STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF PROFESSIONAL STANDARDS

In the Matter of the Certificate of Need Application of:	)	OPS No. 95-06-05-854 CON
SUNRISE HEALTHCARE-THURSTON COUNTY, Applicant.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER

INTRODUCTION

Sunrise Healthcare Corporation/Careage Inc. (referred to as Sunrise or the Applicant) applied for a certificate of need to build and operate a 120-bed nursing home in Thurston County. The Certificate of Need Program of the Department of Health (the Program) denied the application because it did not meet the review criteria for need, financial feasibility, and cost containment. Sunrise requested an adjudicative proceeding before the Secretary of the Department of Health (the Department). Puget Sound Health Care, Evergreen Nursing and Rehabilitation Center, Roo-Lan Healthcare Center, and Mother Joseph Care Center (the Intervenors), intervened in the adjudicative proceeding. After a comprehensive hearing and review of the record, the Presiding Officer performed a de novo review of the evidence. The Presiding Officer finds that the Sunrise application does not meet the nursing home certificate of need review criteria for need, financial feasibility, and cost containment. Accordingly, the Presiding Officer denies Sunrise's application to build and operate a 120-bed nursing home in Thurston County. The Presiding Officer's Findings of Fact and Conclusions of Law follow.

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I. RELEVANT PROCEDURAL HISTORY

1.1 By letter dated June 12, 1995, the Program denied Sunrise's certificate of need application (the Sunrise Application) to establish a new free-standing, 120-bed

nursing home facility in Thurston County. On June 16, 1995, Sunrise requested an adjudicative proceeding to review the Program's denial of its Thurston County application. Sunrise had also applied for certificate of need approval to establish a nursing home facility in Benton County, Washington. The Program has denied that application, for which Sunrise has requested an adjudicative proceeding.

1.2 On June 21, 1995, a Scheduling Order in the Thurston County matter was issued notifying the parties that a prehearing conference was scheduled for October 25, 1995 and the hearing was scheduled for January 17, 1996.

1.3 On September 27, 1995, the Intervenors filed a Petition for Intervention with the Office of Professional Standards. The Presiding Officer granted the Petition for Intervention by order dated October 26, 1995.

1.4 On October 25, 1995, a prehearing conference was held and the parties and the Presiding Officer agreed on a prehearing schedule. Following the prehearing conference, the Presiding Officer issued Prehearing Order No. 1, dated October 26, 1995, which set forth the agreements of the parties.

1.5 On October 25, 1995, Sunrise filed a motion to consolidate into one action the adjudicative proceedings relating to the denial of their certificate of need (CON) applications in both Thurston County and Benton County. Both the Program and the Intervenors filed responses in opposition to Sunrise's motion to consolidate. The Presiding Officer issued Prehearing Order No. 2, dated November 15, 1995, which denied Sunrise's motion to consolidate.

1.6 Prehearing conferences were held on November 15, 1995, January 2, 1996, and January 8, 1996, to discuss prehearing matters and organize the case for

hearing. The parties' agreements and the rulings of the Presiding Officer at those conferences are set forth in Prehearing Order No. 3, dated November 20, 1995 and Prehearing Order No. 4: Order Defining Conduct At Hearing, dated January 11, 1996. A Notice of Hearing was issued January 8, 1996, notifying the parties of the dates scheduled for the hearing and a Notice of Extended Hearing Days was issued January 24, 1996 notifying the parties of additional hearing dates.

1.7 The hearing was held before Review Judge Colleen Klein, Presiding Officer for the Office of Professional Standards of the Department of Health, on January 16-18, 22 and 24, 1996, February 20, 26, and 27, 1996 and April 17, 1996 at the Bank of California Building, Seattle, Washington. Thomas H. Grimm, Attorney at Law, represented the Applicant. James Brusselback, Assistant Attorney General, represented the Program. Stephen J. Maag, Attorney at Law, represented the Intervenors. The proceedings were recorded by Robert H. Lewis and Associates and Sandra Baker and Associates.

1.8 After the close of the hearing on February 27, 1996, the Applicant moved to reopen the record to supplement exhibit TA-6 with newly discovered information. The Program and the Intervenors opposed the Applicant's motion. After oral argument, the Presiding Officer granted the Applicant's motion to supplement the record in order to provide a complete record in this case. Supplemental information was added to TA-6. Further, in the interest of fairness, the Presiding Officer permitted presentation of additional testimony concerning the supplemental information. Such testimony was presented on April 17, 1996.

1.9 On May 14,1996, Judge Klein notified the parties that she would soon be leaving her position with the Office of Professional Standards of the Department of Health. She informed the parties that pursuant to RCW 34.05.461(6), Senior Health Law Judge Eric B. Schmidt would assume responsibility as Presiding Officer. The parties made no objections to Judge Schmidt assuming responsibility as Presiding Officer in this case.

1.10 Judge Schmidt reviewed the transcripts of the hearing, except for the additional evidence presented on April 17, 1996, for which he listened to an audio tape made by Judge Klein. He reviewed all of the exhibits presented by the parties.

1.11 The parties submitted post-hearing briefs in lieu of closing arguments. The Appellant's Post-Hearing Memorandum, Closing Brief of the Department of Health, and Brief of Intervenors were filed on April 19, 1996. The Reply Brief of Applicants and Reply Brief of Intervenors were filed on May 3, 1996. The filing of the post-hearing briefs closed the record in this adjudicative proceeding.

1.12 As documented in the May 14, 1996 letter from Judge Klein to the parties, the adjudicative proceeding on the denial of Sunrise's application in Benton County was stayed by agreement of the parties, pending the resolution of this proceeding.

II. EXHIBITS

2.1 The following exhibits offered by the Program were ADMITTED:

TD-0	Application for Certificate of Need
TD-1	Sunrise Application for CON, January 1995
TD-2	Adult Family Home Growth Thurston County, 12/19/94
TD-3	Thurston County Data 12/94

TD-4	1993 Nursing Home Bed Utilization Summary, 12/19/94
TD-5	Thurston County 1994 Census
TD-6	Memo to Frank Chestnut from Kathy Leitch, 12/27/94, re: Certificate of Need Application for Thurston County
TD-7	Article in South Sound Business Examiner, 1/16/95, "Assisted Living Facility Breaks Ground in Olympia"
TD-8	Memo to Frank Chestnut from Kathy Leitch, 1/25/95, re: Additional Residential Resources in Thurston County
TD-9	Memo to Kathy Leitch from Frank Chestnut, 2/9/95, re: Additional Residential Resources in Thurston County
TD-10	Letter to Frank Chestnut from Anthony Hernandez, 2/21/95
TD-11	Memo to Frank Chestnut from Suzanne Plaja, 2/24/95, re: Quality History for Sunrise Healthcare Corp.
TD-13	Memo to Frank Chestnut from Lois Brighten, 3/30/95, re: Careage/Sunrise-Thurston County Project
TD-14	Letter to Frank Chestnut from Stephen Maag, 4/3/95, re: Careage/Sunrise Certificate of Need Application
TD-15	Public Hearing Agenda, 4/6/95
TD-16	Memo to Frank Chestnut from Kathy Leitch, 4/6/95, re: Careage/Sunrise Thurston County Project
TD-17	Letter to Frank Chestnut from Thomas Grimm, 4/27/95, re: Careage/Sunrise Certificate of Need-Thurston County
TD-18	Letter to Frank Chestnut from Stephen Maag, 4/28/95, re: Careage/Sunrise Certificate of Need Application - Thurston County
TD-19	Letter to Frank Chestnut from Anthony Hernandez, 5/1/95, re: Careage/Sunrise Certificate of Need
TD-20	Memo to Frank Chestnut from Kathy Leitch, 5/19/95, re: Careage/Sunrise Thurston County Project
TD-21	Letter to Anthony Hernandez from Maria Gardipee, 6/12/95
TD-22	Implementation of Assisted Living in the State of Washington, 2/92
TD-23	Medicaid Long Term Care GAO Report to the Chairman, 8/94
TD-24	Presentation to the House Appropriations Committee, 2/2/95, Charles Reed
TD-25	Average Monthly and Average Daily Costs in Total and State Dollars for Aging and Adult Services Clients Served During July 1995 By Type of Service
TD-26	Thurston LTC Services Utilization

TD-27 Resume, Janyce Thomas

TD-28 Resume, Amanda Carmier

2.2 The following exhibit offered by the Program was WITHDRAWN:

TD-12 ESSHB 1908, Washington Health Care Association, 3/30/95

2.3 The following exhibits offered by the Applicant were ADMITTED:

TA-0 Letter of appeal from Thomas H. Grimm to Department of Health, 6/16/95

TA-2 Department of Health Decision Letter

TA-5 Anthony Hernandez study: "Supplemental Bed Needs Study for Thurston County 1995"

TA-6 Certificate of Need Action Log, with CON determinations subsequent to HB 2098

TA-7 Table: "Statewide Nursing Bed to Population Ratios by County"

TA-8 Hernandez study of nursing home admissions and discharges, state and Thurston County

TA-9 Hernandez summary of state data on Thurston County admissions and discharges

TA-10 Nursing Home Utilization Table

TA-11 Table, Nursing Home Admission and Discharge Data, with Utilization, by County

TA-12 Batelle Debility Scores for Thurston County

TA-13 Table of Statewide and County ADL Dependency and Medical Profile, 1991-1995

TA-14 Patient Day Statistics by County

TA-15 Stop Placement/Negative Action Log

TA-16 "Assisted Living in the United States: A New Paradigm for Residential Care for Frail Older Persons?" American Association of Retired Persons, 1993

TA-17 "Medicaid Long-Term-Care: Successful State Efforts to Expand Home Care Services While Limiting Costs," GAO Study, August 1994 (pp. 13, 43, 47, 50, 51)

TA-19 Nursing Home Yearbook, 1994, Health Date Associates, Inc., 1994

TA-20 1994 Nursing Home Bed Utilization Summary by County for Washington State, AASA

TA-21	Annual Report for Home and Community Based Services, AASA years 1990 - 1994 (five documents)
TA-22	Presentation to the House Health Care Committee, 1/13/95, AASA
TA-23	Aging and Adult Services Administration's Plan to Reduce Costs to Comply With 601 Initiative - Report to Washington State Legislature, 11/15/94
TA-24	The Profile, Thurston Regional Planning Council, September 1993, 1995
TA-25	1992 Review of Nursing Home Bed Need, Department of Health Information, Special Projects
TA-26	Washington State County Total Population Projects, Selected Years, and Age Cohort Projections by County for Selected Years.
TA-28	"Washington Health," 10/30/92
TA-29	Letter, Ralph W. Smith, Aging and Adult Services Administration to Columbia River Area Agency on Aging, dated 4/14/92
TA-30	Letter from Home Care Association of Washington to Lucia Miltenberger, Department of Health, 12/9/92
TA-33	Newspaper article from 10/20/92 Seattle Times, quoting Charles Reed, Department of Social and Health Service
TA-34	Letter from Janis R. Sigman, Manager of Certificate of Need Program, to Stan Scholl, dated 7/24/92

2.4 The following exhibits offered by the Applicant were WITHDRAWN:

TA-1	Certificate of Need Application file
TA-3	Table on "Nursing Homes and Community Services Caseloads"
TA-4	Anthony Hernandez analysis: "Elderly Population and Community Services Caseloads from 1984 - 1995"
TA-18	Implementation of Assisted Living in Washington State, AASA, DSHS, February 1992
TA-27	"Nursing Homes; What Should They Be?" Discussion paper of Health Systems Resources dated August 1988
TA-31	State Health Coordinating Council, Long Term Care Advisory Committee Information Packet #1, 6/21/88
TA-32	Chart, Comparison of Community Based and Nursing Home Services, 1990, Department of Health, 11/17/92
TA-35	Nursing Home Bed Supply Comparison comparing 1989 and 1992

2.5 The following exhibit offered by the Intervenors was ADMITTED:

TI-1 1994 Nursing Home Utilization Summary

2.6 The Office of Professional Standards received transcripts of all of the hearing except the additional testimony taken on April 17, 1996. As an aid to possible judicial review, the Presiding Officer has attempted to cite to the transcript as much as possible. However, citations are not complete and do not necessarily indicate the only reference to the cited information in the record or by a particular witness. The citations to the transcript in this Order refer to the volume and page. Generally, each volume of the transcript represents one of the hearing days, with the exception of day six of the hearing which is in two volumes. Not all volumes of the transcripts are numbered but each is dated. Therefore, the volume citation for each hearing day is as follows:

Volume 1 - January 16, 1996
Volume 2 - January 17, 1996
Volume 3 - January 18, 1996
Volume 4 - January 22, 1996
Volume 5 - January 24, 1996
Volume 6a - February 20, 1996 (morning session)
Volume 6p - February 20, 1996 (afternoon session)
Volume 7 - February 26, 1996
Volume 8 - February 27, 1996

III. ISSUES

3.1 Whether the criteria contained in RCW 70.38.115(2)(k)(i)(ii) must be considered when the Department reviews a nursing home certificate of need application and, if so, whether the review criteria must be analyzed separately?

3.2 Does the Sunrise application meet the review criteria for nursing home certificate of need applications?

This Order will consider the two issues separately.

