

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT**

In the Matter of:

CERTIFICATE OF NEED #1557 ISSUED
TO HERITAGE GROVE,

SELAH CARE AND REHABILITATION;
LANDMARK CARE AND REHABILITATION;
EMERALD CARE; GOOD SAMARITAN
HEALTH CARE CENTER; WILLOW
SPRINGS CARE AND REHABILITATION;
CRESCENT HEALTHCARE, INC.; AND
SUMMITVIEW HEALTHCARE CENTER,

Petitioners,

HERITAGE GROVE, PRESTIGE CARE,
INC., CARE CENTER (YAKIMA), INC., AND
YAKIMA VALLEY VENTURES, LLC,

Intervenors.

Master Case No. M2015-1082

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND INITIAL ORDER

APPEARANCES:

Petitioners, Selah Care and Rehabilitation; Landmark Care and Rehabilitation; Emerald Care; Good Samaritan Health Care Center; Willow Springs Care and Rehabilitation; Crescent Healthcare, Inc.; and Summitview Healthcare Center (“Selah Care”), by Perkins Coie, LLP, per Brian W. Grimm and Luke M. Rona, Attorneys at Law

Department of Health Certificate of Need Program (Program), by Office of the Attorney General, per Richard A. McCartan and Janis Snoey, Assistant Attorneys General

Intervenors, Heritage Grove; Prestige Care, Inc.; Care Center (Yakima) Inc.; and Yakima Valley Ventures, LLC (“Heritage Grove”), by Ryan, Swanson & Cleveland PLLC, per Thomas H. Grimm and Robert R. King, Attorneys at Law

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND INITIAL ORDER

PRESIDING OFFICER: Roman S. Dixon Jr., Chief Health Law Judge

A hearing was held in this matter on April 20-22, 2016, regarding Heritage Grove's Certificate of Need application to construct a 97-bed skilled nursing facility in Yakima County. CN GRANTED to Heritage Grove WITH CONDITIONS.

ISSUES

- A. Did the Program properly consider applicable CN criteria in RCW 70.38 and WAC 246-310 when it issued CN #1557 to Heritage Grove?
- B. Did the Program err in issuing the requested CN to Heritage Grove?

BRIEF PROCEDURAL HISTORY

On January 8, 2015, Heritage Grove Corporation (Heritage Grove) applied for a certificate of need (CN) to establish a 97-bed skilled nursing facility in Yakima County.

On August 3, 2017, the Program issued Heritage Grove Certificate of Need #1557 to construct the 97-bed Medicare and Medicaid certified skilled nursing facility in Yakima County. The Program concluded that the application was consistent with the applicable criteria of the Certificate of Need Program, provided Heritage Grove agreed to certain conditions.

Selah Care timely filed a petition for an adjudicative proceeding on August 24, 2015, to contest the Program's decision. On October 16, 2015, the Presiding Officer allowed the Intervenors (the Applicant and its proposed contractors and lessors) to intervene in this case.

SUMMARY OF PROCEEDINGS

At the hearing, the Program presented the testimony of:

1. Robert Russell, Analyst, Certificate of Need Program, Washington State Department of Health (DOH).

The Petitioners presented the testimony of:

1. Gloria Dunn, Administrator, Landmark Care and Rehabilitation;
2. Calvin Groenenberg, Executive Director, Summitview Healthcare Center;
3. Taylor Hall, Administrator, Good Samaritan Health Care Center;
4. Molli Harrington, Administrator, Crescent Health Care, Inc.;
5. Mike Hoon, Administrator, Emerald Care; and
6. Norman Hyatt, President, Hyatt Management Company.

The Intervenors presented the testimony of:

1. Rick Weaver, Heritage Grove Board Member;
2. David Henderson, COO of the management company, Prestige Care, Inc.;
3. Bill Ulrich, President and CEO of Consolidated Billing Services Inc.; and
4. Linda Miller, V.P. Human Resources, Prestige Care.

The Presiding Officer admitted the following exhibits at the hearing:

Program Exhibit:

Exhibit D-1: The Application Record, comprised of documents the Program considered in making its decision.

Petitioners' Exhibits:

Exhibit P-1: Complete Application Record.

- Exhibit P-2: DOH Nursing Home Bed Projections (Source: Washington State Department of Social and Health Services (DSHS)); Admitted at hearing upon Motion for Reconsideration.
- Exhibit P-3: Medicaid Cost Report Data (October 1, 2012 – March 31, 2013) (Source: DSHS).
- Exhibit P-4: Medicaid Cost Report Data (April 1, 2013 – September 30, 2013) (Source: DSHS).
- Exhibit P-5: Medicaid Cost Report Data (October 1, 2013 – March 31, 2014) (Source: DSHS).
- Exhibit P-6: Medicaid Cost Report Data (April 1, 2015 – September 30, 2014) (Source: DSHS).
- Exhibit P-13: Letter from Norman Hyatt to Bob Russell (April 6, 2015).
- Exhibit P-14: Letter of Intent between Prestige Care, Inc. and Chalet Healthcare, Inc. (May 1, 2012).
- Exhibit P-15: Extension of Letter of Intent between Prestige Care, Inc. and Chalet Healthcare, Inc. (October 30, 2013).
- Exhibit P-16: Karen Nidermayer Telephone Call Notes regarding Call with Bill Ulrich (June 17, 2014).
- Exhibit P-17: Karen Nidermayer Email to Doug Bault (April 25, 2013).
- Exhibit P-23: Prestige Care & Rehabilitation – Clarkston (July 2014 Inspection) (Source: DSHS).
- Exhibit P-25: Prestige Care & Rehabilitation – Parkside (August 2014 Inspection) (Source: DSHS).
- Exhibit P-31: Prestige Care & Rehabilitation – Sunnyside (September 2014 Inspection) (Source: DSHS).
- Exhibit P-32: Prestige Care & Rehabilitation – Sunnyside (November 2014 Investigation) (Source: DSHS).

