STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT

In Re:	)	Master Case No. M2008-118469
	)	
Evaluation of Two Certificate of Need Applications Submitted by Central Washington Health Services Association d/b/a Central Washington Hospital and DaVita, Inc., Proposing to Establish New Dialysis Facilities in Douglas County,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER ON CROSS-MOTION FOR SUMMARY JUDGMENT
	)	
Central Washington Hospital,	)	
	)	
Petitioner.	)	
_____	)	

APPEARANCES:

Petitioner, Central Washington Health Services Association, d/b/a Central Washington Hospital, by
Davis Wright Tremaine LLP, per
Brad Fisher and Lisa Rediger Hayward, Attorneys at Law

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

and

Law Offices of Kimberlee L. Gunning, per
Kimberlee L Gunning, 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: John F. Kuntz, Review Judge

Central Washington Health Services Association, d/b/a Central Washington Hospital (Central Washington) filed a Memorandum in Opposition to DaVita Motion to

Supplement Record, and Cross-Motion for Summary Judgment Ordering Withdrawal of CON.[1] Central Washington seeks an order for entry of summary judgment ruling as a matter of law that DaVita, Inc. (DaVita) did not qualify for the certificate of need awarded by the Department of Health Certificate of Need Program (Program). Both DaVita and the Program oppose the cross-motion. Central Washington's cross-motion is granted.

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

Certificate of Need

1.1 A certificate of need is a non-exclusive license to establish a new health care facility. *See St. Joseph Hospital & Health Care Center v. Department of Health*, 125 Wn.2d 733, 736 (1995). The development of health services and resources, including the construction, modernization, and conversion of health facilities, should be accomplished in a planned, orderly fashion, consistent with identified priorities and without unnecessary duplication or fragmentation. RCW 70.38.015(2).

1.2 The establishment of a new healthcare facility (including new kidney dialysis centers) requires a certificate of need. RCW 70.38.105(4)(a) and RCW 70.38.025(6). The applicant is responsible to show or establish that it can meet all of the applicable criteria. WAC 246-10-606.

1.3 When the Program receives two applications for a certificate of need for the same planning area (the geographic area designated for the calculation whether additional kidney dialysis facilities are required), it engages in a concurrent review. A concurrent review is defined as a comparative analysis and evaluation of competing or

[1] DaVita's Motion to Supplement the Record is addressed in Prehearing Order No. 11.

similar projects in order to determine which of the projects best meet the identified needs. RCW 70.38.115(7). For kidney dialysis facilities, the concurrent review process is set forth in WAC 246-310-282.

1.4 In determining whether to issue a facility a certificate of need, the Program engages in an analysis whether an applicant meets the criteria in four areas: a determination of need; a determination of financial feasibility; criteria for structure and process of care; and a determination of cost containment. WAC 246-310-200(1).[2] In addition to the basic criteria, the applicant seeking a kidney dialysis certificate of need must meet additional criteria specific to that type of certificate.[3]

1.5 For kidney dialysis applications, there are five stages for gathering information on applications.[4] The five stages consist of: (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. The Program will not consider any information regarding a certificate of need application submitted by an applicant after the conclusion of the public comment period. WAC 246-310-090(1)(a)(iii). The certificate of need rules do not restrict what information 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 (step 4 above), the applicant can still

[2] *See also* WAC 246-310-210 through WAC 246-310-240.
[3] *See* WAC 246-310-280 through WAC 246-310-290.
[4] WAC 246-310-280.

address or rebut that possible discrepancy in the rebuttal period (step 5 above) before the Program concludes the public comment period.

1.6 As part of its analysis, the Program screens the application for completeness. If it has questions after screening the application, the Program forwards those questions to the applicant for clarification. For regular reviews an applicant submitting a response to the Program's screening request can exercise one of three options:

(a) Submission of written supplemental information and a written request that the information be screened and the applicant be given opportunity to submit further supplemental information if the department determines that the application is still incomplete;

(b) Submission of written supplemental information with a written request that review of the certificate of need application begin without the Program notifying the applicant whether the supplemental information is adequate to complete the application; or

(c) Submission of a written request that the application be reviewed without supplemental information.

