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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Petitioner,

v.

FIVE POINTS HEALTHCARE, LTD.

Respondent.

CASE NO.:
L.T. NO.: 17-005531

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DIVISION OF
ADMINISTRATIVE HEARINGS

FILED

PETITION FOR WRIT OF PROHIBITION

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
PRELIMINARY STATEMENT	1
BASIS FOR THE COURT’S JURISDICTION.....	2
STATEMENT OF THE FACTS	2
NATURE OF THE RELIEF SOUGHT	8
ARGUMENT	9
CONCLUSION	24
CERTIFICATE OF SERVICE.....	26
CERTIFICATE OF COMPLIANCE	26

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Armstrong v. Harris</i> , 773 So. 2d 7 (Fla. 2000)-----	12
<i>Arrow Air, Inc. v. Walsh</i> , 645 So.2d 422 (Fla. 1994) -----	21, 22
<i>Atlantic Found. v. Gurlacz</i> , 582 So. 2d 10, 11 (Fla. 1st DCA 1991) -----	2, 10
<i>Baker Cnty. Med. Svcs., Inc. v. Ag. for Health Care Admin.</i> , 178 So.3d 71, 77 (Fla. 1st DCA 2015), rvw denied, SC15-2217, 2016 WL 1083235 (Fla. Mar. 18, 2016)-----	14, 16, 18
<i>Campus Comm'ns, Inc. v. Dep't of Rev.</i> , 473 So. 2d 1290, (Fla. 1985)-----	14
<i>Metro. Dade Cnty. v. Chase Fed. Hous. Corp.</i> , 737 So.2d 494, 499 (Fla. 1999)-----	21
<i>De Groot v. Sheffield</i> , 95 So. 2d 912, 916 (Fla. 1957)-----	12
<i>Dep't of Banking & Fin. v. Osbourne Stern & Co.</i> , 670 So. 2d 932, 933 (Fla. 1996)-----	12
<i>Dep't of Educ. v. Cooper</i> , 858 So. 2d 394, 396 (Fla. 1st DCA 2003)-----	13
<i>Dep't of High. Saf. & Motor Veh. v. Lopez</i> , 188 So.3d 95 (Fla. 3d DCA 2016) -----	11
<i>Dep't of Rev. v. Vanamburg</i> , 174 So. 3d 640, 642 (Fla. 1st DCA 2015)-----	13

<i>DHL Express (USA), Inc. v. State, ex rel. Grupp,</i> 60 So.3d 426, 428 (Fla. 1st DCA 2011)-----	11
<i>Dressler v. Dressler,</i> 967 So.2d 1009, 1010 (Fla. 4th DCA 2007)-----	11
<i>English v. McCrary,</i> <u>348 So. 2d 293 (Fla. 1977)</u> -----	2, 10
<i>Fla. Bd. of Med. v. Fla. Acad. of Cosmetic Surgery,</i> 808 So. 2d 243, 257 (Fla. 1st DCA 2002)-----	12
<i>Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.,</i> 67 So. 3d 187 (Fla. 2011)-----	22
<i>Florida Virtual Sch. v. K12, Inc.,</i> 148 So. 3d 97, 99 (Fla. 2014)-----	13
<i>Godwin v. State,</i> 593 So.2d 211, 212 (Fla. 1992) -----	19
<i>Hassen v. State Farm Mut. Auto. Ins. Co.,</i> 674 So.2d 106 (Fla. 1996)-----	21
<i>J.D. v. Dep't. of Child. & Fams.,</i> 114 So. 3d 1127 (Fla. 1st DCA 2013)-----	13
<i>Lamounette v. Akins,</i> 547 So. 2d 1001 (Fla. 1st DCA 1989)-----	2, 10
<i>Landgraf v. USI Film Products,</i> 511 U.S. 244, 272-73, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)-----	22
<i>Legal Envtl. Assistance Found. v. Bd. of Cnty. Comm'rs of Brevard Cnty.,</i> 642 So. 2d 1081 (Fla. 1994)-----	12
<i>Legal Envtl. Assistance Found., Inc. v. Clark,</i> 668 So. 2d 982, 987 (Fla. 1996)-----	12

<i>Liner v Jafco, Inc.,</i> 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed. 2d 347 (1964)-----	19
<i>Mandico v. Taos Const., Inc.,</i> 605 So. 2d 850, 853 (Fla. 1992)-----	10
<i>McKenzie Check Advance of Florida v. Betts,</i> 928 So. 2d 1204 (Fla. 2006)-----	14
<i>Metro. Dade Cnty. v. Chase Fed. Hous. Corp.,</i> 737 So.2d 494, 499 (Fla. 1999)-----	21
<i>Montgomery v. Dept. of Health and Rehab. Srvs.,</i> 468 So.2d 1014, 1016-17 (Fla. 1st DCA 1985)-----	19
<i>Nikolits v. Hanna,</i> 92 So.3d 299 (Fla. 4th DCA 2012)-----	11
<i>Parlato v. Secret Oaks Owners Ass'n,</i> 793 So. 2d 1158, 1162 (Fla. 1st DCA 2001)-----	12
<i>Powell v McCormack,</i> 395 U.S. 486 (1969)-----	19
<i>Rehrer v. Weeks,</i> 106 So. 2d 865 (Fla. 2d DCA 1958) -----	10
<i>Scott v. Francati,</i> 214 So.3d 742 (Fla. 1st DCA 2017)-----	2, 10
<i>State ex rel. Carmichael v. Rowe,</i> 104 So.2d 134 (Fla. 1st DCA 1958)-----	11
<i>Strickland v. Fla. A & M Univ.,</i> 799 So. 2d 276 (Fla. 1st DCA 2001)-----	13
<i>Terners of Miami Corp. v. Freshwater,</i> 599 So. 2d 674 (Fla. 1st DCA 1992)-----	10

