



STATE OF WASHINGTON
DEPARTMENT OF HEALTH

August 10, 2016

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RE: Master Case No. M2015-1165

Dear Parties:

Enclosed please find Findings of Fact, Conclusions of Law, and Final Order on Summary Judgment dated August 8, 2016.

Any questions regarding the terms and conditions of the Order should be directed to Janis Sigman, Program Manager at (360) 236-2956.

Sincerely,

Michelle Singer, Lead Adjudicative Clerk
Adjudicative Clerk Office
PO Box 47879
Olympia, WA 98504-7879

cc: Janis Sigman, Program Manager

Enclosure



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

In Re:)
) Master Case No. M2015-1165
CERTIFICATE OF NEED APPLICATION)
OF VIDELL HEALTHCARE MERCER) DECLARATION OF SERVICE
ISLAND, LLC, DOH DECISION RETURN) BY MAIL
CON APPLICATION, August 21, 2015)
)
VIDELL HEALTHCARE MERCER)
ISLAND, LLC; BD RENTON I, LLC,)
)

Petitioner)

I declare under penalty of perjury, under the laws of the state of Washington, that the following is true and correct:

On August 10, 2016, I served a true and correct copy of the Findings of Fact, Conclusions of Law, and Final Order on Summary Judgment, signed by the Review Officer on August 8, 2016, by placing same in the U.S. mail by 5:00 p.m., postage prepaid, on the following parties to this case:

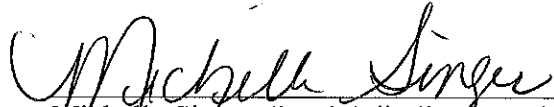
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Office of the Attorney General
PO Box 40109
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DATED: This 10th day of August, 2016


Michelle Singer, Lead Adjudicative Clerk Office
Adjudicative Clerk

cc: Janis Sigman, Program Manager

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF THE SECRETARY

In the Matter of:

Master Case No. M2015-1165

CERTIFICATE OF NEED APPLICATION OF
VIDELL HEALTHCARE MERCER ISLAND,
LLC, DOH DECISION RETURNING CON
APPLICATION, August 21, 2015

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

VIDELL HEALTHCARE MERCER ISLAND,
LLC; BD RENTON I, LLC,

Petitioners, and

SECOND GENERATION PARTNERS, LLC

Intervenor.

APPEARANCES:

Petitioner, Videll Healthcare Mercer Island, LLC, by
David Wright Tremaine, LLP, per
Lisa R. Hayward and Brad Fisher, Attorneys at Law

Petitioner, BD Renton I, LLC, by
Ryan, Swanson and Cleveland, PLLC, per
Thomas H. Grimm, Attorney at Law

Department of Health, Certificate of Need Program, by
Robert W. Ferguson, Attorney General, per
Richard A. McCartan, Assistant Attorney General

Intervenor, Second Generation Partners, LLC, by
Lane Powell, PC, per
Barbara J. Duffy and Jonathon Bashford, Attorneys at Law

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Master Case No. M2015-1165

ORIGINAL

PROCEDURAL HISTORY ON REVIEW

This matter comes before the Review Officer for administrative review of the Corrected Prehearing Order No. 3: Order on Summary Judgment (Initial Order) dated February 26, 2016, of the Presiding Officer, Roman S. Dixon, Jr. The Presiding Officer issued the Initial Order in response to a Motion for Summary Judgment brought by Videll Healthcare Mercer Island, LLC (Videll) and BD Renton I, LLC (BD) (collectively Petitioner) seeking resolution on several issues including the Certificate of Need Program's (Program) failure to process Videll's certificate of need application to utilize 100 banked nursing home beds. The Program also filed a Motion for Summary Judgment seeking an order denying Videll's application due to its failure to timely bank the nursing home beds.

The Initial Order granted the Program's motion and denied Videll's application, but granted in part Petitioner's motion for summary judgment regarding the legal interest of Intervenor Second Generation Partners LLC (SGP) in the beds. The Initial Order was served on the parties on February 29, 2016. Petitioners filed a Petition for Administrative Review (Petitioner's Petition) on March 18, 2016. SGP filed a Petition for Administrative Review (SGP's Petition) on March 21, 2016.