See WAC 246-310-090(2)(c). If the application is part of a concurrent review, an applicant submitting a response to the Program's request for supplemental information may submit the supplemental information or request in writing that the incomplete application be reviewed. WAC 246-310-090(2)(e).

1.7 After completing the review, the Program issues a written decision on the application. The Program can deny an application if the applicant has not provided the information which is necessary to make a determination that the project meets all of the

applicable criteria, and which the Program has prescribed and published as necessary. WAC 246-310-490(1)(a)(ii). This presumes that the Program requested the information in the screening letter in accordance with WAC 246-310-090(1)(c).
WAC 246-310-490(1)(a)(ii).

1.8 The Program's application form requires the applicant to provide a variety of information. The Program uses the application form to "prescribe and publish" the information applicants must supply to obtain a certificate of need.
See WAC 246-310-090(1). The Program uses the same application form for each certificate of need application it receives. There is no separate kidney dialysis application form.

1.9 Under the project description section of the application form, the Program requests the applicant:

> p. Provide documentation that the applicant has sufficient interest in the site or facility proposed. *"Sufficient interest"* shall mean any of the following:
>
> a. clear legal title to the proposed site;
>
> b. a lease for at least five years, with options to renew for not less than a total of twenty years, in the case of a hospital, psychiatric hospital, tuberculosis hospital, or rehabilitation facility;
>
> c. a 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 surgical facilities, hospice, or home health agency;

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

(Emphasis supplied in the original).[5]

1.10 Subsection (d) of the Program's application form is the basis for the Program's practice of accepting draft leases from applicants as evidence of site control.[6] The Program will accept a draft lease if the document shows or identifies a specific physical location for the facility or planned facility, and that the applicant has sufficient interest in the facility.

1.11 Identification of a specific location and the nature of the applicant's interest in that site enables the Program to determine whether the applicant can meet the following criteria: (1) The immediate and long-range capital and operating costs of the project can be met; (2) the costs of the project, including any construction costs, will probably not result in an unreasonable impact on the costs and charges for health services; and (3) the project can be appropriately financed. WAC 246-310-220.

DaVita Application

1.12 In November 2007, DaVita and Central Washington each filed certificate of need applications to establish a new kidney dialysis facility in East Wenatchee, Douglas County, Washington.

[5] Declaration of Brad Fisher in Support of Cross-Motion for Summary Judgment (Fisher Declaration), Exhibit I, page 6.
[6] *See* Program Memorandum Opposing Central Washington Motion for Summary Judgment, page 3.

1.13 In December 2007, the Program accepted both applications under the Kidney Disease Treatment Centers-Concurrent Review Cycle #4.[7] Under the concurrent review process, the Program could determine that either one of the applicants, both of the applicants, or neither of the applicants would be awarded a certificate of need to establish the kidney dialysis facility.

1.14 On November 13, 2007, one of DaVita's attorneys sent an email request to the Program's Executive Manager.[8] DaVita contacted the Program for clarification on what requirements were necessary to document a developer's interest in a proposed site. The email stated, in part:

> As we discussed, you wanted to first check with Richard McCartan[9] but advised that you thought a letter of intent or similar document from the landowner would be sufficient. A letter of intent would indicate the landowners' intent to sell or otherwise convey (e.g. long-term lease) the site to the developer on the condition that the Department approve a CN for the site. You indicated the Program was not interested in the financial aspects of the seller-developer arrangement but wanted evidence the developer would have the right to develop the property for subsequent lease to DaVita.
>
> I understand your advice is contingent on consultation with Richard and you indicated you would get back to me if your position was different than what we discussed.[10]

In response to DaVita's email, the Program responded by email on November 15, 2007. The responsive email stated:[11]

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[7] *See* WAC 246-310-282.
[8] Declaration of James M. Beaulaurier in Opposition to CWH Cross-Motion for Summary Judgment (Beaulaurier Declaration), Exhibit 19.
[9] Richard McCartan is the primary Assistant Attorney General representing the Certificate of Need Program.
[10] Beaulaurier Declaration, Exhibit 19.
[11] *Id*.

> Thanks, this is a good summary of what we discussed. I think a letter of intent is great. Please, make sure the letter identifies the parties and is signed by the land owner.

