

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

In Re:	)	
	)	Master Case No. M2008-118433
Evaluations of the Following Four	)	
Certificate of Need Applications	)	FINDINGS OF FACT,
Proposing to Add Dialysis Station	)	CONCLUSIONS OF LAW
Capacity to Benton County:	)	AND FINAL ORDER ON
(1) DaVita, Inc., Proposing a Ten Station	)	SUMMARY JUDGMENT
Dialysis Facility in Kennewick;	)	
(2) DaVita, Inc., Proposing a Nineteen	)	
Station Dialysis Facility in Richland;	)	
(3) Fresenius Medical Care, Proposing	)	
a Twelve Station Dialysis Facility in	)	
Kennewick; and (4) Fresenius Medical	)	
Care, Proposing a Seventeen Station	)	
Dialysis Facility in Richland,	)	
	)	
Qualicenters Inland Northwest, LLC.	)	
	)	
Petitioner.	)	
	)	

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**APPEARANCES:**

Petitioner, Qualicenters Inland Northwest, by  
Davis Wright Tremaine, L.L.P., per  
Douglas C. Ross and Lisa R. Hayward, Attorneys at law

Department of Health Certificate of Need Program, by  
Office of the Attorney General, per  
Richard A. McCartan, Assistant Attorney General

Intervenor, DaVita, Inc., by  
Law Offices of James M. Beaulaurier, per  
James M. Beaulaurier, Attorney at Law

**PRESIDING OFFICER:** Theodora M. Mace, Health Law Judge

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND FINAL ORDER ON  
SUMMARY JUDGMENT

On November 26, 2008, DaVita, Inc. (DaVita), filed a Motion for Summary Judgment seeking that the Department of Health (Department) uphold the Certificate of Need Program's (Program) grant of certificates of need to DaVita and the Program's denial of certificates of need to Qualicenters Inland Northwest (Qualicenters).<sup>1</sup> DaVita's Motion for Summary Judgment is granted.

On January 2, 2009, Qualicenters filed a Cross-Motion for Partial Summary Judgment, requesting the Department to accept amendments to its applications, to grant it certificates of need, and to deny DaVita a certificate of need for its proposed Kennewick dialysis facility. Qualicenters' Cross-Motion for Summary Judgment is denied.

### **PROCEDURAL HISTORY**

In November 2007, DaVita<sup>2</sup> and Qualicenters<sup>3</sup> filed two applications each for certificates of need to establish kidney dialysis centers in the cities of Richland and Kennewick, respectively, in Benton County, Washington. The DaVita applications requested authority to establish a 10-station facility in Kennewick and a 19-station

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<sup>1</sup> A subsidiary of Fresenius Medical Care Holdings, Inc. (Qualicenters).

<sup>2</sup> DaVita is a for-profit corporation providing dialysis services in 42 states and the District of Columbia, including 23 kidney dialysis facilities in the state of Washington. See DaVita Motion for Summary Judgment, Declaration of James Beaulaurier (Beaulaurier Declaration), Exhibit No. 6, Program Evaluation of Projects (Program Evaluation), p. 4.

<sup>3</sup> Fresenius Medical Holdings is the parent company of Qualicenters Inland Northwest, which is one of four other QUALICENTERS subsidiaries. Four of the five subsidiaries operate dialysis centers in 45 states, the District of Columbia, and Puerto Rico. In the state of Washington, QUALICENTERS or one of its subsidiaries owns, operates, or manages 16 kidney dialysis facilities in 13 counties. See Program Evaluation, p. 5.

facility in Richland. The Qualicenters applications requested authority to establish a 12-station facility in Kennewick and a 17-station facility in Richland.