PETITIONER'S PETITION FOR REVIEW

Petitioners cite two categories of alleged error as basis for their Petition. Specifically, Petitioner's claim seven errors relating to the Findings of Fact in the Initial Order, as well as fourteen issues related to the legal basis of the Initial Order.

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THE PROGRAM'S RESPONSE

The Program opposes Petitioner's Petition. The primary basis for this opposition is the contention that Videll's July 30, 2014 request to bank the beds was untimely due to revocation of its license by DSHS on June 27, 2014.

SGP'S PETITION FOR REVIEW

SGP's Petition notes support for the Initial Order's finding that Petitioner made an untimely request to bank beds. However, it alleges error in the determination that SGP has no interest in the banked beds because that issue was not included in Petitioner's request for an adjudicative proceeding, was not addressed by the Program, and is beyond the jurisdiction of this proceeding.

PETITIONER'S RESPONSE

Petitioner opposes SGP's Petition and asks that it be denied. Petitioner asserts that SGP's interest in the beds is properly before this tribunal.

THE PROGRAM'S RESPONSE

The Program supports SGP's Petition. It argues that Petitioner's request for an adjudicative proceeding contested only Videll's bed banking rights and did not raise the issue of SGP's bed banking rights. Further, the validity of SGP's bed banking would only be relevant if it chose to submit a certificate of need application to un-bank the beds.

ISSUES

- 1) Should Petitioner's December 14, 2015 Motion for Summary Judgment be granted?

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- 2) Should the Program's December 14, 2015 Motion for Summary Judgment be granted?

I. PROCEDURAL HISTORY AND SUMMARY OF PROCEEDINGS

1.1 On July 30, 2014¹, Videll filed with the Program a Notice of Intent to retain 100 Nursing Home Bed Allocation at Mercer Island Care and Rehabilitation Center (Mercer Island facility). On July 22, 2014, SGP had also filed a request with the Program to bank the same 100 beds at the Mercer Island facility. Based on Videll's representation that the nursing home closure date was July 3, 2014,² the Program indicated the beds were properly banked.

1.2 On July 6, 2015, Videll filed a Certificate of Need application to build a new facility in Renton, Washington, utilizing the 100 banked beds from the Mercer Island facility.

1.3 On August 21, 2015, the Program notified Petitioner that the Program was returning Videll's application to "un-bank" the beds without further review because the 100 beds were not properly retained under the applicable law.

1.4 On September 11, 2015, Petitioner filed a Request for Adjudicative Proceeding. The request contested the Program's letter dated August 21, 2015.

1.5 On October 22, 2015, SGP filed a Motion to Intervene which was granted by Health Law Judge John F. Kuntz on November 25, 2015.³

1.6 On December 14, 2015, Videll filed a Motion for Summary Judgment. Videll argued that it timely reserved its right to bank the 100 licensed nursing home beds, and is

¹ An email notice was also sent to the Program on July 29, 2014.

² See letter dated July 21, 2014, and signed by Steve LaForte on behalf of Videll.

³ See Prehearing Order No. 1: Order on Motion to Intervene.

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therefore entitled to submit a certificate of need application utilizing the banked beds. In addition, Videll alleged that the Program, which previously informed Videll that the beds were properly banked, should be estopped from changing its bed banking decision. Videll also asserted that SGP has no legal interest in the bed rights.

1.7 On December 14, 2015, the Program also filed a Motion for Summary Judgment. The Program argued that Videll's notice to bank the 100 beds was not timely and, therefore, the beds were never properly banked.

1.8 The parties filed numerous responses and replies to the motions for summary judgment.

1.9 On February 23, 2016, the Presiding Order issued Prehearing Order No. 2: Order on Summary Judgment. On February 26, 2016, the Presiding Officer issued Corrected Prehearing Order No. 3: Order on Summary Judgment (Initial order).⁴ The corrected Initial Order was served on the parties on February 29, 2016.

1.10 On March 18, 2016, Petitioner filed a Petition for Review.

1.11 On March 21, 2016, SGP filed a Petition for Review.

1.12 Program filed opposition to Petitioner's Petition on April 7, 2016, and support of SGP's Petition on April 11, 2016.