IV. FINDINGS OF FACTS

Based upon the testimony of the witnesses and the exhibits admitted into the record, the Presiding Officer hereby makes the following Findings of Facts:

IV.A Historical and Procedural Background

IV.A.1 Long-Term Care in Washington

4.1 Washington state has developed a policy which encourages the development of home and community-based long-term care services. TA-25, p. 5; TA-5, p. 1. With the passage of Substitute House Bill 2098 (SHB 2098) in 1993, the Washington state legislature expressly set the direction of long-term care in Washington:

> The legislature finds that the aging of the population and advanced medical technology have resulted in a growing number of persons who require assistance. The primary resource for long-term care continues to be family and friends. However, these traditional caregivers are increasingly employed outside the home. There is a growing demand for improvement and expansion of home and community-based long-term care services to support and complement the services provided by these informal caregivers.
>
> The legislature further finds that the public interest would best be served by a broad array of long-term care services that support persons who need such services at home or in the community whenever practicable and that promote individual autonomy, dignity, and choice.
>
> The legislature finds that as other long-term care options become more available, the relative need for nursing home beds is likely to decline. The legislature recognizes, however, that nursing home care will continue to be a

> critical part of the state's long-term care options, and that such services should promote individual dignity, autonomy, and a homelike environment.

1993 Wash. Laws 508, section 1.

4.2 It was the legislature's expressed intent that long-term care include a balanced array of services that "promote individual choice, dignity and the highest practicable level of independence." SHB 2098; 1993 Wash. Laws chapter 508, section 2. Further, the legislature expressly encouraged the development of home and community-based services to meet the needs of consumers and to maximize effective use of limited resources. SHB 2098; 1993 Wash. Laws chapter 508, section 2. Finally, the legislature expressly intended that state health planning for nursing home bed supply "take into account the increased availability of other home and community-based service options." SHB 2098; 1993 Wash. Laws chapter 508, section 2.

4.3 Again in 1995, the legislature reinforced the direction of long-term care in Washington by enacting Second Substitute House Bill 1908 (SSHB 1908) which, like SHB 2098, made significant changes and additions to long-term care. One such addition permits nurses to delegate certain nursing tasks to nursing assistants who provide care to individuals residing in adult family homes and boarding homes contracting with the Department of Social and Health Services (DSHS) to provide assisted living services. 1995 Wash. Laws chapter 18, section 46. The purpose of this delegation is to enhance health care in community-based settings:

> The opportunity for a nurse to delegate to nursing assistants qualifying under section 46 of this act may enhance the viability and quality of care in community health settings for long-term care services and to allow citizens to live as independently as possible with maximum safeguards.

SSHB 1908; 1995 Wash. Laws, chapter 18, section 45.

4.4 Long-term care includes an array of health, personal care, social and supportive services provided to individuals who are at least partially unable to take care of themselves. TD-23, p. 20. Home and community-based services (also collectively referred to as alternative services) are part of this array of services and include those services used by DSHS to provide publicly assisted health care to individuals in a setting other than a nursing home or hospital. TD-23. Alternative services include assisted living services, enhanced adult residential care, adult residential care, adult family homes, and in-home services. Vol. 2, p. 21; Vol. 3, p. 22; Chapter 74.39A RCW.

IV.A.2 Certificate of Need Overview

4.5 In 1971, the Washington state legislature established a certificate of need program, which was modified in 1979 to conform with the Federal Health Planning Act. Vol. 1, p. 19. The certificate of need (CON) program is codified at chapter 70.38 RCW and gives the Department the authority to regulate the development of certain health care facilities and services. Chapter 70.38 RCW; Vol. 1, pp. 19, 160. The policy underlying the CON program is that the development of health services should be accomplished without unnecessary duplication or fragmentation and should provide accessible health services while controlling excessive increases in costs. RCW 70.38.115(1) and (2). Accordingly, a facility whose proposed project is subject to certificate of need review must apply for and obtain a certificate of need from the Department, or an exception thereto, before certain health care services and resource can be developed. RCW 70.38.105.

4.6 In 1979, nursing home services were recognized to be part of the health care facilities and services to be regulated by the certificate of need program. Free-standing nursing homes are included in the certificate of need process in order to maximize utilization, minimize cost, and avoid duplication of services. RCW 70.38.105(4); 1979 Wash. Laws (1st ex. sess.) chapter 161, sections 10 through 13.

4.7 The certificate of need application process begins with a letter of intent submitted by an applicant to the Program. This letter includes a general description of the project, the service area, the types of services being proposed and the capital expenditures. In response to the letter of intent, the Program forwards to the applicant copies of applicable regulations, an application, and any additional information that may be needed in relation to the proposed project. Vol. 1, p. 21.

4.8 Once a completed application and supporting documents have been submitted to the Program, an analyst is assigned to the application. Within 15 days, the analyst must screen the application for completeness and, if needed, request additional documentation or clarification from the applicant. The applicant has 45 days to respond to any requests by the Program and may then request that the application be either re-screened or reviewed with or without the requested information. Vol. 1, pp. 23-25.

4.9 Once a request for review is received, the Program must begin the review process by notifying the newspaper and other health care facilities of the time and location of a public hearing. The 60-day period after notice of the hearing is published is called the public comment period when comments may be submitted to the Program on the proposed project. The public hearing is designed to elicit comments from the

community or interested persons either in favor of or opposed to the project. Generally, the deadline for submission of comments is the adjournment of the public hearing, unless an extension of time is granted. Vol. 1, pp. 25-26.

4.10 Following the public comment phase, the Program analyst performs an in-depth analysis of the application and considers the comments that have been submitted for review. This is known as the internal review or analysis period. At the conclusion of the internal review period, the analyst prepares a written analysis and a recommended decision, which are submitted for review by other analysts and by the Director of Health Services Development of the Department of Health. The application can either be approved as submitted, denied, or approved with conditions. Vol. 1, pp. 27-28.

IV.A.3 Review of Sunrise's Application

4.11 On January 17, 1995, Sunrise submitted an application for a certificate of need to the Program, proposing to develop and operate a 120-bed nursing home facility in Thurston County (Sunrise application). TD-1. The proposed facility would have three distinct service components; a 30-bed Alzheimer's unit, a 20-bed Medicare unit, and 70 beds to provide care to chronically debilitated long-term care residents. TD-21, p.3; Vol. 6a, p. 20.

4.12 The Program analyst assigned to review the Sunrise application was Frank Chestnut. Mr. Chestnut has approximately 16 years of experience in the area of certificate of need. Mr. Chestnut has a bachelor's degree from Syracuse University and a Master's degree in social work from the University of Washington in 1976, with an

emphasis in community and organizational development. Vol. 1, p. 109. See also, Vol. 1, pp. 106-110.

4.13 Mr. Chestnut generally described the review process. Mr. Chestnut testified that the first obligation in analyzing a CON application is to evaluate the merits of the case presented by an applicant in the application and course of review. To do this, he must identify the review criteria and the policy that applies, including precedents that guide the Department's actions. He uses personal knowledge gained from his experience and considers comments and information from other agencies, including DSHS, and comments received during the review process and public hearing. Vol. 2, p. 56.

4.14 Prior to the Sunrise application, Careage, Inc. (one of the partners in the Sunrise project) and Manor Care had submitted a CON application to build a 120-bed nursing home facility in Thurston County. Mr. Chestnut had also been assigned to review that application. In the course of his review of the Careage/Manor Care application, Mr. Chestnut had requested information from Kathy Leitch, Director of Home and Community Services, AASA, DSHS. Vol. 1, p. 114, TD-6. In response to his request, Ms. Leitch sent a letter dated December 27, 1994, recommending denial of the Careage/Manor application. Before a decision was made on the Careage/Manor application, Manor withdrew from the project and Sunrise Health Care replaced Manor Care as a partner. A new application was submitted by Sunrise and Careage to the Program - the Sunrise application at issue in this proceeding. TD-9.

4.15 After Mr. Chestnut received the Sunrise CON application, he scheduled a public hearing for April 6, 1995, to provide the public with an opportunity to submit

information to the Program on the Sunrise proposal and to allow Sunrise an opportunity to respond to such comments. TD-2, p.353. On February 9, 1995, Mr. Chestnut wrote to Ms. Leitch advising her that Sunrise had replaced Manor Care as partner in the proposed nursing home project and that a new application had been submitted. Mr. Chestnut encouraged her to submit as much detailed information as she could in response to the new application:

> What is the best evidence we can point to that shows that projects such as those underway in Thurston county demonstrably shifted demand from nursing homes to these types of alternatives? I believe this is the case, but I expect that an appeal of a a [sic] denial would seek to show that such projects do not substitute for nursing home beds. It seems to me we would be advantaged if we can begin to develop documentation on this now rather than later. It could be included in the original denial analysis and would likely come across as stronger in that form than if pieced together as supplemental evidence presented in a hearing.

TD-9, p.121.

4.16 At the April 6, 1995 public hearing, Sunrise presented witnesses to testify in support of its application. Interested persons also provided comments. Ms. Leitch testified and submitted written comments on behalf of DSHS. Vol. 1, pp. 122, 123; TD-16.

4.17 Mr. Chestnut testified that he followed the Program's standard procedures for reviewing a CON application, except for extending the public review period to allow an opportunity for interested persons to comment on information provided by Sunrise that had not been made available prior to the hearing. Vol. 1, pp. 122-124; TA-5. Comments were received from the Intervenors, Sunrise, and AASA on the new information. Vol. 1, pp. 123-125; TD-18, TD-19, TD-20.

4.18 After the conclusion of the public review period, Mr. Chestnut reviewed the application, information and comments submitted to the Program from all sources. Vol. 1, p. 126. Mr. Chestnut testified that the Program does not have sufficient time and resources to verify all the information supplied for review and does not believe it is necessary to do so. Rather, the Program makes judgments regarding the nature of the information, and the source providing it. Vol. 2, p. 57.

4.19 Mr. Chestnut stated that the largest part of his reasoning in the Sunrise application was based on the AASA information, although he considered all information submitted during the review process. He did not independently investigate the information supplied by AASA, nor did he exhaustively analyze the study by Anthony Hernandez submitted in support of the Sunrise application. Mr. Chestnut gave "over-riding weight" to the AASA recommendations and the data submitted from AASA. Vol. 2, p. 16.

4.20 Mr. Chestnut considered the information supplied from AASA to be of significant importance because (i) the legislature specifically directs the Department to consider data provided by DSHS and other sources in considering available alternative services and, (ii) because DSHS has the expertise and authority for setting and implementing long-term care policy in the state. Vol. 2, pp. 16, 58; RCW 70.38.115(2)(k)(ii).

4.21 Mr. Chestnut prepared a written analysis of the Sunrise application and recommended its denial. TD-21. The analysis and recommended decision were reviewed by another analyst and then forwarded to Ms. Gardipee, Director of the Office

of Health Services of the Department of Health, for her review and comment. Vol. 1, p. 126.

4.22 By letter dated June 12, 1995, Ms. Gardipee advised Sunrise of the Program's decision to deny its CON application and forwarded a copy of the written analysis. TD-21. The Program's denial of the Sunrise application was based on its findings that the proposed project did not meet certain review criteria under the general criteria of need, financial feasibility and cost containment. Sunrise was informed of its right to request an adjudicative proceeding to challenge the denial of its CON application.

IV.B First Issue

Whether the criteria under RCW 70.38.115 (2)(k)(i)(ii) must be considered when reviewing a nursing home certificate of need application and, if so, whether the Review criteria must be analyzed separately?

IV.B.1 Regulatory and Statutory Criteria

4.23 Generally, there are at least four criteria which must be considered in reviewing a CON application: need, financial feasibility, structure and process of care, and cost containment.

4.24 The criteria relating to a determination of **need** are found at RCW 70.38.115 and WAC 246-310-210. A determination of **need** must consider whether: (i) the population served or to be served has need for the project; (ii) other services and facilities of the type proposed are not or will not be sufficiently available or accessible to meet that need; and (iii) all residents in the service area are likely to have adequate access to the proposed health service. WAC 246-310-210.

4.25 The criteria relating to a determination of **financial feasibility** are found at RCW 70.38.115 and WAC 246-310-220. A determination of financial feasibility must consider whether: (i) the immediate and long-range capital and operating costs of the project can be met; (ii) the costs of the project, including any construction costs, will probably not result in an unreasonable impact on the costs and charges of health services; and (iii) the project can be appropriately financed. WAC 246-310-220.

4.26 The criteria relating to a determination of **structure and process of care** are found at RCW 70.38.115 and WAC 246-210-230. A determination of structure and process of care must consider whether (i) a sufficient supply of qualified staff for the project are available or can be recruited; (ii) the proposed services will have an appropriate relationship to ancillary and support services and these services will be sufficient to support any health services included in the proposed project; (iii) there is reasonable assurance that the project will be in conformance with applicable state licensing and other applicable requirements; (iv) the proposed project will promote continuity in the provision of health care, not result in an unwanted fragmentation of services and have an appropriate relationship to the service area's existing health care system; and (v) there is reasonable assurance that the services to be provided through the proposed project will be provided in a manner that ensures safe and adequate care to the public to be served and in accord with applicable state and federal law.
WAC 246-210-230.

4.27 The criteria relating to a determination of **cost containment** are found at RCW 70.38.115 and WAC 246-210-240. A determination of cost containment must consider whether: (i) superior alternatives, in terms of cost, efficiency, or effectiveness,

are not available or practicable; (ii) the costs, scope, and methods of construction and energy conservation are reasonable and the project will not have an unreasonable impact on the costs and charges to the public of providing health services by other persons; and (iii) the project will involve appropriate improvements or innovations in the financing and delivery of health services which foster cost containment and which promote quality assurance and cost effectiveness. WAC 246-310-240.

4.28 In addition, to these general review criteria, the Department has developed a **nursing home bed need methodology** to project the number of new nursing home beds necessary for reasonable and appropriate use. WAC 246-310-350 through 390. The calculation used by the Department is the "bed-to-population ratio," which is the number of nursing home beds per one thousand persons age 65 years and older. WAC 246-310-350(5). The bed need methodology sets a state-wide target ratio and calculates state and county ratios based on the current populations and numbers of nursing home beds in the state and county. The statewide ratio and the county ratios are compared to the target ratio to determine if the state or county is "under-bedded" or "over-bedded." Vol. 1, p. 37. The term "over-bedded" is used to indicate that the state or county has a ratio greater than the state-wide target ratio. The term "under-bedded" is used to indicate that the state or county has a ratio less than the state-wide target ratio. Vol. 1, pp. 37-38.

