STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT

In Re: Certificate of need Decision by DEPARTMENT OF HEALTH re: CONCURRENT APPLICATIONS OF FRANCISCAN HEALTH SYSTEM/ ST. CLARE HOSPITAL AND DAVITA, INC., TO ESTABLISH A 21-STATION DIALYSIS FACILITY IN PIERCE COUNTY PLANNING AREA NO. 5, FRANCISCAN HEALTH SYSTEM, a Washington public benefit corporation, Petitioner.	)	Master Case No. M2008-118568 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER ON SUMMARY JUDGMENT =

APPEARANCES:

Petitioner, Franciscan Health System d/b/a. St. Clare Hospital, by
Ogden, Murphy, Wallace, P.L.L.C. per
Donald W. Black and Ross Farr, Attorneys at law

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

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

PRESIDING OFFICER: Christopher Swanson, Health Law Judge

On November 26, 2008, Davita, Inc. (DaVita), filed its Motion for Summary Judgment. On January 2, 2009, Franciscan Health System, d/b/a. St. Clare Hospital (Franciscan), filed its response to DaVita's motion and its cross motion for summary

judgment. On January 22, 2009, the Program filed its Memorandum Supporting DaVita's Motion for Summary Judgment and Opposing Franciscan's Motion for Partial Summary Judgment. On January 22, 2009, DaVita filed its reply supporting its motion for summary judgment and response to Franciscan's cross motion for summary judgment. On February 12, 2009, Franciscan filed its reply in support of its cross motion for summary judgment. On February 17, 2009, DaVita filed its sur-reply in support of its motion for summary judgment. On February 19, 2009, Franciscan filed its motion to strike DaVita's sur-reply. On February 20, 2009, DaVita filed its response to Franciscan's motion to strike.

ISSUES

A. Should Franciscan's motion to strike DaVita's sur-reply brief be granted?

B. Should DaVita's summary judgment motion be granted because, as a matter of law, Franciscan failed to demonstrate that it had site control?

C. Did Franciscan demonstrate, as a matter of law, that its application meets all the certificate of need criteria so that the matter should remanded to the Program to conduct a tie-breaker analysis of the Franciscan and DaVita applications?

I. FINDINGS OF FACT

Certificate of Need

1.1 A certificate of need (CN) is a non-exclusive license to establish new health care facilities. *St. Joseph Hospital & Health Care Center v. Department of Health*, 125 Wn. 2d 733, 736 (1995). The purpose of the CN process is to promote public health by providing accessible health services and facilities, while controlling costs.

RCW 70.38.015.

1.2 Establishment of new health care facilities, including new kidney dialysis centers, require a CN from the Department of Health. RCW 70.38.105(4)(a) and RCW 70.38.025(6).

Application Process

1.3 The submission of an application initiates CN review process. WAC 246-310-090. If two CN applications for the same planning area[1] are received simultaneously, the Program reviews the applications concurrently.[2] WAC 346-310-120.

1.4 The application review process includes correspondence with the applicants, public hearings, and written comments by interested parties. WAC 246-310-080 through WAC 246-310-190.

1.5 There are five stages for gathering information on applications: (1) the applicant's letter of intent; (2) the application; (3) the Program's screening and the applicant's response to screening; (4) any public comment received on the application; and (5) any applicant rebuttal to public comment. There is no restriction in the rules or in practice as to what the applicant can submit to rebut information offered by competitors during the public comment period. More specifically, once a competitor identifies a possible discrepancy in the application (stage 4 above), the applicant can still address or rebut that possible discrepancy in the rebuttal period (stage 5 above)

[1] "Planning area" means an individual geographic area designated by the department for which kidney dialysis station need projections are calculated. For purposes of kidney dialysis projects, planning area and service area have the same meaning. WAC 246-310-280(8).
[2] For proposed kidney dialysis centers, the concurrent review process is described in WAC 246-310-282.

before the Program concludes the public comment period.

1.6 After all the information has been submitted, the application record closes and ex parte contact with the Program is not permitted.[3]

1.7 In reviewing the information submitted, the Program applies the criteria in WAC 246-310-200 through WAC 246-390-240. The applicant must show that the proposed project: (1) is needed, (2) is financially feasible, (3) will meet criteria for structure and process of care, and (4) will foster containment of the costs of health care. *Id.*

1.8 In order to meet the financial feasibility criteria under WAC 246-310-220 and cost containment under WAC 246-310-220, the Program requires each applicant to identify a specific site (location) for the proposed facility.

