

**IN THE COURT OF APPEALS OF IOWA**

No. 0-403 / 09-1679  
Filed August 25, 2010

**FOX EYE SURGERY, L.L.C.,**  
Petitioner-Appellant,

**vs.**

**IOWA DEPARTMENT OF PUBLIC  
HEALTH, STATE HEALTH  
FACILITIES COUNCIL,**  
Respondent-Appellee,

**MERCY MEDICAL CENTER, ST. LUKE'S  
HOSPITAL and THE OUTPATIENT  
SURGERY CENTER OF CEDAR RAPIDS,  
L.L.C.,**  
Intervenors.

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Appeal from the Iowa District Court for Polk County, Richard G. Blane II,  
Judge.

Fox Eye Surgery, L.L.C. appeals a district court order affirming the State Health Facilities Council's denial of an application for a Certificate of Need to establish an outpatient surgery facility. **AFFIRMED.**

Deborah Tharnish of Davis, Brown, Koehn, Shors & Roberts, Des Moines,  
for appellant.

Thomas J. Miller, Attorney General, and Heather Adams, Assistant  
Attorney General, for appellee.

Thomas P. Peffer of Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for Intervenor-appellee Outpatient Surgery Center of Cedar Rapids.

Douglas E. Gross and Rebecca A. Brommel of Brown, Winick, Graves, Gross, Baskerville and Schoenebaum, P.L.C., Des Moines, for Intervenor-appellee St. Luke's Hospital.

Edwin N. McIntosh and Heather L. Campbell of Dorsey & Whitney, L.L.P., Des Moines, for Intervenor-appellee Mercy Medical Center.

Considered by Sackett, C.J., and Eisenhauer and Tabor, JJ.

**EISENHAUER, J.**

Fox Eye Surgery, L.L.C. (Fox Eye) appeals from the district court ruling affirming the State Health Facilities Council's denial of an application for a Certificate of Need (CON) to establish an outpatient surgery facility. Fox Eye contends the council's decision was unreasonable, arbitrary, or capricious. It also contends the decision was inconsistent with prior practices and precedents. We affirm.

***I. Background Facts and Proceedings.*** This appeal involves the fourth denial of Fox Eye's application for a CON. A CON is required before an outpatient surgical facility can be established. Iowa Code §§ 135.61(14)(d), 135.61(18), 135.63(1) (2007). Fox Eye first filed an application for a CON in 1996, seeking to construct an outpatient surgery center. The application was denied, but Fox Eye was able to construct and operate the outpatient surgery center through an extension of St. Luke's Hospital's license. After the arrangement with St. Luke's Hospital was terminated in 2004, Fox Eye filed its second application for a CON. This application was also denied and the denial decision was affirmed on judicial review. On appeal, our supreme court held the denial was not unreasonable. *Birchansky Real Estate, L.C. v. Iowa Dep't of Public Health*, 737 N.W.2d 134, 140-41 (Iowa 2007). A third application for a CON filed in 2007 was also denied.

Fox Eye filed its fourth application for a CON on August 12, 2008. Following a hearing, the council denied the application. It concluded Cedar Rapids already has underutilized capacity for cataract surgery and establishing a

new facility “is not the most efficient or appropriate use of resources.” It further concluded the utilization rates had not changed since the denial of Fox Eye’s second application and the current application was not significantly different than the one denied in March 2008.

Fox Eye filed a petition for judicial review. The Department of Public Health filed a motion for summary judgment, arguing Fox Eye’s claims are barred by the doctrine of res judicata and the law of the case doctrine. The district court denied the motion, finding the issue of res judicata was not raised at the agency level and therefore not properly before it. The court also found there was a material of fact as to whether the issue and claim in the prior proceeding were identical to the issue and claim on judicial review. Finally, the court concluded the law of the case doctrine did not apply to a different petition on judicial review.

On October 14, 2009, the district court entered its order affirming the council’s decision to deny Fox Eye’s CON application. It concluded (1) the council’s findings were supported by substantial evidence, (2) the denial was not unreasonable, arbitrary, or capricious, and (3) the council’s decision was consistent with prior practice and precedent. Fox Eye appeals.

***II. Scope and Standard of Review.*** We review the district court’s decision for errors at law. Iowa R. App. P. 6.907. In reviewing the district court’s decision, we apply the standards of the Iowa Administrative Procedure Act to the agency action to determine if our conclusions are the same reached by the district court. *Eyecare v. Dep’t of Human Servs.*, 770 N.W.2d 832, 835 (Iowa 2009). We are bound by the agency’s findings so long as they are supported by

substantial evidence. *Id.* Because the council's review of CON applications is a matter vested within its discretion, we may only reverse if the council's decision to deny the application was "irrational, illogical, or wholly unjustifiable." See *Birchansky Real Estate*, 737 N.W.2d at 138 (quoting Iowa Code § 17A.19(10)(f)).