4.29 In 1989, the Department reduced the target bed-to-population ratio from 53.7 nursing home beds for every 1,000 individuals age 65 years and over to a target ratio of 45 nursing home beds for every 1,000 individuals age 65 and over (referred to as the 45/1,000 ratio). Vol. 1, pp. 84, 94. See also, WAC 246-310-350(5)(b). This

reduction in the bed-to-population ratio was an attempt to facilitate a shift in funding from nursing home care to community-based alternative services. In setting the lower 45/1,000 ratio, the Department considered the increased growth in alternative community-based settings. Vol. 6a, p. 4. However, the target ratio was set prior to the enactment of SHB 2098 in 1993 and SSHB 1908 in 1995, which implemented additional long-term care options and alternative services. Vol. 7, p.5; Vol. 2, pp. 67-70.

4.30 The 45/1,000 target ratio remains a state-wide guideline, although it is not a statutory requirement. Vol. 1, pp. 93, 98. Until the state has achieved this target, no new nursing home beds should be added to the long-term care system. Vol. 1, pp. 35-36.

4.31 In addition to the general review criteria and the nursing home bed need methodology, two new review criteria were added in 1993 when the Washington state legislature passed SHB 2098 amending certain portions of the certificate of need statute. These new review criteria were intended to fit into the state-wide plan focused toward developing more community-based alternative services. Specifically, SHB 2098 directed the Department to consider the following additional criteria for reviewing nursing home certificate of need applications: “(i) the availability of other nursing home beds in the planning area to be served; and (ii) the availability of other services in the community to be served.” RCW 70.38.115(2)(k)(i) and (ii). The legislature also directed the Department to consider data provided by DSHS as among the sources of information concerning the availability of alternative services. RCW 70.38.115(2)(k)(ii).

4.32 The Program's review of the Sunrise application included consideration of these two additional statutory criteria. TD-21.

IV.B.2 Applicant's Position Regarding Applicable Review Criteria

4.33 The Applicant contends that the two new statutory criteria of RCW 70.38.115(2)(k) should not undermine or nullify the existing standards set forth in current Department regulations, particularly the regulations governing the nursing home bed need methodology. The Applicant asserts that, under the Program's normal review procedures related to the determination of need, the Sunrise application would be approved because it conforms to the criteria of need found in current Department regulations, specifically the 45/1,000 target ratio. The Applicant contends that the Program's departure from the objective numerical standards that it has traditionally used for a determination of need for a nursing home project is unexplained and is unfair to the Applicant.

4.34 The Applicant notes the undisputed fact that at the time of the Sunrise application, the state was over-bedded by 29,000 beds and Thurston County was under-bedded by 248 beds. Because the state bed-to-population ratio exceeded that target ratio, no new nursing home beds were being added to the system. Vol. 1, p. 36. However, the Sunrise project would not add additional nursing home beds to the state system because the project proposed to use previously authorized bed rights obtained from service providers in Thurston County and two over-bedded counties. TD 21, p. 3. It is undisputed that even with the addition of the 120-bed Sunrise project, Thurston County would remain under-bedded. Therefore, the Applicant contends that, in accordance with the Department's regulations and traditional analysis, the criterion of need has been met.

4.35 In addition, the Applicant contends that the Program's decision to deny its application based on the general statutory criteria of RCW 70.38.115(2)(k) is arbitrary and subjective. The Applicant asserts that the Department has adopted no rules to implement the criteria of RCW 70.38.115(2)(k) or to indicate the statute's relationship to the other review criteria found in the Department regulations. Therefore, according to the Applicant, the Program has no objective standards for implementing the two new criteria found in RCW 70.38.115 (2)(k).

4.36 Finally, the Applicant criticizes the Program's analysis because it did not separately analyze the sub-criteria related to each statutory review criterion. Vol. 6p, p. 56. The Applicant contends that the Program's analysis and decision was not consistent with other CON decisions rendered since the passage of SHB 2098. The Applicant has submitted copies of CON decisions that have been issued since passage of SHB 2098, to show that the Program's decision was arbitrary and capricious. TA-6.

IV.B.3 Program's/Intervenors' Position Regarding Applicable Review Criteria

4.37 The Program contends the nature and focus of the review criteria have changed since SHB 2098 was passed in 1993 and added two new review criteria, RCW 70.38.115(2)(k)(i) and (ii). The Program argues the legislature's desire to expand community-based alternatives and to decrease reliance on institutional services necessarily affects how the Department analyzes a nursing home CON application and the criteria of need. Vol. 1, p.95.

4.38 Janis Sigman, Health Service Administrator for the Program, testified that prior to the passage of SHB 2098, the bed need methodology was a major factor in

determining need. Generally, the need criterion was met if a planning area was under-bedded. Vol. 1, p.77. However, Ms. Sigman concluded that with the passage of SHB 2098, an applicant must now show more than just that a county has fewer beds than the target bed-to-population ratio: the applicant must now show that the existing services in the community are not capable of meeting the needs of the residents in the county. Vol. 1, p. 41.

4.39 Furthermore, Ms. Sigman testified that the 45/1,000 target ratio was established as a measure of a need for service when there were no alternative services available that could also meet those needs. According to Ms. Sigman, prior to SHB 2098, the evaluation of alternatives was really a comparison of nursing homes. Alternatives such as boarding homes or assisted living were not considered in the Program's evaluation. However, with the passage of SHB 2098, a proposed nursing home project is evaluated and compared to not only existing nursing homes, but also to alternatives such as boarding homes, adult family homes, or assisted living facilities. Vol. 1, pp. 81, 84-85.

4.40 According to Ms. Sigman, the bed-to-population ratio is only a starting point in the determination of need. The bed-to-population ratio is a traditional planning tool for comparing nursing home bed supply from one jurisdiction to another in a standardized way. It is not a measure of the adequacy of supply in a scientific manner, but rather is a guideline to assess the reasonableness of a given supply of nursing home beds. Vol. 1, p. 98; TA-25, p. 6.

4.41 The Intervenors assert that the legislature's amendment of RCW 70.38.115 to add two additional nursing home review criteria reflects the

legislature's desire to maximize the use of existing alternatives and to promote the further development of these alternatives to nursing home facilities. The Intervenors assert that by directly amending RCW 70.38.115, the legislature implicitly reduced the importance of the bed-to-population ratio as a determination of need. According to the Intervenors, the bed-to-population ratio is now more accurately viewed as a minor first step in the analysis of need for a new nursing facility.

4.42 The Program also maintains that the statutory and regulatory review criteria are interconnected and overlapping. Because of this, the Program considers each criterion in relation to the others. Vol. 1, pp. 140-142.

4.43 Finally, the Program asserts that except for the Sunrise applications for Thurston and Benton counties, there have been no CON applications to build a new free-standing nursing home in the state since the passage of SHB 2098. Vol. 6, p. 86. The Program maintains that none of the CON decisions submitted by the Applicant in TA-6 are applications to build a new free-standing nursing home. According to the Program, the applications for new nursing homes are actually applications to build transitional care units. The Program asserts that a CON application to build a free-standing nursing home is not the same as a CON application to establish a transitional care unit in a hospital. Consequently, a transitional care unit application is not analyzed in the same manner as a nursing home application. Vol. 1, pp. 63,103.

IV.B.4 Presiding Officer's Analysis of First Issue

4.44 RCW 70.38.115(2)(k) specifically requires the Department to consider two new criteria in cases of nursing home CON applications. The Department's

consideration of these criteria is not dependent on whether it has promulgated specific rules concerning these statutory criteria. The Department cannot ignore these legislatively mandated review criteria. It must apply them regardless of the analytical procedures employed prior to their enactment.

4.45 The Presiding Officer finds that the absence of regulations implementing the new review criteria of RCW 70.38.115(2)(k) does not render those criteria inapplicable. The criteria are clear, and need no elucidation by regulatory enactments in order to be applied.

4.46 In the case of the Sunrise application, the Program considered and analyzed the new criteria of RCW 70.38.115(2)(k) as part of its determination of whether the Sunrise application met the criteria for need and cost containment. By including at least one of the new criteria in its determination of need, the Program modified the way in which it had analyzed and determined the need criteria in the past. While the Program may have deemed the criterion of need to be satisfied if a planning area was under-bedded in CON applications prior to the enactment of RCW 70.38.115(2)(k), that bed-to-population methodology is no longer sufficient to satisfy the criterion of need, in light of the Program's incorporation of the new review criteria within its determination of need.

4.47 Further, the Sunrise application is one of the first CON applications for a new free-standing nursing home facility analyzed since the enactment of RCW 70.38.115(2)(k). Therefore, it is understandable that the Program's analysis of CON nursing home applications would change to take into consideration the new legislative mandates.

4.48 The Presiding Officer concurs with the Program that the statutory and regulatory review criteria are interrelated in some aspects, especially the new review criteria of RCW 70.38.115(2)(k), which are clearly related to the determination of need. Although the review criteria are set forth separately in statute and regulation, this does not preclude one criterion from affecting another nor does it preclude the Department from using an interrelated analysis. As a practical matter, it does not matter if the criteria are analyzed in relation to one another or independently; the project must meet all applicable review criteria for approval, both statutory and regulatory.

4.49 Finally, because the Presiding Officer is independently making a decision on the Sunrise application after considering all of the evidence presented, including evidence not previously before the Program, it is irrelevant whether the Program's decision deviated from, or was arbitrary when compared to, other CON applications that were granted. Moreover, even if the Program's decisions in other cases are not consistent with the Sunrise application, the solution would be to analyze the Sunrise application properly, not to grant a certificate of need to a facility that does not meet the review criteria.

4.50 Similarly, the Applicant has taken issue with the manner in which the Program has analyzed the above criteria in relation to its application and the manner in which the Program made its decision, including the information upon which it relied in reaching its decision. The Applicant has also challenged the Program's decision because the Program's calculation of the 1994 nursing home utilization rate for Thurston County was later shown to be inaccurate. Again, because the Presiding Officer will independently determine whether the proposed project meets the review

criteria based on the evidence in the record, a discussion of and determination as to whether the Program unduly relied upon a DSHS opinion or upon an erroneous calculation will not be necessary. The following findings of fact contain the Presiding Officer's de novo review of the evidence and analysis of the Sunrise application.

IV.C Second Issue

Does the Sunrise application meet the review criteria for nursing home certificate of need applications?

4.51 The Program found that the Sunrise application is not consistent with the following review criteria:

1. Determination of Need - Need/Availability WAC 246-310-210(1). In its analysis of need, the Department also considered the criteria of availability of other nursing home beds, RCW 70.38.115(2)(k)(i).

2. Financial Feasibility - Reasonable Impact on Costs WAC 246-310-220(2)

3. Determination of Cost Containment - Superior Alternatives - WAC 246-310-240(1). In its analysis of cost containment, the Department also included the criteria of availability of other services, RCW 70.38.115(2)(k)(ii).

4.52 Because the parties have essentially interwoven their arguments and evidence relating to the new criteria of RCW 70.38.115(2)(k) into their analyses of need, and because these new criteria clearly relate to the determination of need under WAC 246-310-210(1), the format of this Order will include the new review criteria in the assessment and determination of need.

IV.C.1 Determination of Need, Availability of Other Beds and Availability of Other Services.

4.53 The applicable review criteria for the determination of need are as follows:

WAC 246-310-210(1) - The population served or to be served has need for the project and other services and facilities of the type proposed are not or will not be sufficiently available or accessible to meet that need. The assessment of the conformance of a project with this criterion shall include, but not be limited to, consideration of the following:

(b) In the case of health services or facilities proposed to be provided, the efficiency and appropriateness of the use of existing services and facilities similar to those proposed.

RCW 70.38.115(2)(k) - In the case of nursing home applications:
(i) The availability of other nursing home beds in the planning area to be served; and
(ii) The availability of other services in the community to be served. Data used to determine the availability of other services will include but not be limited to data provided by the department of social and health services.

IV.C.1.a Program's and Intervenors' Positions

4.54 In its written analysis and findings relating to the determination of need, the availability of other nursing home beds and the availability of other services in the area, the Program made the following findings:

There are six existing nursing homes in Thurston County. 1993 utilization data from the Aging and Adult Services Administration (AASA), DSHS, shows a 95.08 percent occupancy rate for the facilities operating in that year. Utilization data collected by AASA in December 1994 shows Thurston County overall occupancy had declined to 93 percent. A new nine bed subacute care unit at Capital Medical Center was granted certificate of need approval in 1994. The staff analysis of this application provided by AASA indicated that the addition of various assisted living facilities and the continued growth in Adult Family Homes and other home care resources is expected to reduce the nursing home occupancy rate in 1995. The development of these alternatives to nursing home care will result in increased availability of existing nursing home beds in the area and those existing beds will be adequate to meet the need for nursing home care. For this reason, the additional beds proposed are not needed, and this project is not consistent with the criterion on need, WAC 246-310-210(1), under the determination of need.

TD-21, p. 5.