1.15 The Program's November 15, 2007 email response was issued prior to DaVita's filing of its kidney dialysis application on November 30, 2007. Between the time of the email communication between DaVita and the Program, the Program did not modify or amend its certificate of need application requirements as evidenced by its application form.

1.16 As a part of its application, DaVita identified the location of its proposed kidney dialysis facility: the North West Corner of 3rd Street and Colorado Street, East Wenatchee, WA 98802, in Douglas County (aka Douglas County Tax Lots #40100003506 and 40100003516). To show that it had a sufficient interest in the property, DaVita submitted the following information:

A. A November 28, 2007 letter from Henry C. Lewis to the Program.[12] In the letter Mr. Lewis stated he was one of the owners (along with his wife Cathie D. Lewis) of the property in question and had agreed on terms for sale of the property to EDG-DV East Wenatchee (a limited liability company).[13] Mr. Lewis stated they intended to sell the property to EDG-DV East Wenatchee in the event the state approved a dialysis clinic at the location.

B. A draft lease agreement between EDG-DV East Wenatchee (lessor) and Total Renal Care, Inc. (lessee).[14]

[12] Beaulaurier Declaration, Exhibit 17.
[13] Beaulaurier Declaration, Exhibit 29.
[14] Beaulaurier Declaration, Exhibit 18 (referencing Application, Appendix 15). *Note* Total Renal Care, Inc. is owned by, or owns, DaVita. There is no dispute that they are essentially the same entity.

1.17 Following receipt of DaVita's application, the Program submitted screening questions to DaVita on a number of issues.[15] In regard to the issue of site control, the Program asked DaVita whether EDG-DV East Wenatchee existed as a corporate entity.[16] DaVita responded to the Program's question by stating that EDG-DV East Wenatchee did exist as an entity as of January 2008.[17]

1.18 When it filed its application, DaVita did not possess a sufficient interest in the Lewis property. DaVita had not received: (1) a clear legal title for the proposed site from Mr. Lewis (one half of the marital community and one of the identified property owners); (2) a lease for at least one year, with options to renew for not less than five years in the Lewis property; or (3) a legally enforceable agreement to obtain such title or such lease in the Lewis property in the event the certificate of need was issued.

1.19 In fact, DaVita took an additional step to obtain a "sufficient interest" in the proposed site as part of its application process. The additional step DaVita chose to take was to insert a third party (EDG-DV East Wenatchee, a Washington limited liability company) into the process. The first step in DaVita's plan was to have EDG-DV East Wenatchee purchase the property from Mr. Lewis. Assuming that EDG-DV East Wenatchee was successful in purchasing the Lewis property, the second step in DaVita's plan was to then lease the property from EDG-DV East Wenatchee.

[15] *See* paragraph 1.11 above.
[16] *See* Program Memorandum Opposing Central Washington Motion for Summary Judgment (Program Memorandum), page 2, lines 16-17 (citing Application Record page 1160).
[17] Program Memorandum, page 2, lines 17-18 (citing Application Record page 1163).

1.20 EDG-DV East Wenatchee filed its Certificate of Formation with the Washington State Secretary of State's office on January 22, 2008, which was approximately one month after DaVita filed its certificate of need application with the Program.[18] While it did not exist at the time DaVita filed its kidney dialysis application in November 2007, EDG-DV East Wenatchee did legally exist by the time the Program issued its decision on the DaVita's application in July 2008.

1.21 While it did legally exist prior to the issuance of the Program's decision, EDG-DV East Wenatchee neither had a clear legal title to the proposed site or a legally enforceable agreement to receive such a title to the Lewis property prior to the Program's decision to grant DaVita a certificate of need in July 2008. Because EDG-DV East Wenatchee neither had a clear legal title or a legally enforceable agreement to receive such a title to the Lewis property prior to the Program's July 2008 decision, DaVita could not obtain a legally enforceable agreement to lease the propose site from EDG-DV East Wenatchee.