1.9 The application form requires demonstration of a "sufficient interest" in the site, known as "site control."[4] According to page 10 of the application, sufficient interest means one of the following: "(a) Clear legal title to the proposed site; (b) Lease for at least five years with options to renew for to [sic] less than a total of 20 years in the case of a hospital, psychiatric hospital, tuberculosis hospital, rehabilitation facilities; or (c) Lease for at least one year with options to renew for not less than a total of five years in the case of freestanding kidney dialysis units, ambulatory surgery facilities, hospices, or home health agencies; or departments. Legally, enforceable agreements

[3] *See* WAC 246-310-190. "Ex parte contact' means any oral or written communication between any person in the certificate of need program or any other person involved in the decision regarding an application for, or the withdrawal of, a certificate of need and the applicant for, or holder of, a certificate of need, any person acting on behalf of the applicant or holder, or any person with an interest regarding issuance or withdrawal of a certificate of need." RCW 246-310-010(24).
[4] Franciscan does not dispute that site control may be required by the Program.

to give such title or such lease in the event that a Certificate of Need is issued for the proposed project."

1.10 After applying the criteria, the Program may grant or deny the application. WAC 246-310-200, WAC 246-310-490, and WAC 246-310-500.

1.11 If concurrent applications for kidney dialysis centers meet all CN criteria and there is not enough need projected for approval of both, the Program uses a tie-breaker process which assigns points to particular attributes of the competing applications. WAC 246-310-288. The Program then adds up the points to determine which application is granted. Id.

1.12 After processing the CN application(s) (and applying the tie-breaker process, if applicable), the Program issues its written findings and decision.[5] WAC 246-310-490.

Reconsideration Process

1.13 Following the denial of a CN application, the applicant may submit a request for a reconsideration hearing. WAC 246-310-560(1). The request must demonstrate "good cause." Id. The Program decides whether or not to grant the request based upon the standards contained in WAC 246-310-560(2). Id.

1.14 If a request is granted by the Program, a reconsideration hearing is scheduled. WAC 246-31-560(4). Concurrent applicants and other interested parties must receive notice of the hearing, and may also submit new information. Id.

[5] For concurrent applications, Program may grant concurrent applications, deny concurrent applications, or grant one or more applications and deny the other application(s). Chapter 246-310-490.

1.15 The Program may modify its original decision on the basis of the new information. WAC 246-310-560(6).

1.16 If reconsideration is denied by the Program, the original decision stands. An applicant requesting a reconsideration hearing does not forfeit its right to an adjudicative proceeding. WAC 246-310-560(7).

DaVita and Franciscan Concurrent Applications

1.17 In or about November 2007, DaVita and Franciscan both applied to establish a 21-station kidney dialysis facility in the "Pierce 5" planning area.[6] The Program reviewed the two applications concurrently.

1.18 As part of the application process, Franciscan submitted a draft lease agreement for the site of the proposed facility.[7] The draft lease was between Mountain Highway, Tenant in Common (*landlord*) and Franciscan (Tenant). The recorded title to the site was with Simon/Johnson, LLC. The agreement was signed by Mountain Highway only. Thus, Mountain Highway did not have record title to the property, but signed the lease.

1.19 On April 21, 2008, the public comment period ended. In May 2008, Franciscan and DaVita submitted rebuttal comments.

1.20 In its rebuttal comments, Franciscan stated that "Simon Johnson, LLC holds clear title to each of the three parcels[.] Simon/Johnson, LLC's designation of "Mountain Highway, TIC" as the landlord is a legal technicality, which merely meant that

[6] Pierce County is divided into five planning areas. WAC 246-310-280(9)(b).
[7] "Draft" leases are acceptable to the Program to demonstrate site control.

Simon/Johnson, L.L.C. was acting on its own behalf and on the behalf of potential future co-owners of the property. However, as is further explained below, there are no other owners of the property in question, and the designation of Mountain Highway TIC as landlord does not change the terms of the lease or the fact that Simon/Johnson LLC owns the property and has the ability to lease it[,]"

1.21 As part of the application process, Franciscan also submitted a tenancy in common agreement signed by Simon/Johnson, LLC, only.