> A variety of alternative services are available in Thurston County that divert demand from nursing home care to other care settings. AASA has provided information on specific developments in this respect.
>
> The number of Adult Family Homes in the county has increased from 34 in July 1992 to 60 in December 1994. This represents an additional 100 beds. Additionally, home care to publicly funded clients who would otherwise need nursing home care has increased from 104 clients in July 1993 to 153 in July 1994.
>
> The Sisters of Providence of Washington plan to build a 60 unit assisted living facility that will open sometime this year. Senior Services of Thurston County plans to build a 50 unit assisted living facility in downtown Olympia. Quad C Retirement Centers has started construction of a 92 unit assisted living facility that will open sometime this year. Northwest Care Resources is building a 79 unit assisted living facility.
>
> State policy initiatives continue to stress the development of substitutes for nursing home care. House Bill 1908, expected to be signed by the Governor soon, includes provisions to reduce Medicaid nursing home caseload statewide by 1600 clients in the 1995-1997 biennium, and to add funding to increase the availability of home and community-based alternatives to nursing home care.
>
> The department concludes a variety of current and pending alternative services will be available to meet care needs of persons who would otherwise need nursing home care. These arrangements have and will cause a decline in the need for and use of nursing home beds, and such arrangements are superior to nursing home care.

TD-21, pp. 8-9.

IV.C.1.a.i. Nursing Home Beds are Available.

4.55 AASA maintains records and data on nursing home and community-based alternatives that provide services to publicly funded clients. Therefore, a significant amount of the data and information presented at the hearing by all parties focused on the services provided to publicly funded clients.

4.56 As measured against the nursing home bed-to-population target ratio, Thurston County is under-bedded and would remain under-bedded if the Sunrise project was approved. While the Program considered this fact in its analysis, the bed-to-population ratio was only one part of its process of determining need. Other factors were also be considered, one of which was the availability of other nursing home beds in the county. Vol. 1, p. 40.

4.57 There are approximately 689 nursing home beds in Thurston County. TA-10; TA-20, p. 2. The typical community-based nursing home generally has a Medicare wing, an Alzheimer's unit and a unit for other skilled-nursing clients. Vol. 1, pp. 30-31. Most if not all of the nursing homes in Thurston County have Medicare-certified beds or units. Vol. 8, p. 40.

4.58 The largest single payor of nursing home services in the state is Medicaid. Vol. 5, p. 127. Approximately 55 to 60% of nursing home beds statewide are occupied by Medicaid residents. Vol. 3, p. 87; TA-20, p. 2. The total number of publicly supported clients in Thurston County using nursing home beds declined from 411 in June 1993 to 352 in June 1994. Vol. 5, pp. 119, 145. According to Ms. Leitch, this reduction in Medicaid nursing home census means that there are more nursing home beds available to private pay residents or Medicare residents. Vol. 5, p. 119. Ms.

Leitch, as Director of the Home and Community Services Division of AASA, has responsibility for the development of home and community-based services and responsibility for the social workers and community nurses who assess client needs and eligibility. Vol. 2, p. 78.

4.59 Ms. Leitch, among other witnesses, testified that the actual needs of people in nursing homes are quite varied - from people with minimal needs in their activities of daily living to people who are totally dependent on assistance in their activities of daily living. Vol. 2, p. 105; Vol. 5, p. 75. See also, Vol. 1, pp. 30-31, 137. Generally, activities of daily living include such things as bathing, dressing, eating, toileting, transferring, etc.

4.60 Statewide data from the Health Data Association, Nursing Home Yearbook: 1994 reveals the following information about Washington state nursing homes and their residents:

9.1% residents had 0 to 1 ADL needs (ADL is activities of daily living);
9.5% had 2 ADL needs;
8.9% had 3 ADL needs;
72.5% had 4-5 ADL needs.

34.8% of nursing home residents are ambulatory;
0.8% require IV or blood transfusions;
9.7% receive one or more injections in a seven day period;
5.8% require respiratory care;
0.9% require Tracheotomy care;
1.4% require suctioning;
1.8% require ostomy care;
4.5% require tube feeding and
32% required rehabilitative services.

16.1% of nursing homes had occupational therapists on staff;
66.7% had contract occupational therapists;
28.7% of nursing homes had physical therapists on staff and;
62.7% had contract physical therapists.

TA-19, Tables A-3, A-11, B-1, E-4, E-5.

4.61 In 1994, nursing home residents statewide averaged 4.0 impairments in activities of daily living. TD-19, Table A-2.

4.62 Many nursing homes provide care to residents with Alzheimer's disease. Nursing homes are not required to have a separate unit in order to provide Alzheimer's care. Residents with Alzheimer's disease can be part of the general nursing home population. Vol. 5, p. 97. Amanda Carmier, who testified at the hearing, is training coordinator for the community services quality assurance program of AASA. Vol. 5, pp. 84-91; TD-28. According to Ms. Carmier, there can be drawbacks to special units for Alzheimer's care. Vol. 5, p. 97.

4.63 At least three nursing homes in Thurston County have secured Alzheimer's units. Vol. 6, p. 10. Approximately one year ago, one of these nursing homes shifted its specialization to Alzheimer's care after it found its Medicare patient referrals had decreased because of competition from other nursing homes. Vol. 8, pp. 51-52.

4.64 Nursing homes can, and often do, provide subacute level care. Transitional care units also provide subacute care to patients. Vol. 1, p. 63. A nursing home can be viewed as an alternative to a transitional care unit in some instances, depending on their staffing configurations. In 1994 and 1995, the Program approved two CON applications to build transitional care units in Thurston County, for a total of 26 beds. Vol. 1, p. 62. Although transitional care unit CON applications are generally reviewed under the nursing home criteria, there are differences between a transitional care unit and a hospital, which are usually seen in the length of patients' stay and in

nurse staffing. Generally, a transitional care unit has twice as many nursing hours per patient day (5-7 hours per day) as a nursing home (3.5 hours per day average). Vol. 1, p. 104. In addition, transitional care units generally have a shorter length of stay for patients (28 to 45 days) than nursing homes. Vol. 1, p. 104. The Applicant's nurse staffing pattern states an average of 3.08 nursing hours per patient day for the proposed facility. TD-1, p. 30.

4.65 It is uncontested that the nursing home occupancy rate in Thurston County in 1994 was 95.59%. At the hearing, Ms. Leitch testified that the occupancy rate for nursing homes in Thurston County was reduced in 1995, although exact figures were not provided. Vol. 3, p. 24. Conflicting testimony was provided by the Program concerning the meaning of the high nursing home occupancy rates in Thurston County. Mr. Chestnut testified that facilities operating at 95.59% occupancy are operating close to or substantially above capacity. Vol. 2, p. 29. However, Mr. LeVee, owner and operator of the Roo-Lan nursing home, does not consider a facility that is running at 95% occupancy as essentially full. Vol. 6p, p. 16. He testified that nursing homes operate very close to the margin of profitability, and that even an occupancy rate of 95% could threaten the continued viability of the Roo-Lan nursing home. According to Mr. Levee's calculations, based on 689 nursing home beds in Thurston County at just under 96% occupancy, there are approximately 26 or 27 beds available for occupancy at any time. Vol. 6p, p. 16. After taking into account that some beds may be held open for residents during short hospital visits, Mr. LeVee judged the number of available nursing home beds at any one time in Thurston County to be at least 20 beds. Vol. 6p, p. 20.

4.66 The Intervenors assert that 95% nursing home occupancy in Thurston County does not mean that nursing home beds are not available. They calculate that with an occupancy rate of 95.5%, there are approximately 31 nursing home beds available at a given time in Thurston County. TD-18, pp. 2-3. The Intervenors also point out that the 1993 nursing home data indicates many nursing home facilities which were able to operate at levels of 95% occupancy or higher. TD-18, p. 3 Charles Hawley, the Vice President of Continuum Development and Long-term Services for the Sisters of Providence Health System, testified that there are available nursing home beds in Thurston County. The Sisters of Providence operate a number of facilities in Thurston County including Mother Joseph Care Center (a nursing home) and St. Peter Hospital. Vol. 8, p. 5. Mr. Hawley testified that Mother Joseph Care Center has nursing home beds available. He could not remember a time when they have had full capacity with a waiting list. Vol. 8, p. 37. Mother Joseph Care Center had a 95.5% utilization rate in 1994. TA-11, last page.

IV.C.1.a.ii. Home and Community Based Alternatives are Increasing.

4.67 A significant basis for the Program's and Intervenors' position that there is no need for additional nursing home beds in Thurston County is the availability of, and services provided by, home and community-based alternatives. Home and community-based services include such services as adult family homes, assisted living, adult residential care, enhanced residential care and in-home services such as home health care. Vol. 3, p. 22. Alternative services for publicly funded residents in Thurston

County have focused mostly on adult family homes, home care services and, more recently, on assisted living services. Vol. 4, p. 39

4.68 Providers can contract with DSHS to provide services to people who are not in a nursing home but who are "nursing home eligible" through the Community Options Entry System (COPES), which is a federally funded, state administered program. Vol. 4, p. 40. "Nursing home eligible" means that a person requires the supervision or provision of services by a registered nurse or licensed practical nurse, and that the person is eligible for Medicaid payment. Vol. 2, p. 111; Vol. 4, p. 12; Vol. 5, p. 23. The determination of nursing home eligibility is made by an individual assessment of each person's needs and abilities. Vol. 2, p. 111; Vol. 4, p. 15.

4.69 Under federal regulations, a person who is nursing home eligible must be placed in a nursing home unless a COPES waiver is obtained. Vol. 2, pp. 83-84. Therefore, a person who is nursing home eligible is not restricted to placement in a nursing home. Vol. 5, p. 23. See also, TD-23. In July 1995, there were 5,304 persons in the COPES program statewide. TD-25. Since then the COPES program has grown to a little over 6,000 clients. Vol. 2, p. 84.

4.70 There are other publicly funded long-term care services besides the COPES program in Washington state, such as the Personal Care Program and Chore Services. Both of these require that a person need assistance with activities of daily living, but nursing home eligibility is not required. Vol. 2, pp. 84-85, Vol. 4, p. 40. See also, TD-25 and TD-23.

4.71 Some home and community-based alternative services for the elderly in Thurston County have increased considerably over the past several years. One such

service is the service provided by adult family homes. An adult family home is a facility that can take up to six people with personal care needs. Vol. 2, p. 102. Adult family homes in Thurston County have grown from 34 in July 1992, to 60 in December 1994, and to 78 as of the date of the hearing. Vol. 3, p. 82; Vol. 5, p. 15; TD-2, TD-6. More than 50 of those homes contract with DSHS to provide services. Vol. 4, p. 33. In Thurston County, the number of publicly funded clients in adult family homes rose from 35 in 1993 to 70 in June 1995. TD-26. In addition, many adult family homes serve private pay residents. Vol. 5, p. 11.

4.72 Licensed boarding homes can also provide community-based long-term care services. Boarding homes are licensed by the Department of Health. Once licensed, a boarding home can contract with DSHS under the COPES program to provide adult residential care, enhanced residential care, or assisted living services to persons who are nursing home eligible. Vol. 2, pp. 60, 100-104; Vol. 5, pp. 14-16. There are eight licensed boarding homes in Thurston County. These homes have a total of 161 beds. TA-5, Table 11. As of June 1995, there were nine publicly funded clients in licensed boarding home beds receiving adult residential care in Thurston County. Vol. 3, p. 82. Adult residential care was formerly called congregate care. Vol. 5, p. 15. Enhanced residential care has not been used much in Thurston County.

4.73 Assisted living is a generic term, generally understood as a means of providing a range of services to clients living in licensed boarding homes. When the Department contracts with a licensed boarding home to provide assisted living services, certain standards must be met. Vol. 5, p. 15. Although assisted living is a fairly new concept, the number of new facilities has grown statewide. Vol. 5, p. 15. There are 52

assisted living facilities statewide and as of the last reporting period, 552 people were in assisted living through the COPES Program statewide. Vol. 2, p. 125; Vol. 3, p. 40.

4.74 In Thurston County, assisted living facilities are in the process of developing and expanding, and will have a significant impact in the provision of long-term care. Thurston County has one recently opened assisted living facility with a COPES contract to provide services to publicly funded nursing home eligible persons - Sequoia Village Quad C. At the time of the hearing, approximately one-third of Sequoia Village's 92 beds were occupied and about 10 of these were occupied with publicly funded residents. Vol. 3, p. 40; Vol. 4, pp. 5, 7. At the time of the hearing, there were plans for additional assisted living facilities in Thurston County including:

> Windsor Manor - scheduled to open in February 1996 (79 units)
>
> Northwest Care Resources - planning a 50 - 60 unit facility specializing in dementia care
>
> Hampton Alzheimer's Special Care Center - ready to open and be licensed by the Department (serving about 56 people)
>
> Catholic Community Services - looking to build an assisted living facility in Lacey (50-60 units)
>
> Senior Services of South Sound - planning a 50 unit assisted living project
>
> Sisters of Providence - planning 60 units of federally subsidized apartments to serve the frail elderly with 3+ activity of daily living needs. Planned opening in late spring 1997.

Vol. 3, pp. 41-43; Vol. 6, p. 10; Vol. 8, p. 12-13; TD-8; TD-6.

Both Catholic Community Services and Senior Services of South Sound have discussed COPES contracts with DSHS. Vol. 5, p. 130.

4.75 Craig LeVee, owner and operator of the Roo-Lan Nursing Home in Thurston County, testified that he is in the process of building two assisted living

facilities in Thurston County across the street from his nursing home. These facilities will care for residents with Alzheimer's disease. Mr. LeVee testified that he is building the facilities because in his experience there are residents with Alzheimer's disease that are residing in nursing homes that can be cared for in an assisted living facility. Vol. 6p, p. 10.