Exhibit P-33: Petitioners' Designation of Laura Peterson Deposition Testimony.

Intervenors' Exhibits:

Exhibit I-1: The Administrative Record.

Exhibit I-2: Supplemental Administrative Record.

Exhibit I-3: Yakima County Labor Market and wage statistics.

Exhibit I-4: Documents in response to matters raised by Petitioners' witnesses in their depositions of April 5-6, 2016.

Exhibits offered at Hearing:

Petitioners' Exhibits:

Exhibit Demo-1: [Map 1] Yakima Nursing Homes and Hospitals¹

Exhibit Demo-2: [Map 2] Sunnyside/Toppenish Nursing Homes & Hospitals.

Exhibit Demo-3: [Table] Historical Medicaid Occupancy.

Intervenors' Rebuttal Exhibits:²

Exhibit I-5: Prestige Care & Rehabilitation – Sunnyside CMS 5-Star Rating Report for data through January 31, 2015 (included November 2014).

¹ On April 22, 2016 (during the third day of the adjudicative hearing), Intervenors pointed out that Demonstrative Exhibit 1 (the planning area map) contained an error. Pursuant to the Presiding Officer's ruling, Petitioners corrected the error, prepared a replacement and provided it to the Program and Intervenors on April 29, 2016, and requested that any objections be identified by May 6, 2016. Having received no objections, Exhibit Demo-1 is hereby replaced and is part of the record. Although the parties were allowed to use demonstrative exhibits, those exhibits were not admitted into evidence.

² Intervenors' Rebuttal Exhibits were identified as I-1 through I-4, respectively. To avoid confusion, the Presiding Officer renamed the aforementioned Exhibits I-5 through I-8.

- Exhibit I-6: Prestige Care & Rehabilitation – Sunnyside CMS 5-Star Rating Report for data through January 31, 2015 (included November 2014).
- Exhibit I-7: Prestige Care & Rehabilitation – Clarkston CMS 5-Star Rating Report for data through August 31, 2014 (includes July 2014).
- Exhibit I-8: Prestige Care & Rehabilitation – Parkside CMS 5-Star Rating Report for data through August 31, 2014.

Closing Arguments

Pursuant to RCW 34.05.461(7), and by agreement of the parties, closing arguments were filed by brief. Closing briefs were due on May 20, 2016. Reply briefing was due by May 27, 2016. The Record closed on May 6, 2016.

Citations to the Application Record

All citations to the Application Record herein are in footnote form, citing 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.”

Designation of Deposition Testimony

During the latter half of the second day of the adjudicative hearing (April 21, 2016), Intervenors advised that some of their witnesses would not be testifying.³ Specifically, Intervenors stated that witness “Mary Arthur had hip surgery” and was not available, and Angela Ross and Laura Peterson had “some scheduling problems” that

³ See TR 520:10-521:14.

they were trying to resolve.⁴ Consequently, the Presiding Officer concluded the second day of the proceedings.

On the following day, Intervenors called Bill Ulrich, Linda Miller, and David Henderson. Afterwards, Intervenors indicated they had no further witnesses.⁵ Petitioners then requested to read sections of the absent witnesses' deposition testimony into the record.⁶ The Intervenors objected. The Presiding Officer concluded that given the representations by the parties, at the prehearing conference and on the first day of hearing, it was fair to expect that all of the designated witnesses would be called for hearing.⁷ Accordingly, the Presiding Officer ruled that Petitioners could submit designations of the deposition transcripts for the absent witnesses, and following that submission, Intervenors and the Program would have the opportunity to "identify portions of the record in rebuttal – portions of the deposition to rebut . . . or . . . that possibly may address testimony that they want[ed] introduced into the record."⁸ As such, the Petitioners were given until April 29, 2016, **to identify the portions of the Peterson and Arthur depositions** that they wanted admitted into the record.⁹ The page limit was set at four pages each.¹⁰ The Intervenors and the Program had until

⁴ See TR 520:19-21 and TR 520:13-20.

⁵ See TR 739:16-20.

⁶ See TR 739:25-740:17.

⁷ See TR 745:11-15.

⁸ See TR752:10-17.

⁹ See 757:17-24. **Emphasis** added.

¹⁰ *Id.*

May 6, 2016, to designate counter-entries or to offer counter-designations of the **Peterson and Arthur depositions**.¹¹ The same page limit applied.¹²

Prior to ending the discussion concerning the designation of deposition testimony, the Presiding Officer cautioned the parties stating that, “**if you submit material that violates the - violates the prehearing [order] or some of the rulings at hearing, it is going to be problematic for your submission, so keep that in mind when you are designating your material.**”¹³

On April 29, 2016, the Petitioners filed Petitioners’ Designation of Laura Peterson Deposition Testimony.¹⁴ The Presiding Officer finds that this submission is approximately four pages of content and in compliance with the rulings from April 21, 2016.

On May 5, 2016, Intervenors filed Intervenors’ Response to Petitioners’ Designated Additional Testimony. Therein, Intervenors submitted the Declaration of Linda I. Miller, dated May 4, 2016, (Miller Declaration).

On May 12, 2016, Petitioners filed Petitioners’ Motion to Strike Post-Hearing Declaration of Linda Miller. Therein, Petitioners argue, *inter alia*, that the Miller Declaration is an improper attempt to supplement their witness’ hearing testimony

¹¹ See 758:19-23. **Emphasis** added.

¹² *Id.*

¹³ TR 758:24- 759:3. **Emphasis** added.

¹⁴ Petitioners designated Page 43, Line 23 through Page 46, Line 10 and Page 50, Line 14 through Page 51, Line 2.

through post-hearing declarations, exempt from cross-examination or rebuttal. As such, it should be stricken.

