STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT

In the Matter of: CASHMERE CONVALESCENT CENTER, INC., Petitioner.	Master Case No. M2017-937 FINDINGS OF FACT, CONCLUSIONS OF LAW AND INITIAL ORDER ON MOTIONS FOR SUMMARY JUDGMENT

The Certificate of Need Program (Program) brought a Motion for Summary Judgment in this matter. Cashmere Convalescent Center (Petitioner) filed a Cross Motion for Summary Judgment. Program's Motion for Summary Judgment Granted. Petitioner's Motion for Summary Judgment DENIED.

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

1.1 Petitioner is the owner and operator of Cashmere Convalescent Center in Cashmere, Washington. Cashmere Convalescent Center is a skilled nursing home facility. Petitioner reduced its number of nursing home beds from 85 to 65 by reducing the number of beds in 21 of its rooms from two to one in 2013. Attachment A Declaration of Karen Nidermeyer. When a facility reduces its beds but preserves the right to convert them back without obtaining a certificate of need[1] from the Department of Health, the practice is called "bed banking". Petitioner properly banked 21 beds when it reduced its beds in 2013. Attachment A Declaration of Karen Nidermeyer. The

[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 needs shall be issued or denied in accordance with the provisions of Chapter 70.38. RCW and the rules (Chapter 246-310 WAC).

Petitioner's bed banking right became effective on September 2, 2013. The initial four-year bed banking period thereby expired effective on September 1, 2017.

1.2 The Program notified the Petitioner several times in 2016 that conversion of the banked beds (back to nursing home use) must be completed within four years from the date of the original bed banking (by September 1, 2017). Attachment A Nidermeyer Declaration at paragraphs 8-9, Exhibit E. This included sending an email that explained that "to ensure that the licensee does not risk losing the beds, an application to unbank them should be submitted about three months before the expiration date…approximately June 1, 2017." Exhibit D attached to Declaration of Karen Nidermeyer. Any notice from the Petitioner regarding its intention to un-bank the 21 banked beds was due by June 1, 2017; any request to extend the four-year period was also due by June 1, 2017.

1.3 The Petitioner submitted written notice to the Program that it intended to reinstate the banked beds. The Petitioner's written notice was filed on July 14, 2017. Exhibit A Declaration of Beth Harlow. This was 49 days before the Petitioner's intended conversion date for the banked beds.

1.4 The Petitioner also filed a letter with the Program seeking a four-year extension of Petitioner's banked beds on September 5, 2017. Harlow Declaration at paragraph 6, Ex. C. This letter was filed four days following the September 1, 2017, bed banking expiration date under WAC 246-310-580(7)(i). The Petitioner's letter did not include the Department of Health's application form, the required application fee or

provide the other information required under WAC 246-310-580(7). In addition, no good cause for the extension was provided.

1.5 On August 17, 2017, the Program denied the Petitioner's request to convert beds that were currently banked on the basis that the request was untimely. On September 13, 2017, the Petitioner appealed the Program's decision denying the bed banking issue and requested a hearing to contest the decision.

1.6 The Program filed its Motion for Summary Judgment on January 19, 2018. The Program argued: (1) the Petitioner's request to unbank its beds was untimely because RCW 70.38.111(9)(b) and (c), when read together, required the Petitioner to file its request 90 days prior to the September 1, 2017, effective date of the license reduction; and (2) the Petitioner's request to extend its bed banking was untimely and improper.

1.7 The Petitioner responded and filed a cross motion for Summary Judgment on January 29, 2018. The Petitioner argued: (1) RCW 70.38.111(9)(b) and (c) authorized the nursing home (not the Department of Health) to convert banked beds back to nursing home use; (2) Those statutory sections simply required the Petitioner to give the Department of Health (Department) written notice of its intent to convert the beds back and paying a fee within a four-year period. Having provided written notice and payment of the fee, the Petitioner argues the Department is now required to issue the Petitioner's requested license modification and restore the banked beds.

1.8 The Petitioner further argued that the license modification does not take effect immediately upon conversion, but allows the Department of Health to set the effective date a minimum of 90 days after the banked beds are converted. The Petitioner also argued that the Program's communications were misleading. The Petitioner's Motion for Summary Judgment did not attach any declarations as required by CR56 nor did it incorporate the Program's evidence.