4.76 The Program presented a May 1991 study of Heritage House, an assisted living facility in King County. Vol. 2, pp. 120-125; TD-22. The study, in part, assessed and compared the characteristics of the assisted living residents with a sample of nursing facility clients in the same area. Approximately 38 percent of the Heritage House residents had been relocated from nursing home facilities. TD-22, p. 2, Vol. 2, p. 126. The study found, in part, that (i) nursing facility clients are more impaired overall than Heritage House residents; (ii) Heritage House residents appeared similar to non-skilled nursing facility clients with light to moderate care needs; (iii) that up to 45 percent of existing nursing facility residents defined as light or moderate care levels had characteristics not unlike those of Heritage House residents; and (iv) only slightly more nursing facility residents had moderate to total impairment. Heritage House residents averaged 4.5 impairments with activities of daily living. TD-22, p. 13, Figure 1. See also, Vol. 8, pp. 19-25. The Program and the Intervenors point to this study as demonstrating that assisted living facilities are a viable alternative to nursing homes.

4.77 Ms. Leitch testified concerning a 1991 AASA review of assessments of 257 persons entering nursing facilities and 125 persons entering the COPES program. Vol. 2, p. 106; TD-24, p. 9. According to Ms. Leitch, the review data demonstrates that although nursing facility residents had greater needs than the COPES participants, the

needs of both groups were similar, especially in terms of activities of daily living for which they needed assistance. Ms. Leitch stated that this information shows that alternative services can be used to serve people who would otherwise receive nursing home care. Vol. 2, p. 106; Vol. 4, p. 72.

4.78 The Program and the Intervenors also discussed the in-home services currently available to persons on public assistance. DSHS also uses in-home services as an alternative to nursing home care because of consumer preferences to stay at home. Vol. 2, p. 104. Services are provided through Medicaid Personal Care, COPES and Chore Services programs. Like other alternative services, home care services have increased in Thurston County. There was an approximate 50% increase in home care for publicly funded clients from July 1993 to October 1994. Vol. 3, p. 22; TD-6. As of August 1995, 271 nursing home eligible persons were receiving services in their homes. TD-26.

4.79 Adult family homes care for people with a wide range of needs. Vol. 5, p. 16. Services provided in adult family homes can include such services as mental-health services, dementia care, rehabilitation services, and nursing care. Vol. 5, pp. 73-74. While some adult family homes do not take “heavy care” residents, meaning residents with substantial medical and nursing needs, including residents on ventilators, other adult family homes do take such residents. Vol. 5, pp. 16, 20. In addition, adult family homes and some residential settings are using home health services to provide physical, occupational, and speech therapy. Vol. 6p, p. 11.

4.80 A significant number of adult family homes serve residents with Alzheimer's disease. Of the 78 adult family homes in Thurston County, 54 serve residents with Alzheimer's disease. Vol. 5, p. 14.

4.81 There are no restrictions on the type of nursing services that can be provided in adult family homes. Vol. 5, p. 24. Homes that are run by nurses, or that bring in nurses, can provide for substantial nursing care needs. Vol. 5, p. 20. At least 10 adult family homes in Thurston County are owned by nurses. Vol. 4, p. 24. Adult family homes also hire nurses to provide services or have services provided by home health care agencies. Vol. 5, p. 10.

4.82 Mary Lou Spence testified on behalf of the Intervenors at the hearing. Ms. Spence is a registered nurse who operates an adult family home in Thurston County and is also the Director of Nursing Services for Roo-Lan Nursing Home in Thurston County. Vol. 8, p. 42. Ms. Spence described the residents that she currently has in her adult family home as examples of the wide range of clients that can receive services in an adult family home. One resident is recovering from a pelvic fracture and has complex medications. Another resident has class 3 or 4 Alzheimer's disease but is independent in her activities of daily living. A third resident has had a stroke and needs assistance with feeding and dressing. Vol. 8, p. 49.

4.83 Recently enacted legislation will enable nurses to delegate certain nursing tasks to nursing assistants. See SSHB 1908; 1995 Wash. Laws chapter 18, section 46. The Program and the Intervenors assert that nurse delegation will help to increase the number of person whose care can be provided through alternative services. AASA

expects that nurse delegation will facilitate an increase in the number of people with nursing care needs being served in alternative settings. Vol. 5, pp. 16-17.

IV.C.1.a.iii. No Nursing Home Placement Problems.

4.84 The Program and the Intervenors also presented testimony related to the absence of nursing home placement problems in Thurston County. Ms. Leitch testified that no AASA social workers, who look at placement options with clients, had reported placement problems to her from the time of the Sunrise application to the time of the hearing. Vol. 3, p. 40, Vol. 4, p. 49. Ms. Leitch also testified that a state regional administrator reported no knowledge of problems placing Medicaid clients in nursing homes in Thurston County. Vol. 4, p. 45.

4.85 As part of her position as Director of Nursing Services for Roo-Lan, Ms. Spence meets regularly with other nursing directors from Thurston County nursing homes. She also communicates with hospital discharge planners. Ms. Spence testified that she was not aware of any problems in the placement of residents in nursing homes in Thurston County. Nor has she heard that hospitals are having difficulties discharging patients to nursing facilities. Vol. 8, p. 49 .

4.86 Finally, Mr. Hawley testified that St. Peter Hospital had no difficulties placing people in nursing homes as needed in the recent past. Vol. 8, p. 25.

IV.C.1.a.iv. Home and community-based alternatives will meet the needs of a significant number of persons who are nursing home eligible.

4.87 The Program and the Intervenors agree that nursing homes are an important and necessary part of the array of long-term care services. Ms. Leitch sees

the role of nursing homes in the future as being more in the arena of providing services to short stay and rehabilitation residents and less in the arena of serving people who have minimal activities of daily living needs. However, according to Ms. Leitch, nursing homes today still have a number of residents with very minimal care needs who could appropriately be served in other settings. Vol. 3, p. 26. In her opinion, as options are provided to those people, nursing home occupancy will decline and nursing homes will be able to serve the short-stay, subacute Medicare population. Vol. 3, pp. 26, 43-44.

4.88 Ms. Leitch and AASA do not believe that the community-based services component has reached the capacity of its ability to satisfy the needs of the elderly in Thurston County. The 1993 resident assessment data provided to AASA from nursing facility staff indicate that roughly 2,000 nursing home residents statewide require no more than minimal supervision in all activities of daily living. Ms. Leitch believes that most if not all of these residents could be served appropriately in a community-based long-term care setting. TD-16, p. 2; Vol. 3, pp. 31-32.

4.89 Ms. Leitch testified that there will be an increasing need for long-term care services in Thurston County because of the growing number of older people. Vol. 5, p. 120. If development of home and community-based services continue, a significant amount of the need for long-term care services will be met by these alternative services, and additional nursing homes will not be needed. Vol. 3, p. 46. In her opinion, an additional nursing home in Thurston County may be warranted at some point in the future, but at present and in the near future, the developing home and community-based services in Thurston County have the ability to meet the needs of the county's

residents. Vol. 5, pp. 120-121. See also, the opinions of Craig LeVee, Vol. 6p, p. 19, and Charles Hawley, Vol. 8, p. 40.

4.90 The Intervenors believe that while there are a number of residents who are best served in nursing facilities, there are also a large number of residents who could be appropriately served in the community rather than in a nursing facility. Mr. Hawley testified that there are a number of persons residing in Mother Joseph Care Center in Thurston County whose care could be provided by home and community-based services. In his opinion, there are still residents in other nursing homes in Thurston County who could be served in community-based alternative settings. Vol. 8, pp. 30-31. The Intervenors assert that with the increased availability of alternative services and the known increase in the future, there will be viable alternatives to nursing home care for Thurston County residents in the future. TD-18, p. 3.

IV.C.1.b Applicant's Position

4.91 The Sunrise application was prepared by Anthony Hernandez, who was a key witness on behalf of the Applicant. Mr. Hernandez is a private consultant who formerly was employed by Careage for 12 years. Vol. 6a, p. 10, Vol. 6p, p. 61. He has a Bachelor of Arts degree in business administration from Central Washington State College (now University) and a Master's degree in health administration from the University of Washington. Vol. 6a, pp. 10-11. See also, Vol. 6a, pp. 10-18; Vol. 7, p. 35, Vol. 6p, p. 61.

4.92 The Applicant notes it is undisputed that Thurston County is presently under-bedded by 248 beds. Vol. 6a, p. 35. Its nursing home bed-to-population ratio is

34 beds for every 1,000 persons age 65 and over, which is a relatively low ratio as compared to most other counties in Washington. TA-7. To Mr. Hernandez, this means that there is not equal access to nursing home care throughout the state. Vol. 6a, p. 63.

4.93 The Applicant's proposed project would bring 80 "banked beds" to the Thurston County service area, leaving an unmet need of 128 beds in the county. In addition, the over-bedded counties of King and Grays Harbor would have bed reductions of 37 and 43 beds respectively. TD-1, pp. 14-15, Vol. 6a, p. 24. The Applicant asserts that, by itself, this very low bed-to-population ratio in Thurston County shows that there is a basic need for the proposed project. When considered with other data, however, the Applicant contends the need becomes even clearer.

IV.C.1.b.i. The proposed facility would provide care to residents with high care needs.

4.94 The Applicant asserts that its project would serve residents with high care needs. Vol. 6a, p. 40. The Applicant's proposed facility would have three different units that serve three separate and distinct populations: a 30-bed Alzheimer's Unit, a 20-bed Medicare unit providing subacute/short stay care, and 70 beds providing care to the chronically debilitated long-term care patient. Vol. 6a, pp. 19-20, 37 and 41.

4.95 The Applicant contends that without the proposed facility, there will be a substantial unmet need for the care of residents with Alzheimer's disease, which need cannot be met by the two existing nursing home facilities in Thurston County that have distinct Alzheimer's units. Vol. 6a, p. 36. The Applicant contends that the need for its proposed 30-bed Alzheimer's unit is supported by projections of the increase in the

elderly population of Thurston County, the increasing prevalence of Alzheimer's disease, and the lack of specialized Alzheimer's programs in Thurston County. TD-1, p. 148. The Applicant also cites national projections from a 1990 study to show that, as individuals live longer, there is an increasing possibility of residing in a nursing home at some time before death. TD-1, p. 148.

4.96 Cynthia Rang testified at the hearing. Ms. Rang is a geriatric nurse practitioner and is the Director of Nursing at Lakeridge Care Center, a Sunrise facility in Moses Lake, Washington. Vol. 7, pp. 97-98. Ms. Rang believes there is a growing need for specialized Alzheimer's care. Vol. 7, p. 110. Although nothing precludes a nursing home from providing services to residents with dementia as part of the general nursing home population, Ms. Rang opines that residents with Alzheimer's disease cannot be integrated successfully into the general nursing home population. Vol. 7, pp. 101, 116. However, she acknowledges that nursing homes without specialized Alzheimer's units are caring for residents with Alzheimer's disease. Vol. 7, p. 56.

4.97 Ms. Rang described the specialized care that is provided at Lakeridge. Residents in the Lakeridge facility are in varying stages of Alzheimer's disease from stage 3 onward. Vol. 7, p. 116. Ms. Rang also described a 14-bed assisted living facility, which Sunrise is developing across from the Lakeridge facility to serve residents with Alzheimer's disease at levels 2, 3 and 4. Vol. 7, p. 117. Ms. Rang acknowledged that there are and have been residents of their Lakeridge facility who could be appropriately transferred to a assisted living facility if it is a secure facility. Vol. 7, pp. 121-122. Ms. Rang admitted she was not familiar with any of the Alzheimer's care units in Thurston County. Vol. 7, p. 117.

4.98 The Applicant's proposed facility would also include a 20-bed Medicare subacute care unit, which would serve shorter stay residents discharged from hospitals. These persons require heavy nursing care or rehabilitation services, such as occupational therapy and physical therapy. Vol. 6a, p. 37. The Applicant estimates that approximately 15.11% of its revenue would come from Medicare. Vol. 1, p. 58. According to Mr. Hernandez, there has been an increase of 78% in the number of Medicare patient days in nursing homes from 1990 to 1993. TA-5, Addendum p. 2.

4.99 Hospitals are a major referral source for nursing homes, especially for Medicare or subacute care patients. Vol. 7, p. 44. The percentage of nursing home admissions from hospitals has increased 40% statewide and 34% in Thurston County between fiscal years 1991 through 1995. TA-8, p. 9. See also, TA-11. In addition, the percentage of short-stay nursing home residents has increased over the last several years. TA-9. Because of changes in health care, patients are discharged from hospitals sooner and with more needs for nursing care and rehabilitation services than was true in the past.

4.100 The Applicant's proposed facility would be modeled after another Sunrise facility in Everett, Washington: the Everett Rehabilitation and Medical Center (the Everett facility). Vol. 7, p. 58. Mr. Marcotte, the administrator of the Everett facility, testified that the facility as a whole has patients with more needs (also referred to as a high acuity level) than in the past. Therefore, the nurse staffing is much higher at the Everett facility. Vol. 7, pp. 36-39, 54, 59.

4.101 Susan Truscott also testified concerning the Everett facility's sub-acute care unit. Ms. Truscott is a registered nurse and is the Program Director for the

subacute care unit. Vol. 7, pp. 76-78. According to Ms. Truscott, 26 out of the 100 nursing home beds in the Everett facility are designated for Medicare/sub-acute care patients. Some examples of heavy care patients on the Medicare unit since August 1995 include two residents on ventilators, four or five residents requiring tracheotomy care, one patient requiring peritoneal dialysis, and dozens of residents on IV therapy. Vol. 7, pp. 90-91. According to Ms. Truscott, one patient on a ventilator or requiring peritoneal dialysis can require eight or nine hours of nursing care per day. Vol. 7, p. 93.

4.102 Ms. Truscott stated that there are mixed levels of acuity on the Medicare unit. Not all residents in the Medicare sub-acute care unit have heavy nursing care needs. Vol. 7, pp. 54, 95. Some residents may have high rehabilitation needs. Vol. 7, p. 96. Some of the care provided on the Medicare unit could be provided in nursing homes that do not have sub-acute care units, provided they have the proper staffing and expertise. Vol. 7, pp. 53, 94.