On May 23, 2016, Intervenors filed Intervenors' Response to Petitioners' Motion to Strike Post-hearing Declaration of Linda Miller. Therein, Intervenors represented that they "chose not to call Ms. Peterson." In addition, Intervenors made numerous statements, *inter alia*, about the specific nature of Ms. Miller and David Henderson's testimony and offered statements consistent with their theory of the case previously argued at hearing. Further, Intervenors suggest that the Miller Declaration "only expands and clarifies her testimony at the hearing." Consequently, Intervenors argue that Petitioners' Motion to Strike should be denied.

On May 27, 2016, Petitioners filed their Reply in Support of Petitioners' Motion to Strike Post-Hearing Declaration of Linda Miller.¹⁵

Here, it would appear that the Intervenors chose strategy over transparency. Simply put, this is a situation wholly created, or at a minimum, aggravated by the Intervenors' decision not to disclose (until the third day of hearing) that Ms. Peterson would not be appearing for hearing. Whether or not Ms. Peterson was unavailable due to being out of the country, a scheduling conflict, or the Intervenors' day of hearing, strategic decision not to call her, the fact remains that the Intervenors failed to produce her for hearing as previously indicated. In an attempt to mitigate this issue and restore a sense of fairness to the proceeding, the Presiding Officer devised a plan to allow the

¹⁵ No pleadings were filed on behalf of the Program concerning the issue of deposition designations.

parties to submit a proffer of the deposition testimony in question and to allow follow-up with counter-designations. To ensure the parties were on the same page, the Presiding Officer cautioned the parties as to a few simple parameters surrounding the submissions. However, rather than respond as instructed, Intervenors attempted to supplement the record with additional testimony from a witness who testified (at length) at the hearing. Not only is this an improper attempt to bolster the witnesses' hearing testimony through post-hearing declarations exempt from cross-examination or rebuttal, it is also wholly inconsistent with the Presiding Officer's April 21, 2016 ruling; which, instructed the parties to designate portions of the ***Peterson and Arthur depositions***.

Accordingly, Petitioners' Designation of Laura Peterson Deposition Testimony is ADMITTED.¹⁶ In addition, Petitioners' Motion to Strike the Post-Hearing Declaration of Linda Miller is GRANTED. Finally, to the extent Intervenors are requesting to admit the post-hearing Declaration of Linda Miller, that Motion is DENIED as untimely.

I. FINDINGS OF FACT

1.1 A Certificate of Need (CN) is a non-exclusive license to establish a new health care facility or to expand an existing facility. See *St. Joseph Hospital & Health Care Center v. Department of Health*, 125 Wn.2d 733, 736 (1995). Construction of a nursing home requires a CN from the Washington State Department of Health's Certificate of Need Program (Program). See RCW 70.38.025(6) and RCW 70.38.105(4)(a). In order to qualify for a CN, an applicant must show that its

¹⁶ Laura Peterson Deposition excerpt will be admitted as P-33.

application meets all of the relevant criteria in Chapter 246-310 WAC. These criteria include a showing by the applicant that the CN project: (a) is needed; (b) is financially feasible; (c) will meet certain criteria for structure and process of care; and (d) will foster cost containment of health care costs and charges; unless the applicant is otherwise exempt from having to satisfy certain criteria.¹⁷

1.2 Heritage Grove operated 97 nursing home beds in a facility that it leased and called “Heritage Grove” in Yakima County for approximately 10 years; from November 1999 to October 2009. Leading up to its closure, Heritage Grove was the licensee of the Heritage Grove facility and operated the 97-bed facility for the entire year before closing the facility in October 2009 and requesting to bank the beds with the Department of Health.¹⁸ Heritage Grove’s date of full facility closure was October 15, 2009.¹⁹

1.3 By letter dated February 16, 2010, the Program granted Heritage Grove’s request to bank 97 nursing home beds.²⁰ On October 7, 2014, Heritage Grove submitted a letter of intent proposing to unbank and relocate the 97 nursing home beds into a new facility in Yakima County.²¹

¹⁷ Chapter 246-310 WAC

¹⁸ See Application Record (AR) 76-77.

¹⁹ *Id.*

²⁰ See AR 76-77.

²¹ See AR 78.

1.4 On January 8, 2015, the Program received Heritage Grove's CN application to construct the proposed facility.²² The application identified Heritage Grove as the applicant.²³ The application indicated Heritage Grove would hold a valid operating license from the state of Washington Department of Social and Health Services to operate a skilled nursing facility.²⁴ The application further provided that Prestige Care, Inc., held a Purchase and Sale Agreement for the property where the facility would be located.²⁵ Once the purchase was final, Prestige Care, Inc. would assign the property to Yakima Valley Ventures, LLC, which has common ownership with Prestige Care, Inc.²⁶ Among other things, the application indicated that:

1. Heritage Grove would lease the facility from Yakima Valley Ventures, LLC;
2. Prestige Care, Inc. would manage the facility through a management agreement with Heritage Grove;
3. Heritage Grove intends to request a change of ownership after opening;
4. The intended new operating entity would be Care Center (Yakima), Inc., which is a wholly owned subsidiary of Prestige Care, Inc.; and,
5. Care Center (Yakima), Inc. would then lease the facility from Yakima Valley Ventures, LLC.²⁷

²² See AR 80.

²³ See AR 1.

²⁴ See AR 89.

²⁵ See AR 8.

²⁶ See AR 2, 8.

²⁷ See AR 2.

1.5 On August 3, 2015, the Program issued CN #1557 to Heritage Grove to construct a 97-bed skilled nursing facility in Yakima County.²⁸

1.6 On August 24, 2015, Selah Care timely filed a petition for an adjudicative proceeding to contest the Program's decision.

1.7 On October 16, 2015, the Presiding Officer allowed the Intervenors (the Applicant and its proposed contractors and lessors) to intervene in this case.