II. CONCLUSIONS OF LAW

Evidence in Certificate of Need Decisions

2.1 The Department of Health is authorized and directed to implement the certificate of need program. RCW 70.38.105(1). The applicant must show or establish that its application meets all of the applicable criteria. *See* WAC 246-10-606. The Program issues a written analysis which grants or denies the certificate of need

[18] Declaration of Brad Fisher Re Opposition to DaVita Motion to Supplement Record and Cross-Motion for Summary Judgment (Fisher Declaration), Exhibit G.

application. The written analysis must contain sufficient evidence to support the Program's decision. *See* WAC 246-310-200(2)(a). Admissible evidence in certificate of need hearings is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. RCW 34.05.452(1). The standard of proof is preponderance of the evidence. WAC 246-10-606.

Oral Argument

2.2 Unless otherwise ordered by the presiding officer, all motions shall be decided without oral argument. WAC 246-11-380(9). A party requesting oral argument on a motion shall so indicate by typing "oral argument requested" in the caption of the motion or the responsive memorandum. WAC 246-11-380(9).

2.3 Central Washington requested oral argument on its Memorandum on Cross-Motion for Summary Judgment Ordering Withdrawal of CON, and in its Reply in Support of Cross-Motion for Summary Judgment, consistent with the requirements set forth in WAC 246-11-380. Given the extent and detailed arguments presented by the parties in their pleadings, the Presiding Officer determines no oral argument is required in this matter.

Presiding Officer as Agency Fact-Finder

2.4 The Presiding Officer (on delegated authority from the Secretary of Health) is the agency's fact-finder and final decision maker. *DaVita v. Department of Health*, 137 Wn. App. 174, 182 (2007) (*DaVita*). The Presiding Officer is not required to defer to the Program analyst's decision or expertise. *DaVita*, 137 Wn. App. at 182-183.

Summary Judgment

2.5 Administrative tribunals are vested with the authority to rule by summary judgment. *ASARCO v. Air Quality Coalition*, 92 Wn.2d 685 (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 a judgment as a matter of law. Civil Rule (CR) 56(c).

2.6 A material fact is one upon which the outcome of the litigation depends. *Tran v. State Farm Fire & Casualty Co.*, 136 Wn.2d 214, 223 (1998). Summary judgment is not proper if "reasonable minds could draw a different conclusion from undisputed facts, or if all of the facts necessary to determine the issues are not present. *Tran v. State Farm Fire & Casualty Co*., 136 Wn.2d at 223. In ruling on a motion for summary judgment, a court must consider "[a]ll facts and reasonable inferences…in the light most favorable to the nonmoving party, and all questions of law are reviewed de novo." *Sundquist Homes v. Snohomish PUD #1*, 140 Wn.2d 403, 406 (2000) (citations omitted).

2.7 There is no genuine issue of material fact regarding the evidence DaVita submitted as proof of its site control for the Douglas County site. DaVita submitted a letter from one of the property owners, Mr. Lewis, in which he agreed to sell the property to a limited liability company (EDG-DV East Wenatchee). EDG-DV East Wenatchee was not the applicant for the kidney dialysis application. DaVita also submitted a draft lease between it and a limited liability company (EDG-DV East Wenatchee) that did not

own the property at the time it proposed to lease to DaVita (the applicant). DaVita did not have sufficient interest in the property, for the reasons set forth below.

2.8 "Sufficient interest" means either: clear legal title in the proposed site; a lease for at least one year, with options to renew for not less than five years; or a *legally enforceable agreement* to give such title or such lease in the event that a certificate of need is issued for the proposed project.[19] DaVita has no clear legal title in the proposed site owned by Mr. and Mrs. Lewis. That leaves one of the two remaining options (a lease or a *legally enforceable agreement* to give a lease in the event that a certificate of need is issued).

2.9 EDG-DV East Wenatchee did not have a legally enforceable agreement to own the land it proposed to lease to DaVita at the time of the application. The November 2007 letter from Mr. Lewis submitted by DaVita did not contain any terms regarding the proposed sale to EDG-DV East Wenatchee. It did not contain the sale price for the property or show what consideration, if any, was given to Mr. Lewis to obtain that promise to sell. For a contract to form, the parties must objectively manifest their mutual assent, the terms assented to must be sufficiently definite, and the agreement must be supported by consideration. *Keystone Land & Development Corporation v. Xerox Corporation*, 152 Wn.2d 171 (2004) (*Keystone Land*). Otherwise it is merely a speculative "agreement to agree" (an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be

[19] *See* Finding of Fact 1.6. The fourth option, which applies to hospitals or rehabilitation facilities, is not applicable here.

complete). *Keystone Land*, 152 Wn.2d at 175-176 (citiaton omitted). Agreements to agree are unenforceable in Washington. *Keystone Land*, at 176 (citations and footnote omitted).