1.13 On April 12, 2016, Petitioner filed opposition and amended opposition to SGP's Petition.

⁴ The corrected version included language to apprise the parties of their right to request administrative review. No substantive changes were made.

II. FINDINGS OF FACT

2.1 A "certificate of need" means a written authorization by the Program for a person to implement a proposal for one or more undertakings. WAC 246-310-010(11). Certificates of need shall be issued or denied in accordance with the provisions of chapter 70.38 RCW and the rules of the Department of Health (chapter 246-310 WAC). RCW 70.38.115(1).

2.2 From November 2012 to June 2014, Videll was the licensed operator of the Mercer Island facility, a 100-bed nursing home located at 7445 SE 24th Street, Mercer Island, Washington. Nursing homes in Washington State must be licensed by the Department of Social and Health Services (DSHS) in accordance with chapter 18.51 RCW.

2.3 SGP was the owner of the Mercer Island facility. Between November 2012 and June 2014, Videll engaged in a lease agreement with SGP as SGP's tenant.

2.4 On June 5, 2014, DSHS notified the administrator of the Mercer Island facility, *via* certified mail, of the "Appointment of Temporary Manager, Emergency Closure and License Revocation" of the facility's nursing home license. The letter explained that DSHS found it necessary to take emergency action to safeguard the health, safety, and welfare of the facility's residents and that a temporary manager had been appointed to oversee the orderly closure of the facility. The letter further stated the emergency closure and revocation of Videll's license was based on the violations of statutes and regulations identified in the May 29, 2014 Statement of Deficiencies, including level L (immediate jeopardy) citations, and Videll's significant history of

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uncorrected violations. In addition, the letter informed Videll it had the right to request an administrative hearing to appeal but any request for hearing must be filed within 20 calendar days of receipt of the June 5, 2014 letter.⁵

2.5 The June 5, 2014 letter was addressed to Administrator of the Mercer Island Care Center and Rehabilitation facility. Ms. Dawn Jacobs was the facility administrator on June 5, 2014. Ms. Jacobs signed the certified mail receipt indicating she received the letter on June 7, 2014.

2.6 Steve LeForte, manager of Videll, received the DSHS letter via an email copy from the newly appointed temporary manager on June 9, 2014.⁶

2.7 Videll did not request an administrative hearing to contest or appeal the license revocation or other DSHS actions identified in the June 5, 2014 letter. The last day to request such a hearing was June 27, 2014, based on the June 7, 2014 date of receipt. Therefore, the DSHS emergency action revoking Videll's license became final on June 27, 2014.⁷

2.8 The last resident moved out of the Mercer Island facility on July 3, 2014.

2.9 On July 11, 2014, Videll's attorney, Thomas Grimm, contacted Certificate of Need Program Analyst Karen Nidermayer regarding the reservation of bed rights. Among other things, Mr. Grimm and Ms. Nidermayer discussed a facility shut down date of July 3, 2014, and that Videll was allowed 30 days to submit a notice of reservation of

⁵ See Appointment of Temporary Manager, Emergency Closure, and License Revocation letter dated June 5, 2014.

⁶ See Declaration of Stephen J. LeForte dated December 11, 2015.

⁷ An email from DSHS staff dated July 10, 2015, states the effective date of the license revocation was June 25, 2014, but this appears to begin the 20 period to appeal from the date of mailing the June 5, 2014 letter rather than the date of receipt.

bed rights pursuant to RCW 70.38.115(13)(b). Mr. Grimm indicated that based on his calculation the notice of bed banking must be given by August 1, 2014.⁸

2.10 On July 23, 2014, SGP submitted to the Program its request to bank 100 beds at the Mercer Island facility.

2.11 On July 30, 2014, Videll filed a Notice of Intent to Retain Nursing Home Bed Allocation at the Mercer Island facility. Videll represented that full facility closure occurred on July 3, 2014. The Notice indicated BD Renton Properties I, LLC, and MidCap Funding IV, LLC, also held secured interest in the facility.⁹

2.12 On August 1, 2014, Ms. Nidermayer informed Videll and SGP the Program received two requests to bank beds and, according to documentation provided by DSHS, the facility closed on July 3, 2014. Ms. Nidermayer also indicated that because both requests were received by the Program by 5:00 pm on Friday, August 1, 2014, both requests were valid.