4.103 The Applicant's proposed facility would also have approximately 70 beds which would serve those residents who are chronically debilitated. Mr. Hayes, President of Careage, testified that these 70 beds would be skilled nursing beds that would serve residents with a wide range of medical needs. Vol. 7, pp. 123, 146. Mr. Hernandez testified these residents would have a variety of care needs that are quite extensive and exceed the level of care that community-based alternatives can provide. Their length of stay could be quite long or quite short. Vol. 6a, p. 37. He noted that the percentage of residents who reside in a nursing home in Thurston County for more than one year has remained relatively stable over the past few years. TA-9.

IV.C.1.b.ii. Profile of the Nursing Home Patient is Changing.

4.104 The Applicant contends that the profile of the nursing home patient and the role of the nursing home have changed. Today's nursing home patient is generally a much sicker patient with heavy care requirements and medically complex needs. Because of this, the role of the nursing home has changed, and nursing homes are caring for heavier care residents.

4.105 Most witnesses at the hearing agreed that today's nursing home residents generally require heavier care than those in the past and that nursing homes are providing higher levels of care. Vol. 5, p. 118; Vol. 6, pp. 5-6; Vol. 7, pp. 42, 64-65, 88, 128. Mr. Hayes does not see nursing homes as competing with community-based alternative services, but rather as competing with acute care hospitals. Vol. 7, pp. 135, 138. He believe community-based alternative services operate on a "social model" and are not necessarily appropriate for the medically sick with complex medical procedures. Vol. 7, p. 139. Mr. Hayes states that on a continuum of care, which begins with a hospital and ends at home, the Applicant's proposed project is just below a hospital. Vol. 7, p. 138.

4.106 According to the Applicant, there has been a shift in the nursing home population, in that the custodial type residents have moved out and the residents with more medical needs have moved in. As support for this contention, the Applicant offers Exhibit TA-12 and TA-13. Exhibit TA-12 shows the scores from Batelle tests that measured the amount of care needed by nursing home residents in Thurston County between 1990 and 1994. Exhibit TA-13 shows both the percentages of nursing home residents needing assistance with activities of daily living and the percentages of

nursing home residents with certain medical-type needs for the fiscal years between 1991 and 1995.

4.107 Mr. Hernandez states that the generally increasing Batelle scores shown in TA-12 illustrate that nursing home residents are requiring higher levels of care. Vol. 6a, pp. 101-104. Likewise, Mr. Hernandez states that the increase in medical need indicators and the decline in activity of daily living needs in nursing home residents shown in TA-13 illustrate that the nursing home population is evolving into a profile that requires a specialized setting and an expertise that community-based settings cannot provide. According to Mr. Hernandez, community-based alternative services serve a different market than nursing homes. Vol. 6a, pp. 84-93.

4.108 Kristen Grudt testified on behalf of the Applicant. Ms. Grudt is employed by Sunrise as a consultant for the area from King County to the Canadian border. Ms. Grudt has a Bachelor of Arts degree in social services from Pacific Lutheran University in 1989 and a Master's degree in social work from the University of Washington in 1994. Vol. 7, pp. 60-62. Ms. Grudt testified that the ability of community-based alternatives to care for the medical needs of patients varies with each facility. Ms. Grudt believes that nursing home residents have a higher acuity level than those using community-based alternative services and that DSHS has removed those nursing home residents who should be placed in community-based settings. Vol. 7, pp. 65-67. Ms. Grudt acknowledged that she is not familiar with long-term care services in Thurston County. Vol. 7, p. 73.

4.109 Mr. Hernandez believes that the nursing home target population will continue to become more focused on medical and rehabilitative needs, rather than on

meeting the needs for activities of daily living. TA-5, pp. 7-8. Mr. Hernandez predicts that in five to seven years, nursing homes will be treating only short stay residents. Vol. 6a, p. 99.

IV.C.1.b.iii. Community-based alternatives serve a different population.

4.110 The Applicant asserts that community-based alternatives are not substitutes for nursing homes. TA-5, p. 3. According to the Applicant, nursing homes are the most appropriate setting for the type of heavy care patient found in today's nursing homes. Vol. 6p, pp. 58-59. It contends that "community based alternatives, no matter how extensive, will not eliminate the role of the nursing care facility, especially in light of the increasing debility profiles." TD-1, p. 35. Therefore, the Applicant contends that community-based settings can not adequately serve the population that the Applicant proposes to serve.

4.111 Mr. Hernandez believes that less than 2% of today's nursing home population could be cared for in community-based alternative settings. His opinion is based on data in TA-13, which indicates that, for the fiscal year 1994-1995, only 1.8% of nursing home residents had "no need for nursing home." Vol. 6p, p. 62; TA-13, p. 2.

4.112 Further, the Applicant points out that no evidence has been presented that the assisted living facilities planned for Thurston County would serve the same residents that the proposed project would serve. Mr. Marcotte, the administrator for the Sunrise Everett facility, testified that nursing home residents now need 24-hour nursing care and that assisted living facilities do not provide such care. Of the 87 residents at the Everett facility, only one was appropriate for discharge to a lower setting. Vol. 7, pp. 42-44. However, Mr. Marcotte also stated that he is not familiar enough with adult

family homes or assisted living facilities to know what they can or cannot do. Vol. 7, p. 51. Mr. Marcotte is also not familiar with long-term care services in Thurston County. Vol. 7, p. 52.

4.113 In addition, the Applicant contends that relatively few public assistance clients are in community-based alternative settings in Thurston County. The 1995 AASA data shows that there were 70 AASA clients in adult family homes, nine publicly assisted clients in assisted living, and none in congregate care facilities (now known as adult residential care). TD-26. In addition, the Applicant points out that state law and agency regulations limit both the type of patient that a boarding home can accept and the services that a boarding home can provide. RCW 18.20.160, WAC 246-316-010, 246-316-240, 246-316-265, and 246-316-268. Further, regulations relating to adult family homes also have some restrictions on the residents that can be accepted. WAC 388-76-160 and 388-76-200.

4.114 Mr. Hernandez described a relationship that is developing between nursing facilities and community-based alternatives that is similar to that which has developed between hospitals and nursing homes. Both statewide and Thurston County data show an increase in both nursing home admissions and discharges (with more discharges than admissions), an increase in the number of short-stay nursing home residents (30 days or less), and an increase in hospital discharges to nursing homes. TA-8; TA-9; TA-11, p. 2; Vol. 6a, pp. 67-76. To Mr. Hernandez, these figures indicate that the system is working, in that hospitals are discharging residents to nursing homes sooner, and nursing homes are treating these shorter stay patients and discharging them to lower care settings. However, according to Mr. Hernandez, an examination of

other data, including the nursing home utilization rates in Thurston County, indicates a need for more nursing home beds.

4.115 The Applicant submitted a Supplemental Bed Need Study (the Study), which Mr. Hernandez prepared for consideration by the Program in reviewing the need for the Sunrise project. Mr. Hernandez wanted to make some assessment of the impact of community-based alternatives on the use of nursing homes. Vol. 6a, p. 43. The Applicant submitted the Study to provide a “snapshot” of what appears to be going on in long-term care delivery and utilization from 1985 to the present. Mr. Hernandez stated "it is hoped that trends can be identified and reasonable inferences can be made." TA-5, p. 3. Mr. Hernandez recognizes that further formal research is necessary.

> It will of course take further formal research design to document the statistical impact of these changes on decreased nursing home utilization versus increased use of community-based alternatives, as well as to help to answer the public policy implications surrounding quality of care, quality control, appropriateness of setting given certain patient profiles, comparative cost, provider qualifications and ability to meet care/dependency needs.

TA-5, p. 8.

4.116 For part of the Study, Mr. Hernandez used data collected by AASA for the last four years from the "minimum data set" (MDS) - an assessment tool used to assess the medical profile of persons admitted to nursing homes. The assessment is administered within 14 days after a patient is admitted to a nursing home. Vol. 6a, pp. 45-49. Although the data presented in the Study does not include data concerning 1,426 nursing home beds statewide that are paid for privately, the data for Thurston County includes data from all nursing home facilities. Vol. 6a, p. 48. Some of the data and information from the Study is presented below in combination with other exhibits

and testimony from the hearing. Although not all of the data and information presented at the hearing can be discussed in this Order, all of it has been considered by the Presiding Officer.

4.117 The Study includes statewide nursing home bed utilization rates for the state and for Thurston County from 1985 through 1994. TA-5, pp. 9, 18, and last page, TA-10, p. 3. According to Mr. Hernandez, the nursing home "use rate per thousand" category tells how much of the nursing home system is actually being used. Vol. 6a, p. 53. According to Mr. Hernandez, the use rate generally declined from 1985 to 1991. He attributes this decline in use rates to the impact of community-based alternatives on nursing homes. Vol. 6p, pp. 56, 59. He concluded the nursing home use rate stabilized around 1992 both statewide and in Thurston County. Vol. 6a, p. 54; Vol. 6p, p. 59. Mr. Hernandez believes that the recently stabilized use rate, in light of increasing community-based alternatives, indicates that the impact of community-based alternatives on nursing home use has reached its maximum. Vol. 6p, pp. 59-60. Consequently, Mr. Hernandez opines that the residents who remain in nursing homes are residents with higher care need and treatment requirements, who belong in a skilled nursing facility and are not appropriate for placement in community-based alternatives. Vol. 6a, pp. 55-57. Therefore, in Mr. Hernandez's opinion, the impact on nursing homes from the new community-based alternative facilities being developed will be negligible, because nursing homes are now treating a different population than those of the community-based alternatives. Vol. 6a, p. 59.

4.118 In addition, Mr. Hernandez asserts that, for the last three years, the nursing home system in Thurston County has operated at maximum capacity. Vol. 6a,

p. 50. In 1992, the Thurston County nursing home occupancy rate was 94.2%; in 1993, it was 95.08%; and in 1994, it was 95.59%. TA-11. Mr. Hernandez contends that 95% occupancy is "pretty much full capacity" because of the delays and timing involved in discharging and admitting residents and because a certain number of beds must remain open for the increasing Medicare short-stay residents. Vol. 6a, p. 51; TA-5. See also, Vol. 7, p. 47. Other witnesses for the Applicant at the hearing agreed that 95% occupancy rate was essentially full. Mr. Hayes believes that the 95% nursing home occupancy rate in Thurston County indicates that there is a need that is not being met. Vol. 7, p. 134.

4.119 Mr. Hernandez states that nursing homes are continuing to operate at full capacity even though community-based alternatives are increasing and providing higher levels of service. He believes this is so because community-based alternatives are serving a different market niche from nursing homes. Vol. 6a, p. 119.

4.120 As a result of "full" nursing home occupancy in Thurston County, Mr. Hernandez contends that Thurston County will not be able to meet the increased admissions from hospitals and the needs of the new nursing home patient population. Vol. 6a, pp. 77, 99. As the longer stay patient population increases, more beds are tied up and fewer beds are available for the short stay Medicare patient. According to Mr. Hernandez, the system is going to back up and hospitals will not be able to discharge patients to nursing homes because beds will not be available. Vol. 6a, p. 51. In addition, the elderly population in Thurston County is growing. Mr. Hernandez predicts that, if the proposed Sunrise project is built, there will be a short-lived reduction in nursing home occupancy rates for the existing facilities, but that all facilities would

again fill up, through was has been called the “woodwork effect.” Vol. 6a, pp. 79-80. See also, TA-10.

4.121 Mr. Hernandez concludes that his Study shows the Sunrise application should be approved:

> Based upon Thurston County's current occupancy level of 96%, increasing elderly population, increasing patient day curve, changing patient mix, stabilized use rate, increasing use of community based alternatives, and the current bed to population ratio of 33 beds per 1000, the proposed 120 bed facility should be approved.

TA-5, Public Hearing Testimony Addendum, p. 4

IV.C.1.c. Presiding Officer’s Analysis

4.122 Washington's long-term care policy encourages the development of community-based alternative services. The recent legislative directives to develop community-based alternative services and to reduce the Medicaid nursing home population reinforce this policy and the current direction of long-term care services in Washington. Although the legislature has encouraged the development of community-based alternatives, the legislature has also recognized the critical role of nursing homes in the continuum of long-term care services. Therefore, the legislature has not precluded the development of new nursing homes, provided there is a need for additional nursing home services.

4.123 Health care services for the elderly are at a cross-roads. With the encouragement of home and community-based alternatives, providers are endeavoring to carve out a niche in the marketplace. At this time, the reality is that the services provided by various long-term care providers overlap. While the goal is to find the best

coordination of long-term care services, no one knows what the final long-term care picture will look like.

4.124 The Department's role in this evolving system is, in part, to contain health care costs and prevent unnecessary duplication of services through the certificate of need program. Therefore, requests for certificate of need approval must be carefully reviewed under the criteria set forth in statute and departmental regulations. However, the complex and rapidly changing long-term care system makes it difficult to assess the need for additional nursing homes beds.

4.125 The Sunrise Application was submitted in the midst of revised legislative directives and shifts in long-term care policy. In fact, the Sunrise Application, and Sunrise's application for a facility in Benton County, are the first applications seeking CON approval to build new free-standing nursing facilities since the enactment of SHB 2098.

4.126 The Applicant, the Program and the Intervenors presented considerable documentary evidence and testimony at the hearing. The voluminous materials, testimony and arguments presented by the parties prohibit the Presiding Officer from commenting in this Order on each argument or piece of evidence. However, the Presiding Officer reviewed and considered all documentary evidence, testimony, and arguments in arriving at this decision.

