in Marysville & Certificate of Need #1532, dated September 11, 2014;
- Exhibit P-7: Settlement Agreement Relating to HealthVest CN #1518 and #1532, dated February 23, 2015;
- Exhibit P-8: Certificate of Need #1518E, dated October 21, 2015;
- Exhibit P-10: Revised need calculation produced by the Program on November 3, 2016; and
- Exhibit P-11: US HealthVest Consolidated Audited Financial Statements and Supplemental Information for the Years ended December 31, 2015, and 2014.

HealthVest

- Exhibit HV-1: Padilla-Frausto DI, et al., Three out of Four Children with Mental Health Needs in California Do Not Receive Treatment Despite Having Health Insurance, Los Angeles, CA: UCLA Center for Health Policy Research, 2014, cited at AR 26;
- Exhibit HV-2: National Council for Behavioral Health, Meeting the Behavioral Health

Needs of Veterans, Operation Enduring Freedom and Operation Iraqi Freedom, November 2012, cited at AR 27;

- Exhibit HV-3: Joseph C Blader, PhD, Acute Inpatient Care for Psychiatric Disorder in the United States, 1996 Through 2007, Archives of General Psychiatry 2011; 68(12): 1276-1283, cited at AR 30;
- Exhibit HV-4: Joseph P. Morressey, et al., Geographic Disparities in Washington State's Mental Health Workforce, August 2007, cited at AR 42;
- Exhibit HV-6: Notice for Supporters, South Sound Behavioral Hospital, May 3, 2016; and
- Exhibit HV-7: US HealthVest South Sound Behavioral Hospital, PowerPoint presentation, May 3, 2016.

The parties were also allowed to use demonstrative exhibits at hearing, which were not admitted into evidence.

1.9 During the hearing, the Presiding Officer accepted Providence's designation of the deposition testimony of Robert Russell, retired Department of Health CN Program Analyst. HealthVest and the Program were provided the opportunity to provide objections and cross-designations by December 14, 2016; Providence was given the opportunity to provide objections and reply designations by December 21, 2016. HealthVest subsequently provided cross designations and Providence provided reply designations. The Presiding Officer admitted all of the deposition testimony of Robert Russell provided by the parties.

1.10 The parties submitted briefs in lieu of closing arguments as authorized under RCW 34.05.461(7). The initial closing briefs were due on January 6, 2017, and the responsive closing briefs were due on January 17, 2017. The hearing record was closed on January 17, 2017.

1.11 On May 8, 2017, the Presiding Officer issued the Initial Order which was served on the parties on May 9, 2017.

1.12 On May 30, 2017, Providence filed a Petition for Administrative Review.

1.13 On June 19, 2017, HealthVest filed its Response to Petition for Administrative Review.

1.14 On June 19, 2017, the Program filed a Brief Opposing Providence's Petition for Administrative Review.

1.15 All citations to the Application Record herein are cited to the Bates Stamp page number, as in "AR 343." All citations to the transcript of the administrative hearing are cited to the page number, as in "TR 99."

II. FINDINGS OF FACT

2.1 The Findings of Fact in the Initial Order dated May 8, 2017, are adopted herein.

III. CONCLUSIONS OF LAW

3.1 The Department of Health is authorized and directed to implement the Certificate of Need Program. RCW 70.38.105. Establishment of a psychiatric hospital requires a certificate of need. RCW 70.38.105(1).

3.2 The Secretary is authorized to designate a Review Officer to review initial orders and to enter final orders. RCW 43.70.740.

3.3 The Petition, responses thereto, and Providence's reply were timely filed. WAC 246-10-701; Order dated June 21, 2017.

3.4 A CN applicant must show or establish that its application meets all of the applicable criteria. WAC 246-10-606(2). An applicant “shall submit a certificate of need application in such form and manner and containing such information as the department has prescribed and published as necessary to such a certificate of need.” WAC 246-310-090(1). The standard of proof in this case is preponderance of the evidence. WAC 246-10-606(3). Admissible evidence in CN hearings is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. RCW 34.05.452(1); WAC 246-10-606(1).

3.5 The Presiding Officer (on delegated authority of the Secretary of Health) is the agency’s fact finder and decision maker. *DaVita v. Dept. of Health*, 137 Wash.App. 174, 182, 151 P.3d 1095 (2007). The Presiding Officer engages in a *de novo* review of the record. *University of Wash. Med. Ctr. v. Dept. of Health*, 164 Wash.2d 95,103, 187 P.3d 243 (2008). The Presiding Officer may consider the Program’s written evaluation in reaching a decision but is not required to defer to the Program. *DaVita*, 137 Wash.App. at 182-183.

3.6 In 2013, the Washington State Legislature amended the law to make the decisions of Presiding Officers initial, rather than final, orders. RCW 43.70.740. The Review Officer shall exercise all the decision-making power that the Review Officer would have had to decide and enter the final order had she presided over the hearing. RCW 34.05.464(4).

3.7 In acting as the Department’s final decision maker, the Review Officer reviewed the entire file including the application record, clerk’s file, transcript of

proceedings, and briefing submitted by the parties. The Review Officer applied the standards found in WAC 246-310-200 through 246-310-240 in evaluating the application.

3.8 Conclusions of Law 2.4 through 2.13 in the Initial Order dated May 8, 2017 are adopted herein.

IV. FINAL ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

4.1 that HealthVest's CN application to establish a 75-bed psychiatric hospital in Thurston County, Washington is **GRANTED** subject to the conditions of the Program's July 5, 2016, letter to HealthVest, including, but not limited to, the following:

So long as the state desires to contract with the facility for providing care to Involuntary Treatment Act (ITA) patients, US HealthVest, LLC will contract with the state to provide that care. An ITA referral may only be rejected if there are no beds available at US HealthVest, LLC at the time of the referral or if such referral is clinically inappropriate.

4.2 Failure to abide by the conditions required herein may result in suspension or revocation of the certificate of need pursuant to RCW 70.38.115 and WAC 246-310-500.

Dated this 30th day of October, 2017

JOHN WIESMAN, DrPH, MPH
SECRETARY OF HEALTH


By KRISTI WEEKS
REVIEW OFFICER

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NOTICE TO PARTIES

Any Party may file a petition for reconsideration. RCW 34.05.461(3); RCW 34.05.470. The petition must be filed within ten (10) days of service of this Order with:

Adjudicative Clerk Office
Adjudicative Service Unit
PO Box 47879
Olympia, WA 98504-7879

A copy must be sent to the other parties. If sending a copy to the Assistant Attorney General in this case, the mailing address is:

Agriculture and Health Division
Office of the Attorney General
P.O. Box 40109
Olympia, WA 98504-0109

The petition must state the specific grounds upon which reconsideration is requested and the relief requested. WAC 246-10-704. The petition for reconsideration is considered denied twenty (20) days after the petition is filed if the Adjudicative Clerk Office has not responded to the petition or served written notice of the date by which action will be taken on the petition.

A petition for judicial review must be filed and served within thirty (30) days after service of this Order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, the thirty (30) day period for requesting judicial review does not start until the petition is resolved. RCW 34.05.470(3).

The Order remains in effect even if a petition for reconsideration or petition for

judicial review is filed. "Filing" means actual receipt of the document by the Adjudicative Clerk Office. RCW 34.05.010(6). This Order was "served" upon you on the day it was deposited in the United States mail. RCW 34.05.010(19).

Final orders are public documents, and may be placed on the Department of Health's website and otherwise released as required by the Public Records Act, chapter 42.56 RCW.