2.13 On August 22, 2014, the Program's manager notified SGP and Videll that the Program received two timely full facility closure bed banking requests submitted for the Mercer Island facility. The Program notified SGP and Videll "According to information provided by the Department of Social and Health Services, Mercer Island Care and Rehabilitation Center's last resident left July 3, 2014. Therefore, the effective date of Mercer Island Care and Rehabilitation Center's closure is July 3, 2014." The Program further stated "the Department of Health will not issue a Certificate of Need to

⁸ See Declaration of Thomas Grimm dated December 14, 2015.

⁹ See Declaration of Karen Nidermayer dated December 14, 2015; Notice dated July 21, 2014, and signed by Steve LaForte on behalf of Videll.

un-bank these 100 beds until documentation is presented that verifies uncontested ownership of the bed rights.”¹⁰

2.14 On July 6, 2015, the Department of Health received a Certificate of Need application from Videll to un-bank the 100 beds from the Mercer Island facility.

2.15 On August 10, 2015, the Program learned that Videll’s license to operate the Mercer Island facility had been revoked by DSHS effective June 25, 2014.¹¹

2.16 On August 21, 2015, the Program notified Petitioner that the Program was returning Videll’s application to un-bank the beds without further review because the 100 beds were not properly retained under applicable law.¹² Although it originally accepted that Videll’s July 30, 2014 request to retain beds was timely, the Program now stated:

However, in its request to retain beds, Videll failed to disclose to DOH that its license had been revoked by DSHS effective June 25, 2014. DOH was not aware of the revocation date – which was earlier than when the last resident left the facility on July 3, 2014 – started running the 30 day period in which to file a bed-retention request.

...

Hence, when Mercer Island Care and Rehabilitation failed to request a hearing the June 5, 2014, revocation became final by operation of law on June 25, 2014.

2.17 On September 11, 2015, Petitioner filed a Request for an Adjudicative Proceeding.

¹⁰ See letter of Program Manager Janis Sigman to Mary Jane Hynes and Steve LeForte dated August 22, 2014.

¹¹ See Declaration of Karen Nidermayer dated December 14, 2015

¹² See letter of Program Manager Janis Sigman dated August 21, 2015.

2.18 On October 22, 2015, SGP filed a Motion to Intervene which was granted on November 25, 2015 in Prehearing Order No. 1: Order on Motion to Intervene. In that Order, the Presiding Officer concluded a party is not required to demonstrate it has a secured interest as a prerequisite to seeking intervention but rather SGP only had to demonstrate a substantial interest in the outcome of the matter. "The question of whether or not SGP had a legitimate right to submit a request to bank the nursing home beds or whether it has a secured interest in those beds is not yet ripe for resolution."¹³

2.19 On December 14, 2015, Videll filed a Motion of Petitioners for Summary Judgment. In its summary judgment motion, Videll made the following arguments:

1. Videll's notice of reservation of bed rights was timely, based upon the date that Steve LeForte received the June 5, 2014 Notification from DSHS;
2. The Department had no authority to repudiate its bed banking decision;
3. The Department is estopped from changing its bed banking decision; and
4. The Department has erroneously applied WAC 246-310-396(1) and DSHS's regulations in making its decision in this case;
 - a. The Mercer Island facility could not be, and was not, operated without a license;
 - b. Videll was not served with a revocation order, and DSHS's conduct results in a violation of due process;
 - c. SGP failed to demonstrate it had an interest in the Mercer Island facility bed rights.

2.20 On December 14, 2015, the Program filed a Motion for Summary Judgment. The Program argued its prior notice that the beds were properly banked was

¹³ See Prehearing Order No. 1: Order on Motion to Intervene at 2.3.

based on erroneous information provided by Videll stating the nursing home facility closure date was July 3, 2014. It wasn't until August 10, 2015, that the Program learned that the Department of Social and Health Services (DSHS) revoked Videll's nursing home license on June 5, 2014, and the revocation became effective on June 25, 2014. Thus, the deadline to bank the beds was July 25, 2014. Based on Videll's failure to reserve the bed rights within 30 days of June 25, 2014, the request to bank the beds was not timely and the application was properly denied.