1.8 A hearing was held in this matter on April 20-22, 2016, regarding Heritage Grove's Certificate of Need application to construct a 97-bed skilled nursing facility in Yakima County.

WAC 246-310-210 "Determination of Need"

1.9 WAC 246-310-210(1) and (6) require an applicant to prove that need exists for the proposed project. However, RCW 70.38.115(13)(b) states, in relevant part, that numeric need shall be deemed met where a nursing home licensee has properly banked beds upon full closure of a facility, the licensee had operated the beds for at least one year immediately preceding the reservation of the beds, and is replacing the beds in the same planning area. The Program determined that Heritage Grove is such a licensee.²⁹ Prior to the hearing, the Presiding Officer summarily ruled that Heritage Grove was exempt from demonstrating need³⁰ (under subsections (1) and (6))

²⁸ See AR 285-288.

²⁹ See AR 263.

³⁰ See Prehearing Order No. 6: Order on Motion for Summary Judgment, dated April 15, 2016.

and excluded hearing testimony, exhibits, and argument that would implicate numeric need criteria. However, despite being exempt from demonstrating numeric need, an applicant must still demonstrate compliance with the requirements of WAC 246-310-210.³¹

WAC 246-310-210(2) “Access”

1.10 WAC 246-310-210(2) requires Heritage Grove to demonstrate that this nursing home would be available to all residents of the services area, including: low-income, racial and ethnic minorities, handicapped, and other underserved groups. In addition, as a community based nursing home, Heritage Grove must also participate in the Medicare and Medicaid programs.

1.11 As part of the application process, Heritage Grove submitted its admission agreement and confirmed that patients would be admitted without regard to race, ethnicity, national origin, age, sex, pre-existing condition, physical, or mental status.³² The agreement also referenced private pay, Medicare, and Medicaid admissions, and included a description of the financial responsibilities of the patient under each type of coverage. *Id.*

1.12 Further, Heritage Grove submitted financial documents stating that it intends to provide services to the Medicare population and that Heritage Grove has

³¹ See RCW 70.38-115(13) and WAC 246-310-210.

³² See AR at 267-269.

committed to contract with Medicaid and provide services to the Medicaid patients in the planning area. Nonetheless, to ensure that Heritage Grove participated in both the Medicare and Medicaid programs, the CN Program conditioned approval of the application on: 1) Heritage Grove agreeing to provide documentation that Prestige obtained its Medicare and Medicaid provider identification numbers within a specific timeframe; and 2) Heritage Grove agreeing to maintain Medicare and Medicaid certification throughout operation of the facility, regardless of ownership.³³ Based on the source information reviewed and Heritage Grove's agreement to the conditions, the Program determined that Heritage Grove met the applicable need criteria in WAC 246-310-210(2).³⁴

1.13 At hearing and in its post-hearing briefs, Selah Care argued, *inter alia*, that the proposed new facility will not provide adequate access to low-income individuals. More specifically, Selah Care argues that Heritage Grove's projections demonstrate that the proposed facility is only financially viable if it captures a disproportionately high percentage of Medicare, private pay, and private insurance residents, and severely limits its number of Medicaid residents. However, Richard Weaver testified that Heritage Grove is committed to providing access to all residents of the service area and satisfying the conditions mandated by the Program. In addition, Robert Russell testified

³³ See AR 257-258 and AR 267-269.

³⁴ *Id.*

that there is no criteria regarding an applicant's fair share of Medicaid days and the criterion does not require an applicant to project a particular Medicare-Medicaid patient ratio in order to meet the requirement for adequate access.

1.14 Based on the Application Record and the testimony at hearing, the Presiding Officer finds that Heritage Grove has met the applicable criteria in WAC 246-310-210, subject to the conditions specified by the Program. Moreover, the aforementioned conditions appear fair and appropriate.

WAC 246-310-220 “Financial Feasibility”

1.15 WAC 246-310-220 requires an applicant to meet the immediate and long-range capital and operating costs of the project and to demonstrate that the project can be appropriately financed.³⁵ In evaluating this criterion, the Program acknowledged that there are no known recognized standards directing what operating revenues and expenses should be for a project like Heritage Grove.³⁶ As such, the Program used its experience and expertise to evaluate Heritage Grove's pro forma income statements.³⁷ In doing so, the Program further acknowledged that Heritage Grove intends the facility to serve an emergent post-acute care, shorter stay market with an occupancy rate of 85 percent by the third year following completion.³⁸ In addition, Heritage Grove based the Medicaid occupancy percentage on two facilities of similar design and opening in

³⁵ AR 268-272.

³⁶ AR 268.

³⁷ *Id.*

³⁸ AR 268-271.

the prior three years. Those facilities were Manor Care Salmon Creek, with 30 percent Medicaid occupancy and Manor Care Lacey, with 27 percent Medicaid occupancy.³⁹ Further, the capital expenditure associated with the proposed 97-bed nursing home is \$18,665,494. Based on its review, the Program determined Heritage Grove's projected revenues and expenses were reasonable, the costs of the project (including any construction costs) would not result in unreasonable impact on the costs and charges for health services, and the project could be appropriately financed.⁴⁰

1.16 At hearing and in its post-hearing briefs, Selah Care argued, *inter alia*, Heritage Grove failed to prove the project satisfies the Department's financial feasibility criteria, because: the capital budget does not include the \$200,000 cost for Prestige to purchase the unbanked beds; the financial projections used a historical average occupancy rate for Yakima County, that did not account for the 97 beds that would be added to the planning area; and the financial projections used an unrealistic payor mix.

1.17 As made clear by both the testimony at hearing and the Application Record, the \$200,000 bed transaction is a cost that is to be borne by the new owner. Thus, it was appropriately omitted from the capital budget/pro forma. In addition, Selah Care's additional arguments concerning beds "to be added to the planning area," and an "unrealistic payor mix," appear to implicate aspects of numeric need and must be rejected.⁴¹

³⁹ AR 268.