The Program treated the two DaVita applications and the two Qualicenters applications as competing applications, subject to Cycle 4 concurrent review under RCW 70.38.115(7), WAC 246-310-120, and WAC 245-310-280(3).<sup>4</sup>

On December 31, 2007, the Program issued screening requests to both applicants.<sup>5</sup> The Program asked Qualicenters for revised pro forma financial data for all site-related costs and all costs associated with the medical director for the proposed facilities.<sup>6</sup> Qualicenters made a timely response to the screening request on January 31, 2008, the last day such responses could be filed.<sup>7</sup>

The Program's review of the applications commenced on February 19, 2008, and the public comment period ended April 21, 2008.<sup>8</sup>

On April 21, 2008, Qualicenters filed public comments in which it corrected two transposition errors in its January 31, 2008 response to the Program's screening requests. The errors involved Qualicenters' inclusion of the Richland amounts for lease costs and medical director expenses in the Kennewick pro forma data and vice versa.

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<sup>4</sup> RCW 70.38.115(7) reads in part: Concurrent review is for the purpose of comparative analysis and evaluation of competing or similar projects in order to determine which of the projects may best meet identified needs. WAC 246-310-120 specifies time lines and procedures employed for concurrent review. WAC 246-310-280(3) states that, under concurrent review, the department "compares the applications to one another and to these rules."

<sup>5</sup> DaVita's Motion for Summary Judgment, Beaulaurier Declaration, (DaVita Motion) Exhibit No. 2.

<sup>6</sup> A pro forma financial statement is a one or two page document estimating the revenues and expenses associated with a given project.

<sup>7</sup> See Qualicenters Response to DaVita's Motion, attached Exhibit Nos. 4 and 7.

<sup>8</sup> DaVita's Motion, Exhibit No. 6, Program Evaluation, p. 8.

To correct the transposition errors, Qualicenters submitted a third version of its pro forma revenue and expense statement for each application.<sup>9</sup>

The Program determined that these corrections to Qualicenters' January 31, 2008 pro forma statements constituted untimely amendments to the applications in violation of WAC 246-310-090, WAC 246-310-100(6), and WAC 236-310-170. Due to their untimeliness, the Program did not consider the amendments in evaluating the applications.<sup>10</sup>

Relying on Qualicenters' January 31, 2008 pro forma statements, the Program determined that the amounts attributed to lease expense and medical director expense did not match the amounts stated in the respective underlying draft lease agreements and medical director agreements submitted with the applications, and thus the Program could not verify those expenses.<sup>11</sup> This, in turn, caused the Program to conclude that neither of the Qualicenters' applications met the financial feasibility criteria under WAC 246-310-220 because the Program could not evaluate the applications' long-range capital and operating costs,<sup>12</sup> their costs and charges per dialysis,<sup>13</sup> and whether the costs for the projects would result in an unreasonable impact to the costs and charges for health care facilities.<sup>14</sup>

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<sup>9</sup> Program Evaluation, p. 19.

<sup>10</sup> Id.

<sup>11</sup> Id., pp. 20-21.

<sup>12</sup> Id., pp. 23-24

<sup>13</sup> Id., pp. 26-27.

<sup>14</sup> Id., p. 28

The Program also could not determine whether the Qualicenters' applications met the structure and process of care criteria under WAC 246-310-230, because of uncertainty about the forecasted viability of the projects. The Program determined that this uncertainty would have the potential to fragment dialysis services in the applicant's service area.<sup>15</sup>

Finally, the Program could not determine whether the Qualicenters' applications met the cost containment criteria under WAC 246-310-240.

The Program concluded that, under WAC 246-310-240(1), which requires the Program to find what is the best available alternative to meet the need for dialysis facilities, the DaVita applications constituted the best available alternatives because they had met all the applicable review criteria.<sup>16</sup> On that basis, the Program granted DaVita certificates of need in both its applications.

On July 11, 2008, the Program issued its decision approving both of the DaVita applications and denying both of the Qualicenters applications.

Qualicenters did not request reconsideration of the denial, but filed an application for adjudication on August 8, 2008.

On November 26, 2008, Davita filed its Motion for Summary Judgment. Qualicenters filed a response on January 2, 2009. DaVita filed a reply to the response on January 30, 2009. The Program filed a response supporting the motion on January 30, 2009.

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<sup>15</sup> Id., pp. 40-41

<sup>16</sup> Id., p. 43.