2.10 In addition, Mrs. Lewis is identified as one of the owners, but her signature is absent from the November 2007 letter. Neither person shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which real estate is sold, conveyed, or encumbered. RCW 26.16.030(3). So even if Mr. Lewis's November 2007 letter had contained sufficient terms to represent the agreement between the parties (Lewis and DaVita or Lewis and EDG-DV East Wenatchee), it would not be a legally enforceable agreement without Mrs. Lewis's signature.

2.11 Based on the facts and evidence in support of the cross-motion for summary judgment, there is no genuine issue of material fact regarding DaVita's site control over the property. DaVita does not have a sufficient interest in the site it intended to use for its proposed kidney dialysis facility. Without a sufficient interest or site control over the Lewis property, DaVita (the applicant) cannot meet all of applicable criteria, specifically the criteria under WAC 246-310-220(1) regarding the financial feasibility of the project by showing that it had sufficient interest in site it proposed to use.[20] The Program's written analysis does not contain sufficient evidence to support its decision. There being no genuine issue of material fact regarding the site control issue,

[20] *See* WAC 246-10-606.

Central Washington's cross-motion for summary judgment should be granted on this issue as a matter of law.

Equitable Estoppel

2.12 In its Response to Petitioner CWH's Cross-Motion for Summary Judgment Ordering Withdrawal of CON (DaVita Response), DaVita contends the Department (the Presiding Officer on authority delegation from the Secretary of Health, as opposed to the Certificate of Need Program) should be estopped from denying the application based on DaVita's contact with the Program's Executive Director.[21]

2.13 Washington case law regarding equitable estoppel states:

> When equitable estoppel is asserted against the government, the party asserting estoppel must establish five elements by clear, cogent, and convincing evidence: (1) a statement, admission, or act by the party to be estopped, which is inconsistent with its later claim; (2) the asserting party acted in reliance upon the statement or action; (3) injury would result to the asserting party if the other party were allowed to repudiate its prior statement or action; (4) estoppel is "necessary to prevent a manifest injustice; and (5) estoppel will not impair governmental functions.

Silverstreak Inc., v. Department of Labor and Industries, 159 Wn.2d 868, 887 (2007) (citing *Kramarevcky v. Department of Social and Health Services*, 122 Wn.2d 738, 743 (1993)). Equitable estoppel against the government is not favored. *Kramarevcky v. Department of Social and Health Services*, 122 Wn.2d 738, 743 (1993). Reliance is justified only when the party claiming estoppel did not know the true facts

[21] *See* Finding of Fact 1.14 above.

and had no means to discover them. *Maraski v. Lannen*, 55 Wn. App. 820, 824-825 (1989).

2.14 Clear cogent, and convincing evidence is evidence that must convince the trier of fact that the fact in issue is "highly probable." *Colonial Imports, Inc. v. Carlton Northwest, Inc*., 121 Wn. 2d 726, 735 (1993). Two of the five elements regarding estoppel appear questionable. DaVita must prove that it is highly probable that the Program's email response is a statement, admission, or act that is inconsistent with its later claim.[22] DaVita must prove that the Program's email statement constitutes clear, cogent, and convincing evidence (highly probable evidence) that the Program would accept the letter of intent as proof of the "significant interest" criteria contained in the certificate of need application form. DaVita must also prove that it relied on the Program's November 15, 2007 email statement to its detriment.

Prescribe and Publish Requirement

2.15 The Program's November 15, 2007 email response to DaVita's email of November 13, 2007 states that:[23]

A. DaVita's email accurately summarizes the discussion between Mr. Eggen and Mr. Beaulaurier regarding the issue of developer site documentation;

B. Mr. Eggen believed a letter of intent is great; and

C. A letter must identify the parties and is signed by the land owner.

[22] DaVita's estoppel claim is not against the Certificate of Need Program. The Program accepted the November 2007 email in its decision to award the certificate of need. The estoppel claim is against the Presiding Officer in his role as decision maker for the Secretary of Health.
[23] Beaulaurier Declaration, Exhibit 19.