⁴⁰ See AR 268-272.

⁴¹ See Prehearing Order No. 6: Order on Motion for Summary Judgment, dated April 15, 2016.

1.18 Based on the Application Record and the testimony at hearing, the Presiding Officer finds that Heritage Grove’s projected revenues and expenses appear reasonable, the costs of the project will not have unreasonable impact on the costs and charges for health services, and the project can be appropriately financed. As such, Heritage Grove has met the applicable criteria in WAC 246-310-220.

WAC 246-310-230 “Structure and Process of Care”

1.19 The criteria for structure and process of care, spelled out in WAC 246-310-230, includes five areas that must be considered when reviewing a CN Application, to wit: adequate staffing, an appropriate organizational structure and support, conformity with licensing requirements, continuity in the provision of health care, and provision of safe and adequate care.⁴²

Staffing

1.20 In evaluating this criterion, the Program acknowledged that there are “no known recognized standards that direct what specific staffing patterns or numbers of FTE’s that should be employed for projects of this type or size.”⁴³ As such, the Program used its experience and expertise in evaluating Heritage Grove’s staffing proposal to determine the reasonableness of the availability of staff.⁴⁴

⁴² See WAC 246-310-230 and AR 272-282.

⁴³ AR 272-282.

⁴⁴ Based on source information reviewed, the Program concluded that adequate and qualified staffing for the nursing home is available or can be recruited. AR 274.

1.21 During both the hearing and public comment phase, several witnesses and otherwise interested parties voiced concerns regarding the lack of available nursing staff. Those individuals also suggested that Heritage Grove's CN should be denied because it does not meet the criteria listed in WAC 246-310-230. In response, Heritage Grove represented that the analysis confirms that there is a deficit of RNs, but not LPNs or nurse aides.⁴⁵ Further, Heritage Grove represented that it understood the challenges faced by every provider trying to hire and retain staff, while remaining competitive and profitable.⁴⁶ To wit, both Linda Miller and David Henderson testified regarding some of the strategies Prestige has successfully implemented in other locations and plans to use to ensure adequate staffing for this project. They include:

- Offering competitive salaries and benefits.
- Offering relocation packages to allow licensed nurses in their other nursing centers to relocate to Yakima.
- Providing state-approved training programs to develop new certified nursing assistants through partnership with community education providers and through current Prestige Care programs.
- Utilizing the existing partnership with Heritage University to place nursing students in certified positions as they progress through their nursing education.
- Provide scholarships through the Sarah Delamarter Scholarship program to attract and retain staff.
- Focus recruitment strategies in Eastern Washington and the Spokane area.

⁴⁵ AR 274.

⁴⁶ *Id.*

- Employ strategies to recruit and hire veterans and transitioning service members who served as medics or nurses in the armed forces, providing relocation assistance for CNA and licensed nurses.
- Utilizing existing Prestige Staffing Pool, to provide CNAs, LPNs, and RNs on an interim basis to meet any short term staffing needs.⁴⁷

1.22 In response, several witnesses testified that their respective organizations had employed several of the strategies offered by Heritage Grove and experienced limited success in overcoming the staffing shortages. However, none of those witnesses testified that they had attempted to implement **all** of Heritage Grove's numerous strategies to eliminate their own staffing woes. As such, the Presiding Officer finds the strategies proposed by Heritage Grove to be more persuasive concerning Heritage Grove's ability to address the perceived nursing shortages in the planning area. Moreover, it appears that a sufficient supply of qualified staff for the project, including both health personnel and management personnel, are available or can be recruited.

Organizational Relationships to Ancillary and Support Services

1.23 For this project, Heritage Grove intends to contract with Prestige for management services and the day-to-day operations of the proposed skilled nursing facility.⁴⁸ Heritage Grove submitted a copy of the Management Services and Lease Agreement and Purchase and Sale Agreement between itself and Prestige as proof of

⁴⁷ See AR 274

⁴⁸ See AR 275

this contractual relationship.⁴⁹ As the management entity, Prestige is proposing to contract with a number of ancillary and support services providers, such as Infinity Rehab for physical, occupational, and speech therapy and Pro Pharmacy for prescription drugs and medical supplies.⁵⁰ The other contracted services proposed by the applicant do not have providers identified at this time.⁵¹ However, the Program has conditioned approval of the CN on the applicant providing executed contracted services agreements for the remaining ancillaries and support services.⁵² Similarly, the Program has also conditioned approval of the CN on the applicant providing an executed medical director agreement.⁵³ As such, the Presiding Officer concludes that if Heritage Grove agrees and complies with the aforementioned conditions, adequate ancillary and support services are available for the Heritage Grove project.

Medicaid and Medicare Licensing Requirements

1.24 For this sub-criterion, the Program must conclude that the proposed services to be provided by Heritage Grove with Prestige as the management entity, would be provided in a manner that ensures safe and adequate care to the public.⁵⁴ However, there are no known recognized standards as identified in WAC 246-310-200(2)(a)(ii) and (b) that a facility must meet when it is to be Medicare

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See AR 575

⁵³ *Id.* Heritage Grove provided a draft medical director agreement that outlined the roles and responsibilities for the position. *Id.*

⁵⁴ See AR 275.

certified and Medicare eligible.⁵⁵ As a result, the Program used its experience and expertise to assess the applicant's history in meeting these standards at other facilities owned or operated by the applicant.⁵⁶

1.25 In assessing Heritage Grove's application, the Program reviewed the quality of care and compliance history for licensed healthcare facilities owned, operated, or managed by Prestige.⁵⁷ Consequently, the review included quality of care information reported by the Centers for Medicare and Medicaid Services (CMS) and state licensing survey results.⁵⁸ CMS assigns a one to five "star rating" in three separate categories to grade the performance of the facilities: health inspection, staffing, and quality.⁵⁹ Based on the star rating in each of the three categories, CMS compiles an 'overall rating' for the facility.⁶⁰ Simply put, the more stars, the better the rating.⁶¹ Because Heritage Grove is not currently operating a skilled nursing facility and Prestige will be operating Heritage Grove when it opens, the Program reviewed data for skilled nursing facilities in Washington operated by Prestige.⁶²