On January 2, 2009, Qualicenters filed its Cross-Motion for Partial Summary Judgment. DaVita filed a response on January 30, 2009. The Program filed its opposition to the cross-motion on January 30, 2009. Qualicenters filed a reply to the response on February 9, 2009.

### **DAVITA'S MOTION FOR SUMMARY JUDGMENT**

The central issue in DaVita's Motion for Summary Judgment is whether the Program properly rejected Qualicenters' corrections to its January 31, 2009 screening responses. DaVita also contends the Department should uphold the Program's approval of DaVita's applications, because it falls within the Program's discretion to interpret and apply its own rules.

Qualicenters challenges the adequacy of DaVita's application as to: 1) the lack of zoning information associated with its project sites; 2) the rising depreciation expenses identified in DaVita's financial information; and 3) the staffing DaVita proposes for its dialysis centers.

### **QUALICENTERS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Qualicenters contends that once its corrections to its applications for rent and medical director expenses are accepted, its applications will be found to be financially feasible. Qualicenters further contends that because DaVita failed to provide a letter from a municipal authority showing that the site for the proposed Kennewick facility is properly zoned, DaVita's Kennewick application must be denied.

## I. FINDINGS OF FACT

### Application and concurrent review process.

1.1 Applicants for certificates of need must provide sufficient evidence that they meet four basic criteria: need, financial feasibility, structure and process (quality) of care, and cost containment.<sup>17</sup> If applications are competing, the Program determines whether to review them concurrently.<sup>18</sup>

1.2 Applicants must file an application form that requests a variety of information. The same application form is used for all certificates of need applications and the form is not tailored to specific projects. There is no separate kidney dialysis application form.

1.3 Under the concurrent review process, once applications are received, the Program screens them for completeness. If the Program has questions regarding the applications after the completion of the screening process, it forwards those screening requests to the applicants for response.<sup>19</sup>

1.4 The Program's review of the applications begins 15 days after the screening response deadline. After completing its review, the Program issues a written decision on the applications.<sup>20</sup> The Program can deny an application if the applicant has not provided timely information which is necessary for determining whether the

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<sup>17</sup> See WAC 246-310-200; see also, WAC 246-310-210, 220, 230, and 240, respectively.

<sup>18</sup> See RCW 70.38.115(7) and WAC 246-310-120. WAC 246-310-282 governs concurrent review of applications to construct kidney dialysis units.

<sup>19</sup> WAC 246-310-090(2)(e).

<sup>20</sup> WAC 246-310-490(1)(a) and (d).

project meets all of the applicable criteria and which the Program has prescribed and published as necessary.<sup>21</sup>

Qualicenters' Amendments.

1.5 Qualicenters' deadline for filing screening responses was January 31, 2008.

1.6 The Program's review of the concurrent applications in this proceeding commenced on or about February 19, 2008.

1.7 Amendments to Qualicenters' applications were due within 30 days of the commencement of the Program's review, or on or about March 19, 2008.

1.8 Qualicenters filed its changes to its applications on April 21, 2008, more than 60 days from the commencement of the Program's review.

Zoning of DaVita's Project Sites.

1.9 The zoning for a dialysis site is a factor in deciding whether a project is financially feasible under WAC 246-310-220(1).

1.10 Under "Project Description," the application form requests that the applicant:

- o. Provide documentation that the proposed site may be used for the proposed project. Include a letter from any appropriate municipal authority indicating that: 1) the site for the proposed project is properly zoned for the anticipated use, and 2) scope of the project or a written explanation of why the proposed project is exempt.

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<sup>21</sup> WAC 246-310-490(1)(a)(ii).