The Program's first sentence only states that DaVita's November 13, 2007 email accurately states the discussion and is not helpful here. The second sentence of the Program's email response might be considered as evidence the Program will accept a letter of intent. The sentence, by itself, does not provide what information such a letter of intent must contain. So, by itself, the second sentence does not provide clear, cogent, and convincing evidence (that is, highly probable evidence) that the Program is authorizing the use of a letter of intent for a legally enforceable agreement to give a lease.

2.16 The second sentence must be read in conjunction with the third sentence of the Program's email response. When read together, those two sentences might be considered evidence that meets the "highly probably" standard of proof that is required for DaVita to assert equitable estoppel against the Department. Only when read together do those two sentences in the Program's email response suggest and/or indicate that the Program will accept a letter of intent as evidence of a legally enforceable agreement of a lease as required by its application form. If it will accept a letter of intent, the Program indicates in the third sentence "[p]lease make sure the letter identifies the parties and is signed by the land owner."

2.17 However, the Presiding Officer concludes the second and third sentences, as contained in the Program's November 15, 2007 email (and the email itself), do not meet the "prescribe and publish" requirements under WAC 246-310-090. The relevant subsection states:

(a) A person proposing an undertaking subject to review shall submit a certificate of need application *in such form and manner and containing such information as the department has prescribed and published as necessary to such a certificate of need application*.

(i) The information, which the department prescribes and publishes as required for a certificate of need application, shall be limited to the information necessary for the department to perform a certificate of need review and shall vary in accordance with and be appropriate to the category of review or the type of proposed project: Provided however, That the required information shall include what is necessary to determine whether the proposed project meets applicable criteria and standards.

(ii) information regarding a certificate of need application submitted by an applicant after the department has given "notification of the beginning of review" in the manner prescribed by WAC 246-310-170 shall be submitted in writing to the department.

(iii) Except as provided in WAC 246-310-190, no information regarding a certificate of need application submitted by an applicant after the conclusion of the public comment period shall be considered by the department in reviewing and taking action on a certificate of need application.

WAC 246-310-090(1) (Emphasis added).

2.18 Unlike the November 15, 2007 email, the Program's application specifies what constitutes its "prescribed and published" requirements for site control for this application. The requirements specify either a lease or a legally enforceable agreement to give such lease. A letter of intent might arguably be acceptable *if* it contained all of the criteria proving the existence of a legally enforceable agreement to grant a lease (that is, not elevating form over substance). However, the Program's November 15,

2007 email does *not* supersede or substitute for its previously prescribed and published application form requirements.

2.19 The Program and/or Department have the authority to change its application form in accordance with the "prescribed and published" requirements in WAC 246-310-090. Such an amended application form could include an appropriately drafted letter of intent under subsection (d) of the "sufficient interest" section of its application form. However, there was no such amendment prior to DaVita filing its application here.

2.20 Because it used its standard application form, the Program's email dated November 15, 2007 does not meet the "prescribed and published" requirement set forth in WAC 246-310-090. Changing the established requirements for issuance of a certificate of need in this manner would constitute improper rulemaking.[24] *See Regan v. State Department of Licensing*, 130 Wn. App. 39, 54-55 (2005). For that reason, the Presiding Officer is not required to accept the November 15, 2007 email as amending the certificate of need application form.

Reliance on the Statement or Action

2.21 For DaVita to prevail on its equitable estoppel defense, it must make a showing by clear, cogent, and convincing evidence that it justifiably relied on the Program's November 15, 2007 email. *See Maraski v. Lannen*, 55 Wn. App. 820, 824-825 (1989).

[24] A "rule" is any agency order of general applicability which establishes, alters, or revokes any qualifications or standards for the issuance of licenses to pursue any commercial activity, trade or profession. *See* RCW 34.05.010(16).