1.9 The Program filed its Response in Opposition to Petitioner's Motion for Summary Judgment on February 8, 2018. The Program argued the Petitioner's Motion contained four fundamental errors that argued against granting the Petitioner's summary judgment motion. These included the Petitioner's: (1) mistaking that the Department of Health issues nursing home license modifications; (2) claiming that the conversion of nursing homes beds occurs with a notice of intent to convert instead of with the license modification reflecting the restored beds; (3) misidentifying when the conversion occurs by asserting that a license modification reflecting restored beds can occur after the expiration of the right to convert beds; and (4) ignoring the express statutory requirement for 90-day notice of intent before a license modification.

II. CONCLUSIONS OF LAW

Summary Judgment

2.1 The Presiding Officer shall rule on motions. WAC 246-10-403(1). An Administrative agency may employ summary procedures and may enter an order summarily disposing of a matter if there is no genuine issue of material fact.

Asarco Inc. v. Air Quality Coal 92 Wn.2d 685, 697, 601 P.2d 501 (1979). A material fact is one upon which the outcome of the litigation depends. *See Tran v. State Farm Fire & Casualty Co*., 136 Wn.2d 214, 223 (1998). As there is no specific summary judgment rule in Chapter 246-10 WAC, the Presiding Officer can resolve the issue on the best legal authority available. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *see also, State Farm General Insurance Co v. Emerson*, 102 Wn.2d 477, 687 P2d 1139 (1984).

2.2 In a summary judgment the moving party bears the initial burden of demonstrating that there is no genuine issue of material fact. *Young v. Key Pharmaceuticals,* 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party meets its initial burden, then the burden shifts to the non-moving party to set forth specific facts showing the existence of a genuine issue of material fact. All facts submitted and all reasonable inferences from them must be viewed in the light most favorable to the non-moving party. Id at 226. *Jones v. Allstate Ins. Co.* 146 Wn.2d. 291, 300, 45 P.3d 1068 (2002). Where a party moves for summary judgment, and the facts in a case are undisputed "the question is whether the [moving party is] is entitled to summary judgment as a matter of law." *Gebbie v. Olson* 65 Wn App. 533, 537, 828 P2d 1170 (1992).

2.3 The parties do not dispute the underlying facts in this case. There are no genuine issues of material fact relating to: (1) the Petitioner's "banking" (removal from use) of the nursing beds effective on September 2, 2013; (2) its intention to un-bank those same beds in 2017; (3) that the Petitioner provided notice of its intention to "un-bank" (put back into use) the nursing home bed on July 14, 2017; and (4) the Petitioner request a four-year extension of the Petitioner's banked beds. While the parties do not disagree on these facts, they do disagree on the interpretation of the relevant statutory and regulatory sections. An interpretation of the relevant statutory and regulatory sections is therefore necessary.

Interpretation of RCW 70.38.111(9)(b) and (c)

2.4 Under RCW 70.38.111(9), under certain conditions, a nursing home that voluntarily reduces its number of beds is not obligated to obtain a certificate of need if it is bringing the beds back into use within four years. RCW 70.38.111(9)(b)and (c) read in relevant part:

> (9)(a) A nursing home that voluntarily reduces the number of its licensed beds to … reduce to one or two the number of beds per room…may convert the original facility or portion of the facility back, and thereby increase the number of nursing home beds to no more than the previously licensed number of nursing home beds without obtaining a certificate of need under this chapter, provided the facility has been in continuous operation and has not been purchased or leased.
> . . . .
>
> (b) To convert beds back to nursing home beds under this subsection, the nursing home must:
> . . . .
>
> (ii) Give notice to the department of health and to the department of social and

> health services of the intent to convert the beds back… the notice must be given a minimum of ninety days prior to the effective date of license modification reflecting the restored beds.…
>
> (c)Conversion of beds back under this subsection must be completed no later than four years after the effective date of the license reduction. However, for good cause shown, the four-year period may be extended by the department of health for one additional four-year period."