1.11 For its Kennewick project, DaVita did not submit a letter from a municipal authority regarding zoning for the proposed site. DaVita submitted a lease warranty from Lessor EDG-DV Kennewick, LLC, that the site was properly zoned; the lessors' lease representation that the lessor knew that the use of the building for a dialysis clinic would not violate the law and would not constitute a non-conforming use; and the lessor's work plan showing the lessor's legal obligation to obtain building permits and connection fees which require proper zoning for the site.<sup>22</sup>

1.12 For its Richland project, DaVita supplied similar lessor warranties from Lessor Bush Living Trust, along with documentation from Benton County about the zoning classification for the proposed site.<sup>23</sup>

1.13 Qualicenters filed no comment or criticism regarding DaVita's failure to supply a letter from a municipal authority during the public comment period.<sup>24</sup>

1.14 The Program did not specifically address DaVita's documentation regarding zoning for the Kennewick project but found that DaVita met the financial feasibility criteria under WAC 246-310-220(1).<sup>25</sup>

#### DaVita's Depreciation expense.

1.15 Depreciation expenses are additional factors in determining whether a dialysis project is financial feasible under WAC 246-310-220.

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<sup>22</sup> DaVita Motion for Summary Judgment, pp. 13-14. See also, Exhibit No. 15 to Beaulaurier Declaration Supporting Motion for Summary Judgment.

<sup>23</sup> See DaVita Motion, Exhibit Nos. 16-17.

<sup>24</sup> Id.

<sup>25</sup> Program evaluation, p. 23.

1.16 DaVita's pro forma financial statements show that its depreciation expense increases slightly over time. DaVita does not identify specific capital expenditures that would cause the increase in depreciation expense, but explains that depreciation expense increases are slight in nature and attributable to minor future projected capital expenditures required due to normal operations.<sup>26</sup>

Staffing at DaVita's Dialysis Centers.

1.17 Facility staffing is a factor in determining whether a project meets the structure and process (quality) of care requirement under WAC 246-310-230.

1.18 For its Kennewick site, DaVita proposed to recruit 5.20 FTEs<sup>27</sup> in partial year 2009, increasing to 11.30 FTEs by the end of the third full calendar year, 2012. For its Richland Facility, DaVita proposed hiring 6.70 FTEs in partial year 2009 with an increase to a total of 21.00 FTEs by 2012.<sup>28</sup>

1.19 Survey staff responsible for determining whether a facility meets Medicare certification standards determined that DaVita's staffing would be adequate.<sup>29</sup>

## **II. CONCLUSIONS OF LAW**

Summary Judgment Authority.

2.1 Administrative tribunals are authorized to rule by summary judgment.<sup>30</sup>

Summary judgment is appropriate if the pleadings, depositions, answers to

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<sup>26</sup> Program evaluation. p. 18.

<sup>27</sup> Full Time Equivalents.

<sup>28</sup> Program Evaluation, p. 30.

<sup>29</sup> Id., p. 31.

<sup>30</sup> ASARCO v. Air Quality Coalition, 92 Wn.2d 685 (1979).

interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.<sup>31</sup>

2.2 A material fact is one upon which the outcome of the litigation depends.<sup>32</sup> Summary judgment is not proper if “reasonable minds could draw a different conclusion from undisputed facts, or if all of the facts necessary to determine the issues are not present.”<sup>33</sup> In ruling on a motion for summary judgment a court must consider “[a]ll facts and reasonable inferences ... in the light most favorable to the nonmoving party, and all questions of law are reviewed de novo.”<sup>34</sup>

2.3 When a party files a motion for summary judgment, the opposing party may not rely on mere allegations or denials but must respond by affidavits or otherwise with specific facts showing there is a genuine issue for trial.<sup>35</sup>

#### Certificate of Need Authority.

2.4 The Department of Health is authorized and directed to implement the Certificate of Need Program.<sup>36</sup> The applicants bear the burden of showing that their applications meet all of the applicable criteria.<sup>37</sup> The Department issues a written analysis which grants or denies the certificate of need applications. The written analysis

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<sup>31</sup> Civil Rule (CR) 56(c).

<sup>32</sup> *Tran v. State Farm Fire & Casualty Co.*, 136 Wn.2d 214, 223 (1998).

<sup>33</sup> *Id* at 223.

<sup>34</sup> *Sundquist Homes v. Snohomish PUD#1*, 140 Wn.2d 403, 406 (2000) (citations omitted).

<sup>35</sup> CR 56(e).

<sup>36</sup> RCW 70.38.105(1).