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.

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 Petitioner's Petition for Administrative Review was timely filed. WAC 246-10-701.

3.4 SGP's Petition for Administrative Review was timely filed. WAC 246-10-701.

Certificate of Need

3.5 RCW 70.38.115(13)(b) states that when a nursing home ceases operation, the licensee may reserve (bank)¹⁴ the beds for eight years or until a

¹⁴ "Bed banking" means the process of retaining the rights to nursing home bed allocations which are not licensed as outlined in WAC 246-310-395. WAC 246-310-010(7).

Certificate of Need is issued to replace them. Specifically, RCW 70.38.115(13)(b) states:

(b) When an entire nursing home ceases operation, the licensee or any other party who has secured an interest in the beds may reserve his or her interest in the beds for eight years or until a certificate of need to replace them is issued, whichever occurs first. However, the nursing home, licensee, or any other party who has secured an interest in the beds must give notice of its intent to retain the beds to the department of health no later than thirty days after the effective date of the facility's closure. Certificate of need review shall be required for any party who has reserved the nursing home beds except that the need criteria shall be deemed met when the applicant is the licensee who had operated the beds for at least one year, who has operated the beds for at least one year immediately preceding the reservation of the beds, and who is replacing the beds in the same planning area.

3.6 WAC 246-310-010(19) defines "effective date of facility closure" as:

(a) The date on which the facility's license was relinquished, revoked or expired; or

(b) The date the last resident leaves the facility, **whichever comes first.**

(Emphasis added.)

Summary Judgment

3.7 Administrative tribunals are vested with the authority to rule by summary judgment. *ASARCO v. Air Quality Coalition*, 92 Wash.2d 685, 696-97, 601 P.2d 501 (1979). Summary judgment shall be rendered if the pleadings, depositions, answers to 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 judgment as a matter of law. CR 56(c).

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3.8 A material fact is one upon which the outcome of the litigation depends. *Tran v. State Farm Fire & Casualty Co.*, 136 Wash.2d 214, 223, 961 P.2d 358 (1998), citing *Ruff v. County of King*, 125 Wash.2d 697, 703, 887 P.2d 886 (1995). By filing cross motions for summary judgment the parties concede there are no material issues of fact. *Pleasant v. Regence Blue Shield*, 181 Wash.App. 252, 261, 325 P.2d 237 (2014), citing *Tiger Oil Corp. v. Dep't of Licensing*, 88 Wash.App. 925, 930, 946 P.2d 1235 (1997). 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 non-moving party, and all questions of law are reviewed de novo.” *Sundquist homes v. Snohomish PUD #1*, 140 Wash.2d 403, 406, 997 P.2d 915 (2000), citing *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994).

Effective Date of Facility Closure

3.9 In any case where DSHS finds that a licensee, partner, officer, director, or managing employee failed or refused to comply with the standards, rules, and regulations governing nursing homes, DSHS may take action including to suspend, revoke or refuse to renew a license; order stop placement; and/or appoint temporary management to oversee the operation of the facility. See RCW 18.51.060.

3.10 There is no genuine issue of material fact that DSHS revoked Videll's license to operate the Mercer Island facility. On June 5, 2014, DSHS sent Videll, via certified mail, a document notifying it of the “**Appointment of Temporary Manager, Emergency Closure and License Revocation**” of the facility's nursing home license. (Emphasis original). The notice used plain and unambiguous language to inform Videll

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that these actions were based on Videll's violations of statutes and regulations as identified in the May 26, 2014 Statement of Deficiencies and Videll's significant history of uncorrected violations, and were necessary to safeguard the health, safety, and welfare of the facility's residents. A temporary manager was appointed to oversee the orderly closure of the facility. Importantly, the notice informed Videll of its right to request an administrative hearing "to appeal the state license revocation, appointment of a temporary manager and emergency closure. You must file your request within 20 calendar days of receipt of this letter."