1.22 On July 11, 2008, the Program approved DaVita's application and denied Franciscan's application. The Program found that Franciscan did not demonstrate site control.

1.23 In its decision, the Program stated "[o]nce a draft agreement is submitted, the department expects the agreement to be between the applicant and the owner of the property." The Program determined that the draft lease in this case was not with the record owner of the property. The Program also noted that a tenancy in common (TIC), by definition, has multiple owners, but that the draft agreement was signed by only one owner. The Program concluded that site control was not sufficiently demonstrated and the financial feasibility and cost containment criteria were not met.

1.24 The Program stated that without a demonstration of site control, the Program could not evaluate the long range capital and operating costs of Franciscan's proposed facility. WAC 246-310-220(1). The Program also stated that, due to lack of a showing of site control, it was unable to calculate the average cost per dialysis with any certainty due to unverifiable pro-forma data. WAC 246-310-220(2). As a result, the

Program concluded that Franciscan did not meet the financial feasibility and cost containment CN criteria.

1.25 Since DaVita's application was approved and Franciscan's application was not approved, the Program did not apply the tie breaker process in WAC 246-310-288.

1.26 On August 8, 2008, Franciscan requested reconsideration of the Program's denial of its application. Along with its request, it submitted supplemental evidence.

1.27 On September 8, 2008, the Program denied Franciscan's request for reconsideration, finding "no good cause." The Program stated "nothing in the new information changes the Program's conclusion that the application should be denied based on [Franciscan's] failure to demonstrate site control."

1.28 On September 26, 2008, Franciscan requested an adjudicative proceeding.[8] A scheduling order was issued on October 20, 2008. On November 7, 2008, the Presiding Officer[9] granted DaVita intervenor status. Both DaVita and Franciscan moved for summary judgment.

Supplemental Evidence

[8] In its request for adjudicative proceeding and briefing, Franciscan does not dispute that DaVita's application met the four CN criteria.
[9] This order was issued by a previous Presiding Officer. The case was transferred to this Presiding Officer in February 2009.

1.29 After the Program's decision was made, Franciscan submitted supplemental evidence for consideration on three separate occasions.

August 8, 2008 Supplemental Evidence: Reconsideration

Franciscan submitted the following supplemental evidence as part of its reconsideration request:

(1) A letter dated August 1, 2008, from Philip M. Rogers, stating "Simon/Johnson was authorized, on behalf of the other tenants-in-common, to enter into the lease between the Co-Tenancy and Franciscan Health Systems[.]'

(2) A letter dated August 1, 2008, from Ryan, Swanson, and Cleveland, PLLC (attorneys at law), stating that the cotenant owners of the subject properties executed a co-tenancy agreement dated May 31, 2006, appointing Simon/Johnson as manager or the properties. The letter also stated that when the properties were acquired, title was mistakenly put in the name of Simon/Johnson, LLC, rather than the name of each of the owners as tenants in common. Additionally, the letter stated that the attorneys were in the process of correcting the situation so that title was placed in the name of each of the owners as tenants in common.

(3) A copy of a TIC agreement signed by Simon/Johnson and other members of the TIC: Ronald R. Butler, Michael J. Goldfarb, Calvin Bamford, and Firs Management. The agreement was executed in May 2006.

January 5, 2009, Supplemental Evidence

1.30 In its January 5, 2009 Response to DaVita's Motion for Summary Judgment and Cross Motion for Summary Judgment, Franciscan submitted a second set of supplemental evidence. Franciscan submitted copies of corrected deeds for the subject property recorded on September 9, 2008. The deeds reflected ownership by all the members of the TIC. Additionally, Franciscan submitted a letter dated January 30, 2008, from Theodore M. Johnson, Jr., to Wade Moberg, Director of Facilities and Construction Management, Franciscan Health Systems, indicating that Simon/Johnson, LLC, is the developer of the property in addition to being a cotenant.