1.26 As demonstrated by the Application Record and testimony at hearing, the Program reviewed and assessed the ratings for various Prestige owned and operated

⁵⁵ See AR 275.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

facilities. However, the Program has not established when an application should be denied based on quality of care.⁶³ In other words, there is no cutoff or bright-line rule for when an application should be denied.⁶⁴ Rather, the Program has adopted a general standard of only denying an application when a facility has been decertified (i.e. no longer qualified for Medicaid) or has had substantial fines assessed against it.⁶⁵ There is no evidence that Prestige managed facilities have a history of de-certifications or substantial fines.

1.27 Given the existing corporate compliance program implemented by Prestige and the history of those facilities managed by Prestige that have favorable star ratings, and the improvement efforts being made by Prestige and the individual facilities, the Program concluded there is reasonable assurance that Heritage Grove will be operated and managed in conformance with applicable state and federal licensing and certification requirements.⁶⁶ The Presiding Officer reviewed the Program's assessment and concurs with its conclusion that Heritage Grove has met this sub-criterion.

Unwarranted Fragmentation

1.28 WAC 246-310-230(4) measures whether Heritage Grove's project will: promote continuity in health care; not result in an unwarranted fragmentation of services; and have an appropriate relationship to the existing health care system in the

⁶³ See TR 788:8-23

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See AR 281.

service area. However, there are no know recognized standards as identified in WAC 246-310-200(2)(a)(ii) and (b) that directs how to measure unwarranted fragmentation of services or what types of relationships with a service area's existing health care system should be for a project of this type and size.⁶⁷ Therefore, the Program used its experience and expertise to assess the information provided in the application.⁶⁸

1.29 Heritage Grove has not provided services since it closed the Heritage Grove nursing facility in 2009, but Prestige has existing long-term relationships with healthcare entities in Yakima and has been providing skilled nursing services at their other Yakima long term care facilities.⁶⁹

1.30 Petitioners argue that Heritage Grove cannot satisfy the structure and process of care criterion under WAC 246-310-230(4), because the proposed new facility will only be viable if it: (1) takes residents, particularly Medicare residents, away from existing nursing homes, thereby reducing overall occupancy and threatening the financial viability of nursing homes across the community; and (2) takes staff away from existing nursing homes.⁷⁰

1.31 Here, the Petitioners' concern that the Heritage Grove project will have a devastating effect on the delivery of nursing services across the Yakima community is

⁶⁷ See AR 281.

⁶⁸ See AR 281.

⁶⁹ *Id.*

⁷⁰ See Petitioners' Post-hearing Brief, filed May 23, 2016.

based entirely on speculation and appears to be driven by an unhealthy fear of competition.⁷¹ Specifically, Petitioners believe that the attraction of a new facility will lure away existing patients and nursing staff from other facilities to Heritage Grove.⁷² Petitioners also fear that their inability to match the higher wages, likely to be offered by Prestige, will contribute to losing staff.⁷³ However, there is no evidence that the natural attrition of Yakima nurses, moving from facility to facility, is specific to Heritage Grove coming on-line.⁷⁴ To the contrary, the process of “hiring away” nurses is a common practice in Yakima.⁷⁵ Moreover, short of speculation, there is simply no way to know whether or not residents will leave their current facilities to come to Heritage Grove.⁷⁶

1.32 Adopting Petitioners’ approach to “unwarranted fragmentation” would have a chilling effect on competition and the creation of new skilled nursing facilities, and would most certainly limit resident options to a handful of pre-existing facilities, indefinitely. Thus, reducing their ability to self-determine their own care for no better reason than maintaining the status quo and protecting the bottom line of the existing facilities.⁷⁷ Rather, the focus, under this sub-criterion, should equally be on ensuring

⁷¹ In support of its objection to Heritage Grove’s CN application, the Petitioners’ surveyed 7 out of 11 skilled nursing facilities in Yakima County (composed of the seven Petitioners), and 3 out of 21 adult family homes. See AR 150; TR 132:13-21; TR 133:3-134:1; TR 134:2-134:19.

⁷² See TR 105:16-22; TR 110:12-21; TR 162:21-163:2; TR 237:24-238-18.

⁷³ See TR 176:7-14.

⁷⁴ See TR 111:11-17; TR 178:4-20.

⁷⁵ See TR 131:13-21; TR 178:4-20; TR 179:7-15; TR 180:7-10.

⁷⁶ See TR 445:8-446:2; TR 486:17-25.

⁷⁷ See TR 162:12-18

that the proposed project will promote continuity in health care *for patients* through relationships with other providers and healthcare facilities.

1.33 Given that the applicant provided an executed management and lease services agreement that would enable Prestige to provide management and day-to-day services at the new skilled nursing facility, the Program concluded that Heritage Grove demonstrated that the new skilled nursing facility would appropriately participate in relationships with community facilities in the planning area. In addition, the Program concluded that approval of this project would promote continuity in the provision of health care for the planning area, and would not result in an unwarranted fragmentation of services. The Presiding Officer reviewed the Application Record, the testimony, and the Program's assessment and concurs with the Program's conclusion that Heritage Grove has met this sub-criterion.

Reasonable Assurance of Safe and Adequate Care

1.34 There are reasonable assurances that the services to be provided through the proposed project will be provided in a manner that ensures safe and adequate care to the public to be served and in accord with applicable federal and state laws, rules, and regulations. This sub-criterion was addressed in paragraphs 1.24 through 1.27. As such, Heritage Grove has met the applicable criteria in WAC 246-310-230.