3.11 Service by DSHS of a revocation notice may be given in any "manner that shows proof of receipt." RCW 43.20A.205(1). The DSHS notice was sent to Dawn Jacobs, administrator of the Mercer Island facility, who signed the certified mail receipt on June 7, 2015. A signed receipt from the person who accepted the certified mail establishes proof of service. WAC 388-97-4430.

3.12 Petitioner failed to provide support in rule, statute, or case law for its argument that the notice was not effective until it reached Steve LeForte personally as opposed to the facility administrator. To the contrary, DSHS rules for nursing homes define "administrator" as "a nursing home administrator, licensed under chapter 18.52 RCW, **who must be in active administrative charge of the nursing home**, as that term is defined in the board of nursing home administrator's regulations. WAC 388-97-0001 (emphasis added). "Active administrative charge" is defined in board rules as "direct participation in the operating concerns of a nursing home. Operating concerns include, but are not limited to, interaction with staff and residents, liaison with the

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community, **liaison with regulatory agencies**, pertinent business and financial responsibilities, planning and other activities as identified in the most current job analysis published by the National Association of Boards of Examiners for Long-Term Care Administrators.” WAC 246-843-010(2) (emphasis added).

3.13 Petitioner argues that the proper period for response is 28 calendar days rather than 20 based on conflicting 1989 amendments to RCW 18.51.065. The first amendment (1989 c 175) strikes existing language regarding actions becoming final after 20 days and simply refers to RCW 43.20A.205 (which requires 28 days) as governing administrative procedures related to license revocations by DSHS. The subsequent and more specific amendment (1989 c 372) reinstates the 20 day response period and also provides that emergency actions to revoke a license are effective immediately upon notice. When the Legislature enacts two or more conflicting amendments to the same law in a legislative session, the act last filed with the office of the Secretary of State shall control. RCW 1.12.025(1). Because the two amendments to RCW 18.51.065 conflict, the second amendment prevails.

3.14 Petitioner failed to provide support for its argument that the appointment of a temporary manager to oversee the orderly closure of the facility precluded DSHS from revoking the facility's license.

3.15 Videll had until to June 27, 2014, to appeal the administrative actions detailed in the notice, including license revocation. Videll elected not to appeal and the revocation became final. Once final, administrative decisions are not subject to collateral attack in subsequent proceedings and courts cannot relitigate the issue and

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substitute their judgment for that of the administrative agency. *Duffy v. State, Dept. of Social and Health Services*, 90 Wash.2d 673, 680, 585 P.2d 470 (1978). See also *Charles Pankow, Inc. v. Holman Properties, Inc.*, 13 Wash.App. 537, 541, 536 P.2d 28 (1975) (It is a general rule that the order or determination of an administrative body acting with jurisdiction and under authority of law is not subject to collateral attack in the absence of fraud or bad faith) (internal citations omitted).

Failure to Timely Bank the Beds

3.16 RCW 70.38.115(13)(b) states that when a nursing home ceases operation, the licensee may reserve (or bank) the beds for eight years or until a Certificate of Need is issued to replace them. It further states that the licensee must give banking notice to the Department of Health no later than 30 days after the "effective date of the facility's closure." *Id.* "Effective date of facility closure" is defined in WAC 246-310-010(19) as "(a) The date on which the facility's license was relinquished, revoked or expired; or (b) The date the last resident leaves the facility, **whichever comes first.**" (Emphasis added). Among other things, notice to the Department of Health must include the name of the facility ceasing operation, the number of beds in the bed allocation to be retained, and **documentation of the effective date of the facility closure.** See WAC 246-310-396(1) (emphasis added).

3.17 Videll's license to operate as a nursing home was revoked on June 27, 2014. The last resident left the facility on July 3, 2014. Because the date of the license revocation occurred first, that is the date from which the 30-day bed banking notice began to run. Videll had until July 27, 2014, to provide the Department of Health with

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written notice in compliance with RCW 70.38.115(13)(b) and WAC 246-310-396. Videll did not provide written notice of its intent to bank the beds until July 29, 2014, at the earliest.¹⁵ Therefore, the notice was not timely.