4.127 The Program and the Intervenors presented both documentary and testimonial evidence in support of their position that there is no need for the proposed project in Thurston County. The testimony of employees from the Program and from AASA employees who work directly within the long-term care system, complemented,

explained and supported the documentary evidence. These witnesses are knowledgeable about, and generally familiar with, long-term care services in Thurston County. Together, the documentary evidence and the Program witnesses' testimony showed that home and community-based alternatives are increasing rapidly both in numbers and in the kinds of services offered. Some residents who would otherwise be in a nursing home are now being cared for at home or in community-based alternatives. Further, testimony and documentary evidence presented by the Program showed that, although nursing home residents generally have heavier care needs, the types of care needs of residents in community-based alternatives and those in nursing homes overlap. The most recent information suggests that there are still nursing home residents for whom care could be provided in a community-based setting.

4.128 In addition, the Intervenors presented testimony from owners and operators of community-based alternatives and nursing homes in Thurston County, including one witness associated with St. Peter's Hospital in Thurston County. The testimony of these witnesses corroborated the Program and AASA data and testimony. These witnesses helped to establish that: a) some community-based alternatives are providing for substantial nursing care needs of some of their residents; b) there have been no known reports of problems placing people in nursing homes in Thurston County during the relevant time period; and c) there are still nursing home residents that could receive care in community-based alternative settings.

4.129 The Applicant also presented both documentary and testimonial evidence. Although the Applicant presented testimony from owners, nurses, and social workers at nursing homes, those nursing homes were not in Thurston County. Further, most of

Applicant's witnesses admitted that they were not personally familiar with the current status of nursing homes or community-based alternatives in Thurston County. Although Mr. Hayes, President of Careage, developed and constructed nursing homes in Thurston County years ago, much of his testimony was based on his recent personal experience with long-term care services as owner/operator of a nursing home in another county. For these reasons, the Presiding Officer does not find the testimony of the Applicant's witnesses particularly relevant or persuasive in resolving the issue whether there is a need for nursing home beds in Thurston County or in determining the availability of alternative services or other nursing home beds in Thurston County.

4.130 The focus of the Applicant's case was Mr. Hernandez's Study and his interpretation and analysis of data collected from AASA and other sources. The Program and the Intervenors do not contest much of the data presented. For example, all parties agree that nursing home residents today generally have heavier care needs than in the past, that nursing homes are generally providing higher levels of care than in the past, and that referrals from hospitals of Medicare short stay residents are increasing. However, the Program and the Intervenors disagree with some of Mr. Hernandez's characterizations and interpretations of the data presented which form the basis for his ultimate conclusions.

4.131 From a combination of various statistics and trends, Mr. Hernandez concludes that the maximum impact of community-based services on nursing homes in Thurston County has been reached and that the residents who remain in nursing homes are heavy care residents, whose care needs cannot be met by home and community-based services. These conclusions led Mr. Hernandez to his ultimate

conclusion that there is a need for additional nursing home beds in Thurston County especially when considered with other data, such as the increasing elderly population, the increasing hospital referrals of Medicare patient to nursing homes and the high occupancy rates in Thurston County.

4.132 While statistical and numerical data can be very useful, they also have their limitations. Data can be subject to multiple interpretations and varying analyses and explanations. In addition, the picture that is presented often depends upon the information that is selected or highlighted by a particular party. As just one example, Mr. Hernandez highlights the increase in both admissions to and discharges from nursing homes as support for the premise that nursing homes are seeing more short-stay, heavy care residents. From the same data, the Intervenors acknowledge the increase in both admissions and discharges but suggest that this indicates that even though hospitals are using nursing home facilities more, nursing home facilities are able to discharge enough residents to meet that need. Thus, the Intervenors conclude that there is still capacity remaining in the nursing home system in Thurston County.

4.133 Furthermore, another limitation in relying solely on statistical and numerical data is that the data presented may not be complete or current or may not address the issue at hand, leaving gaps that are subject to speculation. For example, considerable data was presented to show that, in the past, the care needs of nursing home residents generally overlapped with the needs of community-based residents. However, the exact extent of that overlap in today's nursing home population in Thurston County is not shown by the data presented.

4.134 Finally, unless standardized procedures or definitions are established and are consistently used throughout the data, a meaningful comparison of data is diminished. For example, data was presented concerning the range of care needs of nursing home and community-based alternative residents. However, no explanation was provided that the measurements in the various studies, even those using activities of daily living measurements, were consistently applied or defined.

4.135 Therefore, statistical and documentary data alone without a context or without corroborating evidence may not necessarily provide a complete picture. While much of Mr. Hernandez's data was not contested, Mr. Hernandez's interpretations of the data and ultimate conclusions drawn from the data did not seem to portray an accurate picture of Thurston County when viewed in the context of testimony from long-term care providers and workers in the long-term care arena in Thurston County.

4.136 There are limitations to relying on statistical data without a context. One of many examples presented at the hearing relates to the high nursing home occupancy rates found in Thurston County. The Applicant argued that a 95% occupancy rate in Thurston County showed that nursing home facilities were operating at full capacity. A reasonable assumption could be made that a system operating at full capacity would not have available beds to meet the needs of persons requiring nursing home care. One might also assume that, if a system were operating at full capacity for years, there would be known placement problems. However, the Program and the Intervenors presented testimony from witnesses directly familiar with the long-term care services in Thurston County, who reported that during the relevant time period, they knew of no problems, and had not even heard of any problems, in placing people in

Thurston County nursing homes. Based on the full evidence presented at hearing, the high nursing home occupancy rates in Thurston County do not indicate that access to nursing homes has been compromised. There is no evidence that people are not being served by the existing nursing home providers in Thurston County.

4.137 Although the Applicant asserts that it has presented objective evidence of need, as the examples above show, statistical and documentary data alone fail to reveal the full picture of need presented by a complex mix of available services. Where possible, a determination of need should look at both statistical data and a practical assessment of the long-term care services in the planning area.

4.138 One key issue in this case is whether community-based alternatives are still having an effect on the utilization of nursing homes in Thurston County. Although Mr. Hernandez acknowledges the impact of community-based services on the use of nursing homes in the past, he contends that the maximum extent of that impact has been felt. Mr. Hernandez also opines that the residents that remain in nursing homes have high acuity levels and complex medical needs that cannot appropriately be met by community-based alternatives. Mr. Hernandez bases these conclusions in part on what he characterizes as a “stabilized” nursing home use rate after 1992 and increasing Batelle scores for nursing home residents. However, a conclusion based on these characterizations of the data may lack a proper basis. For example, in reviewing the nursing home use rates in TA-10, the use rates between 1988 and 1991 was even more "stable" than the use rate for those years that Mr. Hernandez has selected to support his conclusions. TA-10. An equally plausible conclusion from this data is that the use rate has shown a slow but steady decline since 1992. Similarly, to show that

the care needs of nursing home residents are increasing, Mr. Hernandez characterizes an increase in the 1990 to 1994 Batelle scores as having significance. Yet he did not note that the majority of this increase occurred between 1990 and 1991. Since then the rate of increase could be labeled as minor or minimal. Vol. 7, pp. 11-12.

4.139 In contrast, both AASA employees and current nursing home owners and employees testified that there are residents in their nursing homes today whose needs could be met in community-based alternatives. This testimony corroborates the 1993 AASA data suggesting that approximately 2,000 nursing home residents statewide could be served in community-based settings.

4.140 Furthermore, Mr. Hernandez's estimation that less than 2% of the nursing home population can be served in community-based settings is misleading. The basis for his opinion was the 1.8% figure taken from the heading "no need for nursing home" under the “Medical Indicators” criterion of TA-13, p. 2. Although this figure indicates that 1.8% of the nursing home population does not need to be in a nursing home, it does not necessarily reflect the number of nursing home residents who are nursing home eligible, yet whose care could be provided in a community-based alternative setting under the COPES program. Because Mr. Hernandez's opinion on the number of nursing home residents that could be served in alternative settings was based on this information, the Presiding Officer accords his opinion little weight on this issue. The Presiding Officer finds the opinions and testimony of the Program witnesses on this issue to be more persuasive.

4.141 Beyond Mr. Hernandez's opinion, there is no evidence that community-based alternatives have gone as far as they can go in Thurston County, or that the vast

majority of Thurston County nursing home residents' needs can only be met in a nursing home.

4.142 Furthermore, the evidence shows that just as there is an overlap in the care provided by transitional care units and some nursing homes, there is an overlap in the care provided by nursing homes and provided by some home and community-based alternatives. Some alternative services are providing for nursing and medical needs of residents through staff at the facility or through home health services. Although the adult family homes providing nursing care for complex medical needs (such as a person on a ventilator) are the exception rather than the rule, nevertheless, the evidence shows that the care provided by home and community-based alternatives overlaps with the care that is provided in nursing homes.

4.143 In asserting that there is a need for additional nursing home beds, the Applicant also focuses on two components of specialized care that the proposed facility would provide: Medicare/subacute care and Alzheimer's care. However, the evidence shows that the needs of both of these populations are currently being met in Thurston County and will likely continue to be met in the near future.

4.144 The need for subacute or intense rehabilitative care in Thurston County will most likely continue to be met in the near future, given the recent CON approval for transitional care unit beds. The Applicant suggests that the proposed Sunrise facility should be compared to a transitional care unit rather than to community-based alternatives. Mr. Hernandez placed the proposed facility on the continuum of care as fitting right below a hospital handling heavy or extensive care needs. Such characterizations are inaccurate and misleading. Although the Applicant emphasized

the heavy care and Medicare/subacute care aspects of its proposed facility throughout, the nurse-to-patient staffing ratio stated in its application and the general make-up of the facility indicate that the facility is more similar to the descriptions of a traditional nursing home than to a transitional care unit, a facility that provides mostly high acuity heavy care or intense rehabilitation services. The Presiding Officer notes that while the proposed facility would have 20 Medicare beds, the facility would also have 70 traditional nursing home beds.

4.145 Similarly, the planned or developed assisted living facilities for residents with Alzheimer's disease in Thurston County, in combination with the existing nursing homes and community-based alternatives serving that population, will most likely meet the need for Alzheimer's care in Thurston County in the near future. In assessing need, the Department may consider proposed facilities that do not physically exist or that are not currently in use, provided the proposed facilities are not just speculative or nebulous. Providence Hospital v. DSHS, 112 Wn.2d 353, 358, 770 P.2d 1040 (1989). The proposed assisted living developments in Thurston County are in various stages of development from preliminary planning to near completion. Most of these proposed projects are not nebulous plans, rather significant steps have been taken to implement their development and planning. Therefore, the planned and developing assisted living facilities in Thurston County should be considered in determining need in this case.

4.146 The evidence at the hearing showed that while some nursing home residents may have heavy care needs, not all do. Traditional nursing homes have a wide range of resident care needs. Even the Applicant's own witnesses testified that not all residents in their subacute care units actually require subacute care. The weight

of the evidence indicates that it is very likely that many of the residents of the Applicant's proposed facility would not require subacute or heavy care.

4.147 The need for additional nursing home beds in Thurston County is neither demonstrated by the Applicant's statistical data and analysis nor by its witnesses, who were generally not directly familiar with long-term care in Thurston County. This is especially true when weighed against the evidence from persons working directly with, and providing services to, the Thurston County elderly population. Their testimony indicates that there is no current need for additional nursing home beds. Although the Presiding Officer recognizes that all witnesses in this proceeding had some interest in the outcome of this hearing, the Presiding Officer finds the testimony of those witnesses who work directly in or with the nursing homes and community-based settings in Thurston County to be the most persuasive.

4.148 Testimony from witnesses most knowledgeable and personally familiar with the status of nursing facilities and community-based alternatives in Thurston County and data supplied by AASA show that: (a) community-based alternatives in Thurston County are growing at a fast pace, both in numbers and in the kinds of services provided, and that their growth will likely continue in the near future; (b) home and community-based services can be an alternative to nursing home care for some people; (c) there have been no reported problems in placing people in existing nursing homes despite high nursing home occupancy rates; and (d) there are still nursing home residents and nursing home eligible persons whose needs can be met by home and community-based alternatives. Except for Mr. Hernandez's interpretation of data and

statistics, which has limitations as noted above, the Applicant has not made any showing of the actual need for additional nursing home beds in Thurston County.

4.149 After considering and weighing the entirety of the evidence presented and the arguments of the parties, the Presiding Officer finds that the existing nursing homes and the home and community-based services in Thurston County will be sufficiently available and accessible to meet Thurston County's need for long-term care services. Furthermore, the Presiding Officer finds that, from the evidence presented, the use of existing nursing homes and alternative services is both an efficient and appropriate use of long-term care resources. The Presiding Officer finds that there is not a current need, nor a need in the near future, for the Applicant's proposed nursing home project in Thurston County.

4.150 Unfortunately, there is no certain method by which to predict the need for additional nursing home beds in the future. Quite possibly, a need for additional nursing home beds will arise. However, based on evidence and testimony presented in this case, that does not seem to be the case now or in the near future.

IV.C.2 Determination of Financial Feasibility.

4.151 The Program found that the Applicant's proposal did not meet the review criteria for financial feasibility contained in WAC 246-310-220(1) and (2). These regulatory provisions pertain to the immediate long-range capital and operating costs of the proposed project and to the impact of these costs on the costs of health services.

4.152 The Program's written analysis relating to the factors of operating and capital costs found in WAC 246-310-220(1) includes in part:

> It is not clear if the operating and capital costs of this project can be met. The AASA evaluated the Applicant's construction costs against the maximum reimbursement for the type of construction involved, and the proposed costs are below the maximum allowable. At the same time, the reasonableness of land costs is in question. The maximum allowable land cost for this project is $576,673, based on the provisions of WAC 388-96-745(8). The reported land expense in the application is $914,773, $338,100 above the lid. Because the cost of land is substantially above the cost lid for land under state Medicaid program rules, the project is not consistent with the criterion of ability to meet capital and operating costs, WAC 246-310-220(1), under the determination of financial feasibility.