2.5 The Department of Health adopted rules to implement the above statute that parallel the statute. WAC 246-310-395(5) reads:

> Notice of intent to convert beds back to nursing home beds shall be given to the department of health and the department of social and health services a minimum of ninety days prior to the effective date of the licensure modification made by the nursing home licensing authority reflecting the restored beds unless construction is required to convert the beds back.

2.6 Certain statutes create a right limited by time. RCW 70.38.111 (9) is one of these "nonclaim" statutes. While an ordinary statute of limitations ends a right to enforce a remedy, a nonclaim statute ends the substantive right itself. *Lane v. Department of Labor & Industries* 21 Wn.2d 420, 151 P2d 440 (1944). A primary characteristic of a nonclaim statute is that is creates a substantive right that does not exist in common law. *Smith v. Toman* 368 Ill. 414, 14 NE 478 NE 478, 118 A.L.R. 924 (1938). Every action necessary to exercise the right must be completed within the statutory life of the right. *Hazel v. Van Beek* 135 Wn.2d 45, 55-59, 954 P.2d 1301 (1998). Once time has elapsed, the right provided by a nonclaim statute cannot be revived. *Lane v. Department of Labor & Industries* 21 Wn.2d 420, 151 P2d 440 (1944).

> A statute is not open to construction as a matter of course. It is open to construction only where the language used in the statute requires interpretation that is, where the statute is ambiguous, or will bear two or more constructions, or is of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation, and the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The plain and obvious meaning of the language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses the legislative intention, so that such *424 plain and obvious provisions must control. A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity. If a statute's meaning is plain on its face, a court gives effect to that meaning as an expression of legislative intent. Lane v. Department of Labor & Industries 21 Wn.2d 420, 151 P2d 440 (1944)

Columbia Riverkeeper v. Port of Vancouver USA, 188 Wn.2d 421, 435, 395 P.3d 1031 (2017). Similarly, the plain language of a certificate of need rule must be given effect. *Overlake Hospital Association v. Department of Health* 170 Wn.2d 43, 53, 239 P.3d 1095 (2010).

2.7 The plain text of RCW 70.38.111(9)(b) provides that a nursing home seeking to convert bank beds back to use by the nursing home must provide notice to the Department of Health "a minimum of 90 days prior to the effective date of license modification." The nursing home must also give notice to the Department of Health at least 90 days before the expiration of the right granted by RCW 70.38.111(9) because once the bed banking right expires it cannot be the subject of a license modification.

2.8 Here, the Petitioner didn't meet this deadline. Specifically, the Petitioner's right to bank the nursing home beds expired on September 1, 2017. Nidermeyer Declaration at paragraph 5-7. To comply with the plain text of RCW 70.38.111(9)(b) and (c) and WAC 246-310-395(5), the Petitioner needed to provide notice of its intent to seek conversion of the beds by June 2, 2017, or earlier. The Petitioner did not do so. Rather, the Petitioner provided notice on July 14, 2017. This was 49 days prior to the expiration of the banked beds. Harlow Declaration. The Petitioner did not timely provide notice of intent to convert its beds and the Program properly denied Petitioner's request to convert its banked beds back to active use without needing a certificate of need.

2.9 Petitioner argues that RCW 70.38.111(9)(c) does not refer to RCW 70.38.111(9)(b). They downplay the language in RCW 70.38.119(b) and focus on the language in RCW 70.38.111(9)(c). This is a strained interpretation that does not read the two subsections together. It violates the statutory construction rule that when interpreting a statute, a single sentence shall not be viewed in isolation. It is the duty of this court to consider all provisions of the act and attempt to harmonize the various provisions in order to ensure proper construction of each. *Prince v. Savage* 29 Wash. App. 201, 627 P.2d 996 (1981).

See also Overlake Hospital Association v Department of Health 170 Wn.2d 43, 51-52 (2010) (certificate of need regulations must not be read in isolation, but rather within the context of the regulatory and statutory scheme as a whole).