February 12, 2009, Supplemental Evidence

1.31 In its February 12, 2009 summary judgment reply brief to its cross motion for summary judgment, Franciscan submitted a third set of supplemental evidence: the declarations of Ronald R. Butler, Michael J. Goldfarb, Calvin Bamford, and Firs Management, tenants in common. The declarations authorized Simon/Johnson, LLC, to enter into lease agreements with tenants on the property, including, without limitation, a lease with Franciscan on such terms as Simon/Johnson, LLC, deems appropriate. The declarations were dated February 11, 2009.

II. CONCLUSIONS OF LAW

Burden of Proof

2.1 Franciscan has the burden to show that its application "meets all applicable criteria." WAC 246-10-606.

2.2 The Presiding Officer may rule on motions for summary judgment. *ASARCO v. Air Quality Coalition*, 92 Wn.2d 685, 697 (1979). Summary judgment is

proper where the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact" and the moving party is entitled to judgment as a matter of law. CR 56(c).

Motion to Strike

2.3 In its summary judgment sur-reply brief, DaVita objects to supplemental evidence and argument contained in Franciscan's reply brief. Franciscan moves to strike DaVita's sur-reply brief as improper under Department rule.

2.4 Franciscan's motion to strike is denied. WAC 246-10-205, WAC 246-10-403, and WAC 246-10-602. Franciscan offered supplemental evidence and argument in its reply. DaVita appropriately offered its position on Franciscan's supplemental evidence and argument. Resolution of the evidence to be considered for purposes of summary judgment is addressed below.

The Program's Decision not to Consider Supplemental Evidence

2.5 Franciscan argues that the Program did not follow the reconsideration process in WAC 246-310-560 by failing to consider whether its supplemental evidence constituted "good cause" for a reconsideration hearing. DaVita and the Program argue that Franciscan's request for reconsideration failed to establish the exclusive grounds for reconsideration listed in WAC 246-310-560(2)(b)(i) through (iii).

2.6 The enumerated grounds in the rule are: "(i) significant relevant information not previously considered which, with reasonable diligence, could not have been presented before the decision; (ii) Information on significant changes in factors or circumstances relied upon in making the findings and decision; and (iii) Evidence the

department materially failed to follow adopted procedures in reaching a decision." The rule explicitly states "good cause for a reconsideration hearing *shall include but not be limited to* [emphasis added][.]" the enumerated grounds. Thus, good cause, under the rule, includes other good cause.

2.7 The Program's August 8, 2008, letter denying Franciscan's request for a reconsideration request references the language of WAC 246-310-560 and concludes that "nothing in the new information changes the Program's conclusion that the application should be denied based on [Franciscan's] failure to demonstrate site control."

2.8 Plainly, the basis of the Program's decision not to hold a reconsideration hearing to consider the supplemental evidence was that the new information provided by Franciscan (even if it had been submitted at the outset of the CN application process) would not change the outcome.[10] Thus, the Program's decision not to hold a reconsideration hearing was based on a broader determination that good cause was not shown rather than solely on the enumerated grounds for reconsideration listed in WAC 246-310-560(2)(b)(i) – (iii). Franciscan's argument that the Program failed to apply the rule broadly has no merit.

[10] In its findings and decision, the Program stated that according to the records available from the Washington Secretary of State and the Washington Department of Licensing, Mountain Highway, TIC, is not currently listed as the registered agent licensed to do business in this state. In its request for reconsideration, Franciscan stated that the TIC was not required to register with the Department of Licensing. In its letter denying reconsideration, the Program acknowledged this fact, but stated that this oversight didn't change the Program's conclusion.

Consideration of Supplemental Evidence on Summary Judgment

2.9 The Presiding Officer has considerable discretion to determine the scope of admissible evidence in a CN adjudicative proceeding. *University of Washington v. Department of Health*, 164 Wn.2d 95, 104 (2008), WAC 246-10-602(3)(b). When ruling on a summary judgment motion, evidence that would be inadmissible at hearing is not considered. *See Jones v. Department of Health*, 140 Wn. App. 476, 494 (2007).

2.10 Since nothing in the CN rules or statutes specifically address the appropriate record before the Presiding Officer, the law leaves the question of admission of supplemental evidence to the Department by rule or the presiding officer by ruling guided by the rules of evidence. *University of Washington*, 164 Wn.2d at 103. The statutory objectives of the CN process may also be considered. *University of Washington*, 164 Wn.2d at 104.