<sup>37</sup> WAC 246-10-606.

must contain sufficient evidence to support the Department's decision.<sup>38</sup> Admissible evidence in the certificate of need proceeding 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). The standard of proof is preponderance of the evidence.<sup>39</sup>

#### Review Criteria.

2.5 Under WAC 246-310-200(1), the criteria for review of all applications, including those under concurrent review, are:

- (a) Whether the proposed project is needed;
- (b) Whether the proposed project will foster containment of the costs of health care;
- (c) Whether the proposed project is financially feasible; and
- (d) Whether the proposed project will meet the criteria for structure and process of care identified in WAC 246-310-230.

#### Application form and information required for applications.

2.6 RCW 70.38.115(6) provides:

The department shall specify information to be required for certificate of need applications. Within 15 days of receipt of the application, the department shall request additional information considered necessary to the application or start the review process. Applicants may decline to submit requested information through written notice to the department, in which case review starts on the date of receipt of the notice. *Applications may be denied or limited because of failure to submit required and necessary information.*

RCW 70.38.115(6) (emphasis added). The regulation in which the Program specifies the information required for the application is set forth in WAC 246-310-090:

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<sup>38</sup> WAC 246-310-200(2)(a).

<sup>39</sup> WAC 246-10-606.

- (a) A person proposing an undertaking subject to review 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 application.
  - (i) The information, which the department prescribes and publishes as required for a certificate of need, shall be limited to the information necessary for the department to perform a certificate of need review, and shall vary in accordance with and be appropriate to the category of review or the type of proposed project: Provided, however, that the required information shall include what is necessary to determine whether the proposed project meets applicable criteria and standards.
  - (ii) Information regarding a certificate of need application submitted by an applicant after the department has given “notification of beginning of review” in the manner prescribed by WAC 246-310-170 shall be submitted in writing to the department.
  - (iii) Except as provided in WAC 246-310-190, no information regarding a certificate of need application submitted by an application after the conclusion of the public comment period shall be considered by the department in reviewing and taking action on a certificate of need application. An exception to this rule shall be made when, during its final review period, the department finds an unresolved pivotal issue requires submission of further information by an applicant and the applicant agrees to an extension of the review period or to resolve this issue as provided for in WAC 246-310-160(2)(b), WAC 246-310-150(2)(c), and 246-310-140(4).

Changes/Amendments to Applications.

2.7 WAC 246-310-100 provides:

- (1) The following changes to an application may be considered by the department an amendment of an application:
  - (a) The addition of a new service or elimination of a service included in the original application.
  - (b) The expansion or reduction of a service included in the original application.
  - (c) An increase in the bed capacity.
  - (d) A change in the capital cost of the project or the method of financing the project.
  - (e) A significant change in the rationale used to justify the project.
  - (f) A change in the applicant.

...

- (5) *An application for expedited or regular review may be changed during the screening period or the public comment period.*
- (6) *An application for concurrent review may be amended according to the following provisions:*
  - (a) *The department shall determine when an application has been amended.*
  - (b) *An amendment may be made through the first 45 days of the concurrent review process. When the department determines an applicant has amended an application, the review period for all applications reviewed concurrently shall be extended by a single 30-day period.*
  - (c) *Any information submitted after the amendment period which has not been requested in writing by the department shall be returned to the person submitting the information and shall not be considered in the review of the application. (emphasis added).*

## **DaVita's Motion for Summary Judgment.**

### **1. Qualicenters' Amendments.**

2.8 The Program properly rejected Qualicenters' April 21, 2008 revisions to its applications.

2.9 Qualicenters erroneously argues the Program should have noticed and corrected Qualicenters' transposition errors contained in its January 31, 2008 responses to screening requests, making it unnecessary to consider Qualicenters' April 21, 2008 revisions. The Program is not obligated to detect or correct such mistakes. An applicant bears the burden of establishing that the application meets all applicable criteria. WAC 246-10-606.

2.10 Qualicenters further erroneously argues that its April 21, 2008 revisions constitute mere changes rather than amendments to its application. To the contrary, under the process for concurrent review, those revisions constituted untimely amendments to its application.