2.10 The Petitioner's Motion for Summary Judgment also erroneously assumes the Certificate of Need Program is responsible for issuing nursing home modifications. It is not. The Department of Social & Health Services, not the Program, issues nursing home licenses. *See* RCW 18.51.010(2). RCW 70.38.111(9) requires notice to both DSHS and the Program because each agency (DSHS and the Certificate of Need Program) has different responsibilities regarding nursing home beds. The Petitioner confuses these two concepts. DSHS administers nursing bed licensing. The Certificate of Need (CN) Program is only responsible to determine if a certificate of need is required.

2.11 The Petitioner further overlooks the role Department of Social & Health Services (DSHS) plays in issuing license modifications and asserts in error that a nursing home converts the banked beds back to nursing home use simply by giving notice and paying a fee to the Certificate of Need Program. Conversion of nursing home beds occurs upon the "effective date of the license modification" issued by DSHS. RCW 70.38.111(9) (b) (ii) Again, this is apparent from the language of RCW 70.38.111(9) (b) (ii)

> To convert beds back to nursing home beds under this subsection, the nursing home must:
>
> (ii) **Give notice** to the department of health and to the department of social & health services **of the intent to convert beds back**. If construction is required for the conversion of beds back, the notice of intent to convert beds back must be given, at a minimum, one year **prior to the effective date of license modification reflecting the restored beds**; otherwise, the notice must be given a minimum of ninety days **prior to the effective date of license modification reflecting the restored beds**. Prior to any license

> modification to convert beds back to nursing home beds under this section, the licensee must demonstrate that the nursing home meets the certificate of need exemption requirements of this section.

2.12 Statutory interpretation must give words their usual and ordinary meaning with regard to the context of the statute in which they appear. *Providence Physician Services Co*., 196 Wn. App at 718-19. The above statute requires the nursing home to give notice of *intent to convert beds back*. The usual and ordinary meaning of a notice of intent to take an action is that the announcement will occur in the future. The nursing home's notice of intent provides the Program (referred to as Department in the statute) and DSHS with the information that the nursing home want to reinstate the beds it has banked. This statute requires notice before the effective date of the license modification. The time of license modification is the only time at which a transition that can be recognized as a conversion takes place. A nursing home cannot use the beds upon announcing its intent. It must wait until DSHS issues the license modification before assigning residents to the beds.

As stated above, the Department must give effect to the plain meaning of the statute. *Columbia Riverkeeper* 188 Wn.2d at 435. The Petitioner also incorrectly argues that the statute does not require the effective date of a license modification to fall within the four-year period following the bed reduction. RCW 70.38.111(9)(c) provides that '[c]onversion of beds back under this subsection must be completed no later than four years after the

effective date of the license modification issued by DSHS. If a nursing home wants to reinstate its banked beds, the plain language of the statute is that license modification must be effective before the end of the four-year period. A nursing home announcing its intent to convert beds back does not complete conversion; only a license modification completes conversion.

2.13 The Petitioner's remaining arguments are also without merit. There is no need to address the Department's certificate of need regulations because nothing in the regulations alters the statutory analysis. In fact, the regulations often parrot the statutory language. The Petitioner complains that the Program's staff was insufficiently clear about when the notice of intent must be submitted but staff communication/technical assistance does not relieve the Petitioner of statutory obligations.

III. ORDER

Based upon the foregoing Procedural History and Findings of Fact, and Conclusions of Law, it is ORDERED:

3.1 The Program's Motion for Summary Judgment is GRANTED.

3.2 The Petitioner's Motion for Summary Judgment is DENIED.

3.3 The prehearing conference and hearing are STRICKEN.

Dated this 26 day of February, 2018.

/s/
LAURA L. FARRIS, Senior Presiding Officer
Presiding Officer

NOTICE TO PARTIES

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

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

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

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

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

and a copy must be sent to the opposing party. If the opposing party is represented by counsel, the copy should be sent to the attorney. If sending a copy to the Assistant Attorney General in this case, the mailing address is:

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

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

Final orders will be reported to the National Practitioner Databank (45 C.F.R. Part 60) and elsewhere as required by law. Final orders will be placed on the Department of Health's website, and otherwise disseminated as required by the Public Records Act (Chap. 42.56 RCW) and the Uniform Disciplinary Act. RCW 18.130.110. All orders are public documents and may be released.

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