**III. Analysis.** On appeal, Fox Eye contends the district court erred in (1) determining the council's decision was not unreasonable, arbitrary, or capricious, and (2) finding the council's decision was consistent with prior practice and precedents.

We first consider Fox Eye's claim the council's decision was unreasonable, arbitrary, or capricious. A decision is "arbitrary" or "capricious" when it is made without regard to the law or underlying facts. *Norland v. Iowa Dep't of Job Serv.*, 412 N.W.2d 904, 912 (Iowa 1987). A decision is "unreasonable" if it is against reason and evidence "as to which there is no room for difference of opinion among reasonable minds." *Id.*

Before the council may grant a CON, the Iowa Code provides the council must consider eighteen distinct criteria, including the need for such services, the availability of alternative methods of providing the care, and the availability of resources. See Iowa Code § 135.64(1). The council must also find the four following factors exist:

- a. Less costly, more efficient, or more appropriate alternatives to the proposed institutional health service are not available and the development of such alternatives is not practicable;
- b. Any existing facilities providing institutional health services similar to those proposed are being used in an appropriate and efficient manner;
- c. In the case of new construction, alternatives including but not limited to modernization or sharing arrangements have been

considered and have been implemented to the maximum extent practicable;

d. Patients will experience serious problems in obtaining care of the type which will be furnished by the proposed new institutional health service or changed institutional health service, in the absence of that proposed new service.

*Id.* § 135.64(2).

Upon considering the factors enumerated in section 135.64, the council concluded (1) “less costly, more efficient or more appropriate alternatives to the proposed health services are available and the development of such alternatives is practicable,” (2) “existing facilities providing health services similar to those proposed are currently underutilized and could easily accommodate the number of cataract surgeries projected to be performed by the proposed facility,” and (3) “patients will not experience problems in obtaining care of the type which will be furnished by the proposed changed health service, in the absence of that proposed service.” In other words, Fox Eye’s application for a CON failed on three of the four elements required under section 135.64(2).

On review, we agree with the district court’s conclusion the denial of the CON was not unreasonable, arbitrary, or capricious. The council clearly applied the facts to the law and made a reasonable determination regarding the existence of the criteria set forth by the legislature. As the district court summarized:

The record details the capacity rates for the existing facilities and that such facilities are being used at below optimal rates. Mercy has sixteen fully-equipped operating room suites, two of which are dedicated solely to ophthalmologic surgery. These two rooms were only operating at 20% to 33% capacity at the time of the hearing and have been made available for Dr. Birchansky’s use. The Surgery Center has five operating rooms, two of which are devoted

to ophthalmologic surgery and available to Dr. Birchansky. At the time of the hearing, these rooms were only operating at 50% capacity. St. Luke's has fourteen operating rooms, operating at 34% capacity, although none are equipped for outpatient ophthalmologic surgery. Therefore, Fox Eye's potential patients would have no difficulty receiving outpatient services at one of the alternate facilities.

Fox Eye does not dispute the accuracy of these figures, but essentially argues the council treats underutilization rates differently in considering CON applications from hospitals. This leads us to its second argument.

Fox Eye's chief argument is the council's decision in denying its application was inconsistent with prior practice and precedents, mainly its decision to grant Mercy-Iowa City a CON in 2007. It also argues the council gives improper consideration to CON applications supported by hospitals, granting a CON if supported by a hospital and denying if opposed. Although this argument has surface appeal, closer examination of past actions reveals the council has consistently applied the four factors required by the code. The fact no hospital-opposed CON application has been granted and no hospital-supported application has been denied does not establish any improper analysis by the council.

Under Iowa Code section 17A.19(10)(g), the district court may reverse an agency action when its actions are inconsistent with prior practice and precedents "unless the agency has justified that inconsistency." The district court rejected Fox Eye's argument, finding the facts in the 2007 Mercy-Iowa City case were quite different from the facts in the case at bar. Mercy-Iowa City was having significant difficulties in scheduling outpatient surgical procedures, a

situation not present in the current case. Here the agency concluded other facilities had regular times and capacity available to accommodate patients.

Because our conclusions are the same as the district court's, we affirm the denial of Fox Eye's petition for judicial review. Accordingly, we need not consider the department's claim the district court erred in denying its motion for summary judgment.

**AFFIRMED.**