2.11 The CN application process is intended to decide whether an application should be granted based upon the circumstances in existence during a particular period of time. *University of Washington*, 164 Wn.2d at 103-104. This is accomplished by setting a deadline by which all evidence must be submitted for consideration.[11] The *University of Washington* case identified the deadline as the close of the public comment period. *University of Washington*, 164 Wn.2d at 104.

[11] This is especially important where applications are competing since parties may have additional incentives to submit supplemental evidence in order to get the last word in before the record closes.

2.12 Although the Presiding Officer is not bound to exclude evidence submitted after this deadline, such evidence may be denied admission as irrelevant. *University of Washington*, 164 Wn.2d at 104 (Since the request for an adjudicative proceeding does not begin the application process anew, requiring the Presiding Officer to admit evidence created long after this period of time would undermine the statutory objective of expeditious decision making and prevent meaningful public input on that evidence).

2.13 In considering whether to admit the supplemental evidence in this case, the Presiding Officer will resolve the issue "on the basis of the best legal authority and reasoning available[.]" WAC 246-310-560(2)(b). WAC 246-310-560(2)(b) and those portions of Civil Rule (CR) 59 (grounds for reconsideration in superior court) address the circumstances under which the existence of new information justifies a new hearing. Both rules, though not strictly applying to an adjudicative proceeding, express the policy that some type of extenuating circumstances must be shown before new evidence is taken and considered. The CN rule appears to have been modeled, at least in part, after portions of CR 59.

2.14 Under WAC 246-310-560(2)(b), supplemental information may be considered where an applicant shows good cause. "Good cause includes, but is not limited to: (i) Significant relevant information not previously considered which, with reasonable diligence, could not have been presented before the decision;

(ii) Information on significant changes in factors or circumstances relied upon in making the findings and decision; and (iii) Evidence the department materially failed to follow adopted procedures in reaching a decision" and other good cause. Id.

2.15 Similar to WAC246-310-560(2)(b), under CR 59, a requestor must show reasonable diligence in submitting the information and ordinary prudence in guarding against accident or surprise.[12] CR 59 also addresses misconduct of the prevailing party of fact finder. Similar, to the other "good cause" requirement in WAC 246-310-560(2)(b), CR 59 provides for reconsideration where "substantial justice" has not been done.

2.16 Both rules express the objectives of expeditious decision making balanced with fairness to all parties and the public. These policy objectives are present throughout the CN application process provided for in Chapter 70.38 RCW and Chapter 246-310 WAC. *See also University of Washington*, 164 Wn.2d at 104 (Expeditious decision making is a statutory objectives of the CN process). Although the Presiding Officer is not necessarily bound to apply the policies expressed in the two

[12] CR 59 provides the following grounds for reconsideration (paraphrased):

> (1) irregularity in the proceedings preventing a fair hearing;
> (2) misconduct of the prevailing party or fact finder;
> (3) accident or surprise which ordinary prudence could not have guarded against;
> (4) newly discovered evidence, material to the party making the application, which he could not with reasonable diligence have discovered and produced at trial;
> (5) damages so excessive or inadequate as unmistakably to indicate that the outcome must have been the result of passion or prejudice;
> (6) error in the assessment of the amount of property (when the action is upon a contract, or for the injury or detention of property);
> (7) that there is no evidence or reasonable inference from the evidence to justify the decision, or that it is contrary to law;
> (8) error in law occurring at the hearing and objected to at the time; and
> (9) that substantial justice has not been done.

rules in exercising his discretion, both rules provide a useful gauge in determining whether supplemental information should be admitted.

2.17 When the policies contained in the two rules are synthesized along with those expressed in the *University of Washington* case, the following factors for gauging admissibility emerge:

(1) When did the supplemental information come into existence (before the close of the public comment period; at reconsideration; at the adjudicative proceeding, etc.)?

(2) Was there an irregularity in the process prejudicing the party's ability to submit the information?

(3) Was there misconduct by the Program, a competing applicant, or another party prejudicing the party's ability to submit the information?

(4) Was reasonable diligence used in submitting all information prior to the deadline?

(5) Was there an accident or surprise which ordinary prudence could not have guarded against?