2.22 Subsequent to its November 2007 email, the Program sent its standard application form to DaVita to use in its certificate of need application. The application form clearly requires that the applicant submit a lease or legally enforceable agreement to give such lease under subsection (d). *See* Finding of Fact 1.9 above. It was not amended or changed in any fashion to reflect the Program's November 15, 2007 email. DaVita provided no clear, cogent, and convincing evidence in its responsive pleading to the cross-motion for summary judgment that it contacted the Program to determine what were the true facts regarding what the documentation needed to prove what constituted proof of "significant interest" in an application site. In other words, there is no evidence that DaVita requested any clarification from the Program whether it should follow the application form or the Program's email. Absent such evidence it is unreasonable for DaVita to now argue that it relied on the Program's email.[25]

2.23 Given that the Program failed to meet its "prescribe and publish" requirement under WAC 246-310-090(1), and given that DaVita failed to produce clear, cogent, and convincing evidence that it reasonably relied on the Program's November 2007 email, DaVita's equitable estoppel claim must fail here.

[25] Although not a controlling factor in his decision, the Presiding Officer notes there is no evidence that the Program notified Central Washington Hospital of its willingness to accept a letter of intent in meeting the site control requirement. Neither is there any evidence that the Program issued any interpretive or policy statement to advise the public of the content of the email The Program's failure to do so argues against its actions being considered an interpretation of the phrase "significant interest" *See Budget Rent A Car Corp. v. Department of Licensing*, 144 Wn. 2d 889, 897-898 (2001).

Ultra Vires Action

2.24 Even if the Program's email was not a failure to follow the "prescribe and publish" requirement under WAC 246-310-090, and could be viewed to authorize the use of a letter of intent or similar document, the language contained in the email clearly provides that the land owner must sign the letter. The proposed site is community property. Therefore, it requires the signature of both owners under RCW 26.16.030(3). So even if it could accept a letter of intent, the Program and/or Department must comply with the RCW 26.16.030(3) and obtain the signature of both Mr. and Mrs. Lewis, the community property owners. To contend otherwise is to suggest that the Program can ignore RCW 26.16.030(3), which would be an ultra vires action. Estoppel cannot be asserted against the government for its ultra vires actions.
See State v. Adams, 107 Wn. 2d 611, 614-615 (1987).[26] So even if DaVita relied on the Program's email (which it should not have) equitable estoppel cannot be used as a defense here.

Conclusion

2.25 The Department of Health has consistently required that an applicant show that it meets *all* of the required criteria to obtain a certificate of need. Failure to meet any one of the criteria is a sufficient basis to deny the application. One of the criteria is the applicant must show it has control over the site it proposes to use as the certificate of need facility. Without the applicant's showing that it has control over the

[26] There are sound policy reasons to require the applicant prove site control during the application period. Proof of site control during the application process helps to ensure that the public receive the health care services in a timely manner. *See generally* RCW 70.38.015.

proposed site, the Department cannot assess whether an applicant can meet its financial feasibility or cost containment requirements. In this matter there is no genuine issue of material fact regarding DaVita's site control over the Lewis property (the property DaVita proposed to use for its kidney dialysis facility). DaVita did not have control over the proposed site as of the date of the Program's decision in July 2008. As there is no genuine issue of material fact that DaVita did not have site control, granting Central Washington Hospital's cross motion for summary judgment is appropriate here as a matter of law. Granting summary judgment means DaVita's application must be denied.

III. ORDER

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

3.1 Central Washington's request for oral argument on its Cross-Motion for Summary Judgment is DENIED.

3.2 Central Washington's Cross-Motion for Summary Judgment is GRANTED.

3.3 DaVita does not qualify for Certificate of Need No. 1381. There is no genuine issue of material fact regarding DaVita's failure to show that it had site control as required under WAC 246-310-220 and WAC 246-310-240. DaVita's application to

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establish a kidney dialysis facility in Douglas County, Washington fails as a matter of law.

Dated this _7__ day of July, 2009.

_____/s/_____
JOHN F. KUNTZ, Review Judge
Presiding Officer

NOTICE TO PARTIES

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

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

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

and a copy must be sent to:

Department of Health Certificate of Need Program
P.O. Box 40109
Olympia, WA 98504-0109

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