2.11 For purposes of making changes to applications, applicants are subject to two different sets of criteria; concurrent and regular/expedited. WAC 246-310-100(5) and (6). Concurrently reviewed applications are treated differently in order to encourage more expeditious review of competing applications, a process that tends to be complicated and contentious. RCW 70.35.115(7).

2.12 An applicant may make changes to applications undergoing regular/expedited review during the screening period or the public comment period.

WAC 246-310-100(5). However, the rule governing concurrently reviewed applications makes no provision for such changes. WAC 246-310-100(6).

2.13 Under the rule governing concurrently reviewed applications, the Department determines what constitutes an amendment. WAC 246-310-100(6)(a). In this case, the Qualicenters changes constitute amendments to its applications. The changes belong to the amendment classification in WAC 246-310-100(1)(e) – they significantly affected the rationale justifying the projects. The proposed amendments have a broad ranging impact on numerous aspects of the analysis required under the rules, including financial feasibility, costs and charges for health care facilities, structure and process of care, cost containment, and construction costs.<sup>40</sup>

2.14 As amendments, the changes Qualicenters proposed on April 21, 2008, were not timely filed. The deadline for screening responses was January 31, 2008,<sup>41</sup> making the date for commencement of review February 19, 2008. Amendments to concurrently reviewed applications must be filed within 30 days of the commencement of the concurrent review process. WAC 246-310-100(6)(b)(i). Qualicenters did not file its amendments until 65 days after review commenced.<sup>42</sup>

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<sup>40</sup> Program evaluation pp. 23, 26, 27, 41, and 43.

<sup>41</sup> The Program submitted its screening request to the applicants on December 31, 2007. Under concurrent review responses to such requests are due within one month of the request, in this case, on January 31, 2008. WAC 246-310-090(2)(e).

<sup>42</sup> January 31, 2008, was the deadline for screening responses. Fifteen days from that date is February 15, 2008. The gap between the latter date and April 21, 2008, is 65 days. Qualicenters acknowledges that if the changes were considered amendments, they were not timely filed. Qualicenters Opposition to DaVita motion, p. 9.



2.15 Qualicenters erroneously contends that, nevertheless, its changes should be allowed under WAC 246-310-090(1)(iii) which states that "no information regarding a certificate of need application submitted by an applicant after the conclusion of the public comment period shall be considered by the department in reviewing and taking action on a certificate of need application." To interpret this rule to allow substantial amendments to concurrently reviewed applications during the public comment period, as Qualicenters proposes, would create an absurd result. It would prejudice the opportunity of competing applicants to comment on applications – in effect, the applications would become moving targets for commentators. Further, it would create significant difficulties for the Program's expeditious review of such applications. While upholding the amendment deadlines may appear harsh, applicants, such as the parties to this case, have long experience with the review process and the concern for expeditious review. It behooves such sophisticated applicants to file timely amendments in order to avoid the prospect of gaming the review system.

## **2. Zoning of DaVita's Dialysis Sites.**

2.16 Qualicenters challenges DaVita for failing to provide letters from a municipal authority regarding the zoning of its proposed dialysis sites. Qualicenters contends they must be provided because the certificate of need application form requires them. DaVita's failure to provide such letters does not harm its applications.<sup>43</sup>

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<sup>43</sup> In its response to DaVita's Motion for Summary Judgment, Qualicenters contests DaVita's zoning proofs for both the Kennewick and Richland applications. However, Qualicenters only challenged the Kennewick application in its Cross-motion for Summary Judgment.

2.17 The Program's application form and screening process are intended to elicit material from applicants that will assist the Program in determining whether applicants have met regulatory criteria in accord with RCW 70.38.115(6) and WAC 246-310-090. The form itself does not constitute an absolute rule regarding which application materials must be submitted.