(6) Would exclusion of the supplemental information result in substantial justice not being done or does other good cause exist for considering the information?[13]

Application of the Factors

1. <u>When did Franciscan's Supplemental Evidence Come Into Existence?</u>

2.18 The signed tenancy in common agreement appears to have come into

[13] Since the Presiding Officer is not "reviewing" the Program's decision, WAC 246-310-560(2)(b)(ii) related to the "factors or circumstances" relied on by Program in its findings and decision and CR 59(7)(no evidence or reasonable inference to justify the decision) are of limited relevance. Likewise, CR 59(5)(excessive/inadequate damages) and (6)(error in the assessment of the amount of property in contract or injury/detention of property actions) are not applicable for obvious reasons.

existence in May 2006, before the application process began. The letter from Theodore M. Johnson, Jr., to Wade Moberg, Director of Facilities and Construction Management, Franciscan Health Systems, dated January 30, 2008, appears to have come into existence before the Program's decision.

2.19 The corrected deeds were filed in Pierce County on September 9, 2008, after the Program's decision. The letters from Philip M. Rogers and Ryan, Swanson, and Cleveland, PLLC, are dated August 1, 2008, also after the Program's decision. The declarations of the tenants in common providing authority to Simon/Johnson, LLC, were created in February 11, 2009, after the Program's decision.

2. Was there an irregularity in the process or misconduct by a party prejudicing Franciscan's Ability to Submit the Information?

2.20 Franciscan did not show that the Program erred in applying WAC 246-310-560(2)(b), the reconsideration rule. Franciscan has not argued any other procedural irregularity or misconduct by any party. Franciscan has not shown an irregularity in the process or misconduct that prejudiced its ability to submit the evidence.

3. Was there reasonable diligence in submitting the information or was there any accident or surprise which could not have been guarded against?

2.21 Franciscan argues that it reasonably relied on the deeds on file with the Pierce County Auditor, indicating that Simon/Johnson, LLC, held the title to the subject properties as sole owner. Franciscan argues it received the draft lease for its prospective third-party landlord in an arms-length relationship. Franciscan claims that it had no control over the private agreement between the co-owners. Franciscan states

the deeds to the parcels were filed in error by the previous attorneys for Simon/Johnson, LLC. Franciscan states that as it learned of additional facts and issues of concern to the Program, it communicated the information to the Program in good faith by submitting supplemental evidence.

2.22 Franciscan may be correct that it cannot control the actions of others. However, it cannot be said that Franciscan could not have guarded against the problems associated with its lease.

2.23 The Program requires a showing of site control. Franciscan knew about this requirement throughout the application process. Page 10 of the application form explicitly states that the Program requires a demonstration that the proposed lease is legally enforceable. Franciscan was given several opportunities to cure its application prior to the Program's decision.

2.24 The lease that was submitted was between Franciscan and a tenancy in common. A tenancy in common is, by definition, ownership by two or more parties. *In re Foreclosure of Liens*, 130 Wn.2d 142, 148 (1996). Franciscan should have detected the discrepancy between having a single record owner and the identification of the landlord of the property as a tenancy in common.

2.25 The tenancy in common agreement that was initially submitted contained the signature of Simon/Johnson, LLC, only. In its rebuttal comments, Franciscan argued that Simon/Johnson, LCC, was the only owner of the property and that the tenancy in common language merely expressed the potential for future co-owners. Later, at reconsideration, Franciscan acknowledged that the tenancy in common

actually owned the property, but it was recorded in error in the name of Simon/Johnson, LLC, only.

2.26 The inconsistencies between the application and Franciscan's representations evidence that Franciscan did not adequately understand the nature of its lease agreement at the time it was negotiated. Nor did it understand the nature of the agreement at the time it was submitted to the Program. It was not until after the Program's decision was issued that Franciscan was able to articulate the true state of affairs. This was way too late in the process.

2.27 Franciscan should have detected problems with the lease at the outset. It cannot be said that there was an accident or surprise that could not have been guarded against.

4. Would exclusion of the supplemental evidence result in substantial justice not being done or does other good cause exist for considering the supplemental evidence?