WAC 246-310-240 "Cost Containment"

1.35 The final criteria for analyzing the viability of a CN Application is a determination of cost containment, as described in WAC 246-310-240.

Superior Alternative

1.36 To determine if a proposed project is the best alternative, the Program takes a multi-step approach.⁷⁸ Step one determines if the application has met the other criteria of WAC 246-310-210 through 230.⁷⁹ If it has failed to meet one or more of these criteria, then the project is determined not to be the best alternative, and would fail this sub-criterion.⁸⁰ Here, Heritage Grove is the only applicant and has met the review criteria in the applicable sections of WAC 246-310-210, WAC 246-310-220, and WAC 246-310-230.

1.37 The only alternative Heritage Grove considered was the alternative to “do nothing.”⁸¹ Petitioners argue that the “do nothing” alternative and maintaining the status quo is a superior alternative to building the proposed new facility. However, this alternative would mean that the properly banked beds would expire in October 2017. Moreover, it is reasonable that a new facility operating in an effective physical plant would benefit the community. Further, Heritage Grove is proposing to target patients discharging to rehab and a location close to the hospitals would better serve patients. Lastly, the applicant is designing the facility to be energy efficient and use the latest in building materials.

⁷⁸ See AR 282.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See AR 282-283.

1.38 During both the hearing and public comment phase, Petitioners argued that another superior alternative is for Prestige Care to remodel the Parkside facility in Union Gap, Washington. However, as demonstrated by the Application Record and the testimony at hearing, Heritage Grove does not own the Parkside facility and has no control over it; as it is owned by an unaffiliated company.⁸² In addition, the Parkside facility is approximately 40-50 years old, in need of significant repair, and would require an unknown amount of money to bring “Parkside up to the caliber of physical plant to match the proposed construction at Heritage Grove.”⁸³ As such, remodeling Parkside facility is not a superior alternative to constructing the Heritage Grove facility.

1.39 Here, the Program did not identify any other alternative that was equal or superior to that considered by Heritage Grove.⁸⁴ Moreover, the Program determined that the rationale for rejecting the identified alternatives appeared reasonable and concluded the applicant met this sub-criterion.⁸⁵ The Presiding Officer reviewed the Application Record, the testimony and the Program’s assessment and concurs with the Program’s conclusion that there are no superior alternatives to constructing the Heritage Grove facility. As such, Heritage Grove has met this sub-criterion.

⁸² See AR 253-254; TR 594:13-20; TR 790:20- 791:12.

⁸³ See AR 253-254; TR 790:20- 791:9.

⁸⁴ See AR 282-283.

⁸⁵ See AR 283.

Construction costs

1.40 Based on the analysis of the financial feasibility criterion under WAC 246-310-220(2) reference above, the Presiding Officer concludes that the costs, scope, and methods of construction and energy conservation are reasonable and the project will not have an unreasonable impact on the costs and charges to the public of providing services by other persons. This sub-criterion is met.

Appropriate Improvements in the Delivery of Health Services

1.41 Based on the Application Record, the testimony, and the Program's assessment, the Presiding Officer finds that this project has the potential to improve delivery of nursing home services to the residents of Yakima County and communities surrounding the city of Yakima. Moreover, the Presiding Officer is satisfied the project is appropriate and will improve the delivery of health services in Yakima County. This sub-criterion is met.

II. CONCLUSIONS OF LAW

2.1 The Department of Health is authorized and directed to implement the Certificate of Need (CN) Program. RCW 70.38.105(1). The applicant must show or establish that its application meets all of the applicable criteria. WAC 246-10-606(2). The standard of proof in this case is preponderance of the evidence.⁸⁶ 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. See RCW 34.05.452(1).

2.2 The Presiding Officer (on delegated authority from the Secretary of Health) is the agency's fact-finder and decision maker. *DaVita v. Department of Health*, 137 Wn. App. 174, 182 (2007) (*DaVita*). The Presiding officer engages in a de novo review of the record. See *University of Washington Medical Center v. Department of Health*, 164 Wn.2d 95 (2008) (citing to *DaVita*). The Presiding Officer may consider the Program's written analysis in reaching his decision, but is not required to defer to the Program analyst's decision or expertise. *DaVita*, 137 Wn. App. at 182-183.

2.3 In acting as the Department's decision maker, the Presiding Officer reviewed the Application Record. The Presiding Officer also reviewed the hearing transcripts and the closing briefs submitted by the parties pursuant to RCW 34.05461(7). Further, the Presiding Officer applied the standards found in WAC 246-310-200 through 246-310-240 in evaluating the application.

2.4 **Need-WAC 246-310-210**

WAC 246-310-210(1) and (6) require an applicant to prove that need exists for the proposed project. However, RCW 70.38.115(13)(b) states that, numeric need shall be deemed met where a nursing home licensee has banked beds upon full closure of a facility and then applies to unbank the beds at a later date. The Program determined that Heritage Grove is such a licensee.⁸⁷ Prior to hearing, the Presiding Officer summarily ruled that Heritage Grove was exempt from demonstrating need⁸⁸ (under subsections (1) and (6)) and excluded hearing testimony, exhibits, and argument that would implicate numeric need criteria.

2.5 **Access-WAC 246-310-210(2)** states:

- (2) All residents of the service area, including low-income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups and the elderly are likely to have adequate access to the proposed health service or services. The assessment of the conformance of a project with this criterion shall include, but not be limited to, consideration as to whether the proposed services makes a contribution toward meeting the health-related needs of members of medically underserved groups which have traditionally experienced difficulties in obtaining equal access to health services, particularly those needs identified in the applicable regional health plan, annual implementation plan, and state health plan as deserving of priority. Such consideration shall include an assessment of the following:
 - (a) The extent to which medically underserved populations currently use the applicant's services in comparison to the percentage of the population in the applicant's service area which is medically underserved, and the extent to which

⁸⁶ See WAC 246-10-606.