2.18 It is clear from the introductory wording of the site control portion of the application form that the Program looks for "documentation that the proposed site may be used for the proposed project." The language subsequent to this introductory phrase suggests that applicants can satisfy this requirement by submitting a letter from a municipal authority. However, since the primary goal of the Program is to determine whether applicants have adequate site control to build and operate the proposed facility over the long term, it is reasonable to assume that the Program may properly look to other assurances from applicants, as it did in this case with DaVita's applications, to determine whether site control is adequate.

2.19 Qualicenters erroneously argues that a holding in a prior Order on Summary Judgment<sup>44</sup> would require the submission of such a letter because the requirement was listed in the application form. Prior certificate of need orders are not precedential unless they are designated as significant decisions. The September 23, 2008 Order on Summary Judgment was not so designated. Nevertheless, nowhere in the September 23, 2008 Order does it state that an application would fail solely because

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<sup>44</sup> Order on Summary Judgment in Docket Nos. 07-12-C-2002CN, 08-01-C-2003CN, 08-01-C-2004CN, 08-01-C-2005CN, 08-01-C-2006CN, 08-01-C-2007CN, 08-01-C-2008CN, 08-01-C-2009CN, & 08-01-C-2010CN, September 23, 2008 (September 23, 2008 Order).

an application form requirement, such as the submission of a letter from a municipal authority was not met. Rather, the Order makes clear, by citing WAC 246-310-090, that the goal of the application form is to elicit sufficient information to allow the department to decide whether an application meets certificate of need criteria. Order at 19, 25-26.

2.20 Because the application form is generic in nature, the Program frequently asks for additional information in its screening requests so as to address issues specific to each application. Moreover, some information in the application form no longer applies. An example is that the application form requires applicants to provide a pro forma balance sheet, something the Program no longer requires applicants to submit.<sup>45</sup>

2.21 In this case, DaVita supplies assurances from Lessor Bush Living Trust (Richland site) and Lessor EDG-DV Kennewick, LLC (Kennewick), that the zoning for the respective sites is appropriate for a dialysis facility. In addition, for the Richland application, DaVita supplies information from government authorities regarding use classifications for the site. The Program properly accepted the lessors' assurances, based on the lessors' financial interest in a stream of income from the property, as adequate evidence of DaVita's site control. In addition, the Program required DaVita to supply executed lease agreements for each site prior to commencement of the projects.<sup>46</sup>

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<sup>45</sup> Second Beaulaurier Declaration attached to Reply Supporting DaVita's Motion, Exhibit No. 19 and Program Evaluation p. 23.

<sup>46</sup> July 11, 2008 cover letters to DaVita attached to Program Evaluation.

2.22 Qualicenters further criticizes DaVita's provision of draft lease agreements but offers no authority that requires executed agreements during the application process. The provision of executed leases prior to a grant of certificate of need may be commercially impractical, and there are other ways to be assured that a draft lease meets certificate of need criteria. Qualicenters fails to meet the criteria in Court Rule 56(e), which requires that the opposing party not rely merely on allegations and denials but provide "specific facts showing that there is a genuine issue for trial."

### **3. DaVita's Depreciation Expense Levels.**

2.23 Qualicenters erroneously contends that DaVita has failed to identify capital expenditures related to construction of DaVita's dialysis facilities as signified by the slight increase over time of DaVita's depreciation expense. The slight increase in DaVita's project-related depreciation expense over time is due to unforeseen capital expenditures that might be required to keep the facilities running. These expenses are minor and have no impact on the profitability of the DaVita dialysis projects. Therefore, the expenses need not be included as capital costs of the projects. Qualicenters provides no additional specific facts showing that there is a genuine issue for trial related to the DaVita depreciation expenses as required under Court Rule 56(e).

### **4. Staffing at DaVita's Dialysis Centers.**

2.24 Qualicenters objects that DaVita's staffing levels do not meet industry standards. However, staffing experts reviewed DaVita's staffing levels and found them adequate. Qualicenters has offered no new specific facts to show that there is a

problem with DaVita's proposed staffing or that there is a genuine issue for trial as required under Court Rule 56(e). Qualicenters' arguments are rejected.