2.28 This case involves competing applications between DaVita and Franciscan. It would be unfair, particularly in a competing application situation, to allow one applicant to continually supplement the record after the Program's decision was made. Furthermore, when supplemental information is admitted after the public comment period, the public is prevented from commenting on the new information. This result is not consistent with polices expressed in the CN statutes and rules. Finally, Franciscan could have guarded against the discrepancies in its application.

5. Conclusion

2.29 Although some of the supplemental evidence came into existence prior to the close of the application record, it was not produced by Franciscan prior to the Program's decision. Franciscan should have detected problems with the application at the outset of application process. Furthermore, it had plenty of time to cure any problems prior to the Program's decision. Instead, it made inaccurate representations about the state of the property at the rebuttal phase and reversed course in its request for reconsideration. Then, it attempted to submit additional supplemental evidence as additional concerns were raised about the state of the lease. It would be inconsistent with the statutory objectives of the CN process and unfair to DaVita and to the public to allow Franciscan to attempt to cure its application at this stage.

2.30 After weighing all of the factors, all three sets of supplemental evidence are denied admission and will not be considered for purposes of summary judgment.

As a matter of law, Franciscan's application fails to meet the CN criteria

CN Criteria

2.31 For CN approval, an applicant must meet four criteria: WAC 246-310-210 (Need); 246-310-220 (Financial Feasibility); 246-310-230 (Structure and Process of Care); and 246-310-240 (Cost Containment).

2.32 The financial feasibility criteria in WAC 246-310-220 requires a showing that "[t]he immediate and long-range capital and operating costs of the project can be met." and "[t]he costs of the project, including any construction costs, will probably not result in an unreasonable impact on the costs and charges for health services."

WAC 246-310-220(1) and (2).

2.33 The cost containment criteria in WAC 246-310-240 require a showing that "[s]uperior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable" and in the case of a project involving construction, "[t]he costs, scope, and methods of construction and energy conservation are reasonable; and . . . [t]he project will not have an unreasonable impact on the costs and charges to the public of providing health services by other persons."

2.34 In order to determine the immediate and long-range capital and operating costs for a facility, the site arrangements submitted by the applicant must be legally enforceable. If they are not, they cannot be relied on to make the appropriate calculations. Nor can the average cost per dialysis for a facility be calculated with any certainty. Finally, it is impossible to compare possible alternatives to a facility without legally enforceable site arrangements.

Franciscan's Argument

2.35 Franciscan argues that it established site control because it submitted a lease between itself and Simon/Johnson, LLC. Franciscan asserts that Simon/Johnson, LLC, as a co-tenant has authority to negotiate a lease on behalf of other cotenants. Franciscan concludes that it submitted what would be a legally enforceable lease with the record owners of the property.

Analysis

2.36 On its face, the lease is between Mountain Highway, tenancy in common, and Franciscan. The record owner of the property was Simon/Johnson, LLC, only. There is no admissible evidence establishing that Mountain Highway, tenancy in common, had authority to enter into the lease.

2.37 Information about the intended arrangement between the Simon/Johnson, LLC, Mountain Highway, TIC, and the other co-tenants was not submitted until after the Program's decision was made. Evidence that the arrangement had become legally binding was submitted even later in the process. That evidence was properly excluded.

2.38 Since Franciscan failed to demonstrate the lease was legally enforceable prior to the Program's decision, site control was not demonstrated.

Conclusion

2.39 The burden is on Franciscan to demonstrate its application meets all applicable CN criteria. WAC 246-10-606(2).

2.40 Franciscan failed, as a matter of law, to demonstrate site control. Without a showing of site control, the Presiding Officer cannot determine the immediate and long-range capital and operating costs for a facility, calculate the average cost per dialysis for a facility with any certainty due to unverifiable pro forma data, or compare possible alternatives to the facility. For these reasons, as a matter of law, Franciscan failed to demonstrate that its application met the financial feasibility and cost containment CN criteria.

Decision

2.41 DaVita's motion for summary judgment should be granted and Franciscan's cross motion for summary judgment should be denied.

III. ORDER

3.1 DaVita's motion for summary judgment is GRANTED.

3.2 Franciscan's cross motion for summary is DENIED.

Dated this __1__ day of June, 2009.

_____/s/_____
CHRISTOPHER SWANSON, Health Law Judge
Presiding Officer

NOTICE TO PARTIES

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

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