TD-21, p. 6

4.153 The Program's written analysis related to the factor of impact on costs and charges found in WAC 246-310-220(2) includes in part:

> Although the applicant's projected per patient day costs are reasonable, the expected availability of nursing home beds at existing facilities as alternatives come on line and shifts in admissions and patient days from existing providers would increase the cost of care at other nursing homes as fixed costs are spread over fewer patients. Further, because existing beds are providing care adequate to meet needs, the applicant's utilization projections would not likely be realized, and the costs of care at the Sunrise facility would be somewhat higher than projected. Because the additional beds are not necessary to meet the needs of nursing home residents, the additional costs related to adding these beds in the service area are not necessary, and, therefore these costs are unreasonable. Based on this, the project is not consistent with the criterion of reasonable impact on costs, WAC 246-310-220(2), under the determination of financial feasibility.

TD- 21, p. 6

IV.C.2.a. Program's Position.

4.154 After its review of the proposed financing of the land and construction costs, the Program asserted that the Applicant's proposal did not meet the operating and capital costs criterion of financial feasibility found in WAC 246-310-220(1). While financing of these costs is appropriate, a portion of the financing depends on reimbursement for land costs under the Medicaid program. At the time of the

application, the projected land costs were above the Medicaid reimbursement lid. Further, the Program was not reassured that the Applicant would receive a waiver or exception from DSHS to this land cost lid. Vol. 1, pp. 146-147. Mr. Chestnut stated at the hearing that if DSHS had granted an exception to the land cost lid for this project, he would have found this financial feasibility criterion satisfied. Vol. 2, p. 61.

4.155 The Program also asserts that costs of the Applicant's proposed project do not meet the impact on health service cost and charges criterion of financial feasibility found in WAC 246-310-220(2). When determining whether or not a project is financially feasible, the Program examines projected operating expenses and compares those expenses to similar existing facilities to determine if the projected expenses and costs are reasonable. The Program compares the following factors: nursing services per patient day; administration and operating costs per patient day; and total operating expenditures per patient day. The Program determines whether it appears that the proposed project can meet the financial obligations associated with the operation of the facility. Vol. 1, pp. 44-45.

4.156 Mr. Chestnut stated that he believed that the costs and charges as stated by the Applicant in its proposal are reasonable. However, because he believed additional nursing home beds are not needed, Mr. Chestnut concluded the Applicant's utilization projection would not likely be realized and the costs would be higher than projected. Furthermore, Mr. Chestnut believed that, if the Applicant's project was approved, there would be excess nursing home beds in Thurston County, which would increase the costs of nursing home care. Therefore, Mr. Chestnut believed that the

costs of the project are unnecessary and inappropriate, and the project would have an unreasonable impact on the costs and charges for health services. Vol. 1, pp. 146-149.

IV.C.2.b. Applicant's Position.

4.157 The Applicant asserts that it could meet the immediate and long-range capital and operating expenses of the project. The Applicant contends that the Program's contrary conclusion on this issue is based on erroneous calculations that project the difference between the land cost and the Medicaid reimbursement lid at a figure higher than the actual figure. The Applicant argues that the actual difference is not substantial. Vol. 2, pp. 34-35. The Applicant also contends that it expects to receive a waiver or exemption from DSHS to this land cost lid. TD-13, p. 2. Therefore, any difference in calculations should not be the basis for a finding that the financial feasibility criteria are not met.

4.158 Further, the Applicant asserts that the proposed project would not have an unreasonable impact on the costs and charges for health services. The Applicant points out that the Program has determined that the costs and charges stated in the Applicant's proposal are reasonable. TD-21, p. 6. The Applicant contends the Program's finding that the financial feasibility criterion WAC 246-310-220(2) has not been met is wholly dependent on its finding that the proposed beds are not needed, and therefore, the project will drive up the overall costs and charges of health services. The Applicant asserts that the Program has impermissibly intertwined the criteria of financial feasibility and need.

IV.C.2.c Presiding Officer's Analysis.

4.159 The Presiding Officer agrees that if DSHS were to grant an exception to the land cost allowance, the criterion of WAC 246-310-220(1) would be met. Although the evidence reveals that such an exception is likely, there is no evidence that it has been granted. Therefore, concerns about the proposed project's land costs exceeding the Medicaid land cost reimbursement lid remain.

4.160 The Presiding Officer also agrees the Program's finding related to financial feasibility under the criterion of WAC 246-310-220(2) was significantly influenced by its finding related to a determination of need. However, because the criterion of financial feasibility necessitates consideration of the impact of the proposed project on the costs and charges for health services, the need for the proposed services will undoubtedly affect this determination. Because the Presiding Officer has concluded that there is no need in Thurston County for the additional nursing home beds proposed by the Applicant, the Presiding Officer also finds that the cost and charges for health services in Thurston County would be unreasonably impacted by the proposed facility.

IV.C.3. Determination of Cost Containment.

4.161 The Program found that the Applicant's proposed project did not satisfy criterion for cost containment under WAC 246-310-240(1). A determination of cost containment under this section must consider whether superior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable.

4.162 The Program's written analysis related to the factor of superior alternatives found in WAC 246-310-240(1) includes in part:

> The department concludes a variety of current and pending alternative services will be available to meet care needs of persons who would otherwise need nursing home care. These arrangements have and will cause a decline in the need for and use of nursing home beds, and such arrangements are superior to nursing home care. For this reason, this project is not consistent with the criterion of superior alternatives, WAC 246-310-240(1), under the determination of cost containment.

TD-21, p. 9

4.163 The parties' positions and the evidence presented on the criterion of superior alternatives is intertwined with and is essentially the same as their positions and evidence concerning the criterion of need addressed above. In addition, the following evidence was offered by the Program and the Applicant.

IV.C.3.a. Program's Position.

4.164 According to the Program, the consideration of superior alternatives with respect to cost containment requires an assessment of whether there is a better way to meet health care needs than the manner proposed. Vol. 1, p. 154. The Program asserts that home and community-based alternatives are superior alternatives because they are cost effective and are preferred by customers.

4.165 The Program presented considerable data and testimony at the hearing to support its conclusion that home and community-based services are cost effective. The Program contrasted monthly and daily public dollars spent for nursing home care with dollars spent for home and community-based options. TD-24, pp. 10, 11, TD-25, pp. 109-110, TD-23, p. 53. The information provided by the Program revealed that community-based services for nursing home eligible AASA clients are generally less than the cost of nursing home care for AASA clients. According to the most recent documentary evidence, the average daily cost for AASA clients served in a nursing

home in July 1995 was $77.28. TD-25. In contrast, the average payment rate for nursing home eligible residents in assisted living facilities and settings in Thurston County is approximately $55 per day. This figure includes room, board, assistance with activities of daily living, and limited nursing services. Vol. 4, pp. 74-75. In addition, the statewide average daily cost of a nursing home eligible client in an adult family home in July 1995 was $29.34. TD-25.

4.166 Furthermore, Ms. Leitch testified concerning reports prepared by AASA for the federal government in relation to the Medicaid waiver program (the COPES program). According to Ms. Leitch, each of the reports has shown that the COPES program is cost-effective and reflects savings related to serving nursing home eligible people in alternative settings. The most recent report submitted showed a savings of 50 million dollars for the period between April 1994 through March 1995. According to Ms. Leitch, this figure includes all Medicaid costs associated with a person in the COPES program, including residential costs and services, and such extra costs as prescriptions, physicians, home care, and home health. Vol. 5, pp. 122-123.

4.167 Testimony from a nursing home owner in Thurston County was offered to corroborate the cost data presented by the Program. According to Mr. LeVee, owner and operator of Roo-Lan, nursing home care is considered to be the most expensive care. Therefore, in order to provide care to more people and to provide it on a more cost effective basis, efforts have been made to develop alternative services. Vol. 6p, p. 7.

4.168 Finally, the Program contends that consumers prefer community-based alternatives to nursing homes. Evidence was presented that community-based

alternatives are preferred over nursing home care, and that nursing home placement is not the first choice of persons needing care. Vol. 5, p. 23; Vol. 7, p. 136; Vol. 8, p. 29; Vol. 1, p. 159; TA-23, p. 8.

IV.C.3.b. Applicant's Position.

4.169 The Applicant points out that the cost data presented by the Program does not reflect the actual costs of community-based services. The Applicant asserts that some of the cost figures presented by the Program fail to include client participation funds paid to community settings and to include the cost of needed services not provided by the facility.

4.170 The Applicant also questions the cost-effectiveness of the community-based alternatives for the type of patient that is now being served by nursing homes. The Applicant asserts that at some stage, nursing facility services are the most appropriate, cost-effective and reasonable solution to managing those persons who are in need of skilled nursing care. TD-1, p. 35. Mr. Hayes testified that if a person needs 24-hour nursing care, it is more cost effective to provide that care in a skilled nursing facility, because of the lowered costs associated with the physical plant and with staffing. Vol. 7, pp. 140-142.

4.171 Furthermore, the Applicant contends that by not adding nursing home beds when beds are needed, the Program is limiting both access to nursing homes and consumer choice, both of which are important aspects of Washington's long-term care policy. Vol. 6a, pp. 77-78. Mr. Hayes testified that if nursing homes operate at more than full occupancy, nursing homes can select the type of patients they accept. As a

result, access to nursing homes and consumer choice are diminished particularly for those most in need of services - the Medicaid recipient. Vol. 7, p. 134. The Applicant asserts that AASA's recommendation that the Sunrise CON application be denied is in part an attempt to limit consumer and Medicaid resident choice of care settings.

IV.C.3.c. Presiding Officer's Analysis.

4.172 The Presiding Officer recognizes the limitations in some of the cost data provided by the Program. However, even when all costs of care are considered, the evidence shows a substantial savings to the state. While alternative services are not cost-effective for all people in need of care, the evidence shows that home and community-based services are generally more cost-effective than nursing home care.

4.173 Furthermore, no evidence was presented to show that consumers prefer nursing home care to home and community-based services. While there are probably some people for whom this may be true, the evidence presented at hearing establishes that people generally prefer to receive care in their homes or in community-based setting.

4.174 Finally, as addressed above, there is no evidence that access to nursing home care has been a problem in Thurston County during the relevant time period and no evidence that residents are being deprived of a choice of long-term services. No evidence was presented to show that residents were having any difficulty being placed in nursing homes when necessary and appropriate.

4.175 Therefore, the Presiding Officer finds that because alternative services are generally preferred over nursing homes and because alternative services are generally more cost effective than nursing homes, home and community-based

services are superior alternatives to nursing home care for that segment of the population whose care needs can be appropriately met in such setting. In making this finding, the Presiding Officer recognizes that there is a certain segment of the population whose care is most appropriately and most cost-effectively provided in a nursing home setting.

V. CONCLUSIONS OF LAW

5.1 The Presiding Officer has jurisdiction over the subject matter of this adjudicative proceeding, pursuant to WAC 246-310-610.

5.2 Based on Findings of Fact 4.1 through 4.50, the Presiding Officer concludes that an application for certificate of need approval to build a nursing home must include the review criteria of availability of nursing home beds and availability of alternative services as set forth in RCW 70.38.115 (2)(k)(i) and (ii).

5.3 Based on Findings of Fact 4.1 through 4.22 and 4.51 through 4.150, the Presiding Officer concludes that the Applicant's proposed project does not meet the criterion of determination of need pursuant to WAC 246-310-210(1), the criteria of availability of other nursing home beds in the area to be served pursuant to RCW 70.38.115(2)(k)(i); and the criterion of availability of other services in the community to be served pursuant to RCW 70.38.115(2)(k)(ii).

5.4 Based on Findings of Fact 4.1 through 4.22 and 4.151 through 4.160, the Presiding Officer concludes that the Applicant's proposed project does not meet the criterion of determination of financial feasibility pursuant to WAC 246-310-220(1) and (2).

5.5 Based on Findings of Fact 4.1 through 4.22 and 4.161 through 4.175, the Presiding Officer concludes that the Applicant's proposed project does not meet the criterion of cost containment pursuant to WAC 246-310-240(1).

VI. ORDER

Based on the foregoing paragraphs, the Presiding Officer makes the following ORDER:

The Sunrise certificate of need application to build a 120-bed nursing home in Thurston County is DENIED for failure to meet the applicable criteria of availability of nursing home beds, availability of alternative services, determination of need, determination of financial feasibility, and determination of cost containment.

"Filing" means actual receipt of the document by OPS. RCW 34.05.010(6). This Order was "served" upon you on the day it was deposited in the United States mail. RCW 34.05.010(18).

As provided in RCW 34.05.461(3), 34.05.470, and WAC 246-10-704, either party may file a petition for reconsideration. The petition must be filed within ten days of service of this Order with the Office of Professional Standards, 2413 Pacific Avenue, PO Box 47872, Olympia WA 98504-7872. The petition must state the specific grounds upon which reconsideration is requested and the relief requested. The petition for reconsideration shall not stay the effectiveness of this Order. The petition for reconsideration is deemed to have been denied 20 days after the petition is filed if the

Office of Professional Standards has not acted on the petition or served written notice of the date by which action will be taken on the petition.

Proceedings for judicial review may be instituted by filing a petition in superior court in accordance with the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review must be filed within 30 days after service of this Order, as provided in RCW 34.05.542.

DATED THIS _____ DAY OF AUGUST, 1996.

_____
ERIC B. SCHMIDT, Senior Health Law Judge
Presiding Officer

DECLARATION OF SERVICE BY MAIL
I declare that today I served a copy of this document upon the following parties of record: **STEPHEN MAAG, JAMES BRUSSELBACK, THOMAS GRIMM** by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS ____ DAY OF AUGUST, 1996.

_____
Office of Professional Standards

cc: **JANIS SIGMAN**