## 5. DeNovo Review.

2.25 Qualicenters erroneously relies on *DaVita v. Dept. of Health*, 137 Wn. App. 172 (2007) to argue that, in this case, DaVita must introduce new evidence in this proceeding *de novo* that its applications meet all certificate of need criteria and sub criteria. *DaVita v. Dept of Health* holds that in certificate of need adjudications, the HLJ "takes evidence, listens to oral argument, and issues her own findings and conclusions." *Id.* at 182. The HLJ conducts the hearing *de novo*. *Id.* The HLJ does not need to defer to the Program analysts. *Id.*, at 183. However, the HLJ has discretion as to how to apply the agency's expertise to evaluate the evidence and is not "free to completely disregard the Program's decision." *Id.* at 184. Moreover, in the more recently decided *University of Washington Medical Center v. Dept of Health (UWMC)*, 164 Wash.2d, 95 (2008), the state Supreme Court held that the HLJ performs a *de novo* review. *Id.* A request for an adjudicative proceeding does not begin the application process anew, but rather is a part of the whole statutorily established certificate of need process. *Id.* at 104.

2.26 Considering all the pleadings and other information together, including the Program's evaluation of the applications, submitted in support of DaVita's Motion for Summary Judgment, it is concluded DaVita has demonstrated that there are no genuine issues of fact for trial and that as a matter of law its own applications met all the criteria established for grants of certificates of need. Furthermore, the pleadings and

information supplied with the Cross-Motion for Summary Judgment shows that there is no genuine issue of fact that Qualicenters: 1) failed to satisfy the financial feasibility criteria in WAC 246-310-220(1);<sup>47</sup> 2) failed to show that its projects would not have an unreasonable impact on costs and charges for health services;<sup>48</sup> 3) failed to show projects had the potential to fragment dialysis services in the planning area;<sup>49</sup> and 4) failed to show projects are not the best alternative to meet the demonstrated need, in comparison to the DaVita projects.<sup>50</sup>

### **Qualicenters' Cross Motion for Summary Judgment.**

2.27 Qualicenters contends that once the corrections to its applications are accepted, its applications would meet all the criteria for granting certificates of need. It has been determined above that Qualicenters' corrections constituted untimely amendments to its applications, and that it therefore, failed to meet the criteria for granting certificates of need.

2.28 Qualicenters further contends that DaVita failed to show that it had adequate site control for its Kennewick facility because DaVita did not provide a letter from a municipal authority showing proper zoning. This contention was rejected in the above findings regarding DaVita's site control evidence and will not be addressed further here.

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<sup>47</sup> Program evaluation pp. 26-28.

<sup>48</sup> Id., p. 41.

<sup>49</sup> Id., p. 43.

<sup>50</sup> Id.

Scheduling Issues.

2.29 This order renders moot the schedule of proceedings for this case which was established as a result of the March 6, 2009 scheduling conference.

**III. ORDER**

It is Ordered that DaVita's motion for summary judgment is GRANTED, and that Qualicenters' Cross-Motion for Summary Judgment is DENIED.

Dated this 13th day of March, 2009.

\_\_\_\_\_/s/\_\_\_\_\_  
THEODORA M. MACE, Health Law Judge  
Presiding Officer

**NOTICE TO PARTIES**

This order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either party may file a **petition for reconsideration**. RCW 34.05.461(3); 34.05.470. The petition must be filed within 10 days of service of this order with:

Adjudicative Service Unit  
P.O. Box 47879  
Olympia, WA 98504-7879

and a copy must be sent to:

Certificate of Need Program  
P.O. Box 47852  
Olympia, WA 98504-7852

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND FINAL ORDER ON  
SUMMARY JUDGMENT

The petition must state the specific grounds for reconsideration and what relief is requested. WAC 246-11-580. The petition is denied if the Presiding Officer does not respond in writing within 20 days of the filing of the petition.

A **petition for judicial review** must be filed and served within 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 above 30-day period does not start until the petition is resolved. RCW 34.05.470(3).

The order is in effect while a petition for reconsideration or review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This order is "served" the day it is deposited in the United States mail. RCW 34.05.010(19).

For more information, visit our website at <http://www.doh.wa.gov/hearings>.