⁸⁷ AR at 263.

⁸⁸ See Prehearing Order No. 6: Order on Motion for Summary Judgment, dated April 15, 2016.

medically underserved populations are expected to use the proposed services if approved;

- (b) The past performance of the applicant in meeting obligations, if any, under any applicable federal regulations requiring provision of uncompensated care, community service, or access by minorities and handicapped persons to programs receiving federal financial assistance (including the existence of any unresolved civil rights access complaints against the applicant);
- (c) The extent to which medicare, medicaid, and medically indigent patients are served by the applicant; and
- (d) The extent to which the applicant offers a range of means by which a person will have access to its services (e.g., outpatient services, admission by house staff, admission by personal physician).

2.6 Based on the Findings of Fact 1.10 through 1.14, Heritage Grove meets the requirements set forth in WAC 246-310-210(2).

2.7 **Financial Feasibility–WAC 246-310-220** states that the determination of financial feasibility of a project shall be based on the following criteria:

- (1) The immediate and long-range capital and operating costs of the project can be met.
- (2) The costs of the project, including any construction costs, will probably not result in an unreasonable impact on the costs and charges for health services.
- (3) The project can be appropriately financed.

2.8 Based on the Findings of Fact 1.15 through 1.18, Heritage Grove meets the requirements set forth in WAC 246-310-220.

2.9 **Quality of Care-WAC 246-310-230** sets forth the criteria to determine if projects foster an acceptable or improved quality of health care, to wit:

- (1) A sufficient supply of qualified staff for the project, including both health personnel and management personnel, are available or can be recruited.
- (2) The proposed service(s) will have an appropriate relationship, including organizational relationship, to ancillary and support services, and ancillary and support services will be sufficient to support any health services included in the proposed project.
- (3) There is reasonable assurance that the project will be in conformance with applicable state licensing requirements and, if the applicant is or plans to be certified under the medicaid or medicare program, with the applicable conditions of participation related to those programs.
- (4) The proposed project will promote continuity in the provision of health care, not result in an unwarranted fragmentation of services, and have an appropriate relationship to the service area's existing health care system.
- (5) There is reasonable assurance that the services to be provided through the proposed project will be provided in a manner that ensures safe and adequate care to the public to be served and in accord with applicable federal and state laws, rules, and regulations. The assessment of the conformance of a project to this criterion shall include but not be limited to consideration as to whether:
 - (a) The applicant or licensee has no history, in this state or elsewhere, of a criminal conviction which is reasonably related to the applicant's competency to exercise responsibility for the ownership or operation of a health care facility, a denial or revocation of a license to operate a health care facility, a revocation of a license to practice a health profession, or a decertification as a provider of services in the medicare or medicaid program because of failure to comply with applicable federal conditions of participation; or
 - (b) If the applicant or licensee has such a history, whether the applicant has affirmatively established to the department's satisfaction by clear, cogent and convincing evidence that the applicant can and will operate the proposed project for which the certificate of need is sought in a manner that

ensures safe and adequate care to the public to be served and conforms to applicable federal and state requirements.

2.10 Based on the Findings of Fact 1.19 through 1.34, Heritage Grove meets the requirements set forth in WAC 246-310-230.

2.11 **Cost Containment-WAC 246-310-240** sets out the criteria for ensuring that a proposed project will foster cost containment, to wit:

- (1) Superior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable.
- (2) In the case of a project involving construction:
 - (a) The costs, scope, and methods of construction and energy conservation are reasonable; and
 - (b) The project will not have an unreasonable impact on the costs and charges to the public of providing health services by other persons.
- (3) The project will involve appropriate improvements or innovations in the financing and delivery of health services which foster cost containment and which promote quality assurance and cost effectiveness.

2.12 Based on the Findings of Fact 1.35 through 1.41, Heritage Grove meets the requirements set forth in WAC 246-310-240.

2.13 The Program requests that the Health Law Judge uphold the Program's decision to issue CN #1557 to Heritage Grove. The Petitioners request that the Presiding Officer issue an order denying Heritage Grove's CN application. The Intervenors request dismissal of the Petitioners' Request for an Adjudicative Hearing, with prejudice.

NOTICE TO PARTIES

When signed by the presiding officer, this order shall be considered an initial order. RCW 18.130.095(4); Chapter 109, law of 2013 (Sec. 3); WAC 246-10-608.

Any party may file a written petition for administrative review of this initial order stating the specific grounds upon which exception is taken and the relief requested.

WAC 246-10-701(1). A petition for administrative review must be served upon the opposing party and filed with the adjudicative clerk office within 21 days of service of the initial order. WAC 246-10-701(3).

“Filed” means actual receipt of the document by the Adjudicative Clerk Office. RCW 34.05.010(6). “Served” means the day the document was deposited in the United States mail. RCW 34.05.010(19). The petition for administrative review must be filed within twenty-one (21) calendar days of service of the initial order with:

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

and a copy must be sent to the opposing party. If the opposing party is represented by counsel, the copy should be sent to the attorney. 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
PO Box 40109
Olympia, WA 98504-0109

Effective date: If administrative review is not timely requested as provided above, this initial order becomes a final order and takes effect, under WAC 246-10-701(5), at 5:00 pm on _____. Failure to petition for administrative review may result in the inability to obtain judicial review due to failure to exhaust administrative remedies. RCW 34.05.534.

Final orders will be reported as provided by law. Initial and Final orders will be placed on the Department of Health’s website, and otherwise disseminated as required by the Public Records Act (Chap. 42.56 RCW). All orders are public documents and may be released.

For more information, visit our website at:

<http://www.doh.wa.gov/PublicHealthandHealthcareProviders/HealthcareProfessionsandFacilities/Hearings.aspx>

FINDINGS OF FACT,
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