Equitable Estoppel

3.18 Equitable estoppel is based on the principle that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who justifiably and in good faith relied thereon. *Kramarevcky v. Dept. of Social and Health Services*, 122 Wash.2d 738, 743, 863 P.2d 535 (1993) (internal citations omitted). Equitable estoppel against the government is not favored. *Id.* When equitable estoppel is asserted against the government, the party asserting it must establish five elements by clear, cogent, and convincing evidence:

1. A party's admission, statement or act inconsistent with its later claim;
2. Action by another party in reliance on the first party's act, statement or admission;
3. Injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission;
4. Equitable estoppel must be necessary to prevent a manifest injustice; and
5. The exercise of governmental functions must not be impaired as a result of the estoppel.

Id.

¹⁵ On July 29, 2014, Videll emailed a copy of its notice of reservation of bed rights to the Program. A hard copy of the same document was delivered via overnight delivery on July 30, 2014. *See* Declaration of Thomas H. Grimm dated December 14, 2015.

The reliance reflected in the second element must be justified. Reliance is justified only when the party claiming estoppel did not know the true facts and had no means to discover them. *Marashi v. Lannen*, 55 Wash.App. 820, 824-25, 780 P.2d 1341 (1989).

In the instant case, Videll has failed to establish by clear, cogent, and convincing evidence that equitable estoppel should apply. First, the Program's notice that the beds were properly banked was based on the erroneous effective date of facility closure supplied by Videll. Instead of the earlier date required by WAC 246-310-010(19) (the date was when the facility license was revoked), Videll provided the later date (the date when the last resident left the facility). The Program was not copied on the DSHS notice dated June 5, 2014. Videll was aware its license was revoked by DSHS but failed to provide that information to the Program. The Program learned on August 10, 2015, that Videll's license was revoked. It then promptly and appropriately notified Videll.¹⁶

Second, Videll cannot claim to have relied on the notice of proper bed banking, which was based on a July 3, 2014 closure date. Reliance is justified only when the party claiming estoppel did not know the true facts and had no means to discover them. *Marashi* at 824-25. Here, Videll had knowledge of the true facts.

Videll also failed to establish that a manifest injustice would occur. On the contrary, based on the misrepresentation of facts, a manifest injustice would occur if the Program were not allowed to correct its August 2014 decision. In addition, estoppel

¹⁶ See Declaration of Karen Nidermayer dated December 14, 2015.

would impair the Program's governmental function of approving bed-banking only when a nursing home makes a timely request.

Finally, equitable estoppel cannot be applied against an agency when the new agency position is supported by a proper interpretation of applicable law. *Dept. of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 20, 43 P.2d 4 (2002).

For these reasons, Petitioner has failed to establish by clear, cogent and convincing evidence that equitable estoppel should be applied in this case.

SGP's Legal Interest in the Bed Rights

3.19 An applicant denied a Certificate of Need or a certificate holder whose certificate was suspended or revoked has the right to an adjudicative proceeding. RCW 70.38.115(10); WAC 246-310-610(1). The application for an adjudicative proceeding must include a specific statement of the issue or issues and law involved and the grounds for contesting the department decision. WAC 246-310-610(2)(b).

3.20 In this case, Petitioner contests the August 21, 2015 letter from the Program. That letter explained that the program would not consider Petitioner's July 6, 2015 Certificate of Need application because the 100 beds were not properly banked by Petitioner under applicable law. The letter did not decide any application by SGP or otherwise address SGP's rights to the beds. Likewise, Petitioner's Request for Adjudicative Proceedings did not implicate or even mention SGP's rights to the beds.

3.21 SGP's interest in or rights to the 100 banked beds is not properly before this tribunal. The request for adjudicative proceeding related solely to the decision of

the Program to not consider Petitioner's application for a Certificate of Need. Therefore, no decision will be made concerning SGP's legal interest in the banked beds.


IV. FINAL ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

- 4.1 Videll's Motion for Summary Judgment is **DENIED**.
- 4.2 The Program's Motion for Summary Judgment is **GRANTED**.

Dated this 8th day of August, 2016

JOHN WIESMAN, DrPH, MPH
SECRETARY OF HEALTH



By KRISTI WEEKS
REVIEW OFFICER

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

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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 timely 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.