Travelers Cas. & Sur. Co. of Am. v. Culbreath Isles Prop. Owners Ass'n,
103 So.3d 896 (Fla. 2d DCA 2012)-----11

United States Parole Commission v. Geraghty,
445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479, (1980)-----19

Verizon Fla., Inc. v. Jacobs,
810 So. 2d 906 (Fla. 2002)-----12

WHS Trucking LLC v. Reemp't Assistance Appeals Com'n,
183 So. 3d 460, 462 (Fla. 1st DCA 2016)-----13

Statutes Page(s)

§ 120.52 Florida Statutes-----13

§ 120.542 Florida Statutes-----3, 4, 5, 20, 21, 23

§ 120.68 Fla. Stat.-----13

§ 120.57 Fla. Stat.-----6

§ 408.040 Fla. Stat.-----3, 14, 18

Rules Page(s)

Fla. Admin. Code R. 28-104.005 -----4, 5, 15

Fla. Admin. Code R. 59C-1.018-----3, 6, 8, 14, 16, 18, 20, 21

**THE STATE OF FLORIDA, AGENCY FOR HEALTH CARE
ADMINISTRATION'S PETITION FOR ISSUANCE OF WRIT OF
PROHIBITION PURSUANT TO RULE 9.100, FLORIDA RULES OF
APPELLATE PROCEDURE**

The State of Florida, Agency for Health Care Administration, (the "Agency") files this Petition for Issuance of a Writ of Prohibition, and as basis, states:

PRELIMINARY STATEMENT

Petitioner Agency for Health Care Administration shall be referred to herein as "the Agency" or "AHCA."

The Respondents to this action are the Administrative Law Judge R. Bruce McKibben and Five Points Health Care Ltd. Five Points Health Care Ltd. shall be referred to as "Five Points." Administrative Law Judge R. Bruce McKibben shall be referred to as "ALJ R. Bruce McKibben."

The Division of Administrative Hearings shall be referred to as "DOAH" or "the Division."

The Appendix submitted with this Petition shall be referred to as "App.," followed by P. reflecting the page number with each page number identified consecutively.

All citations are to the 2016 and 2017 versions of the Florida Statutes, unless otherwise stated.

BASIS FOR THE COURT'S JURISDICTION

This Court has jurisdiction to hear this matter pursuant to Article V, section 4(b)(3) of the Florida Constitution, section 120.68(2)(a), and Rule 9.030(b)(3) of the Florida Rules of Appellate Procedure.

Furthermore, as discussed in greater detail below, a writ of prohibition is the “proper vehicle to test a lower tribunal's rejection of a challenge to its subject matter jurisdiction.” *Atlantic Found. v. Gurlacz*, 582 So. 2d 10 (Fla. 1st DCA 1991) (citing *English v. McCrary*, 348 So. 2d 293 (Fla.1977); *Lamounette v. Akins*, 547 So. 2d 1001 (Fla. 1st DCA 1989)). Prohibition is a proper remedy when the order being reviewed turns on an issue of law, the facts are uncontroverted, and the lower tribunal is poised to proceed without subject matter jurisdiction. *Scott v. Francati*, 214 So.3d 742 (Fla. 1st DCA 2017)

STATEMENT OF THE FACTS

A. Certificates of Need (“CON”).

The Agency is the state health planning agency and issues certificates of need (“CON”) to entities to construct and/or or operate certain facilities, such as hospitals and nursing homes. The CON program is administered pursuant to the Health Facility and Services Development Act, codified at sections 408.031-408.045, Florida Statutes, and related administrative rules.

Relevant to this case, section 408.040(2)(a), Florida Statutes, requires that a CON-holder commence construction within 18 months after a CON is issued, or the CON "shall terminate" by operation of law. The CON-holder may seek an extension of the 18-month CON validity period, pursuant to section 408.040(2)(c), Florida Statutes, and rule 59C-1.018(3), Florida Administrative Code; however, the extension request must be submitted to AHCA in writing at least 15 calendar days before the CON terminates. Specifically, rule 59C-1.018(3)(a) provides:

(3) Extension of the Validity Period.

(a) Extensions of up to 60 calendar days per each request may be requested by a Certificate of Need holder who is approaching the end of the 18-month validity period. The holder must submit a written request to the Agency for approval at least 15 calendar days before the Certificate of Need terminates. The filing of a request does not extend the validity period of a Certificate of Need. Failure to timely file is a waiver of the right to request an extension. . . .

Fla. Admin. Code R. 59C-1.018(3)(a).

B. Emergency Petitions for Variance or Waiver.

Agencies are authorized under section 120.542, Florida Statutes, to grant variances or waivers from their rules in certain limited circumstances. Specifically, section 120.542(2) provides: "Variances or waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. . . ." The

procedural and temporal requirements governing petitions and emergency petitions for variance or waiver, notice, public comment, and the agency's consideration and disposition of such petitions are set forth at section 120.542, Florida Statutes and chapter 28-104, Florida Administrative Code.

Applicable to this case, rule 28-104.005, Florida Administrative Code, sets forth expedited deadlines for emergency petitions for variance or waiver. It provides:

**28-104.005 Time for Consideration of
Emergency Petition.**

(1) Within 5 days after filing a petition for emergency variance or waiver with the agency clerk, the agency shall give notice of receipt of the petition on its website, if it has one. The agency shall also give notice by any procedure that is fair under the circumstances or provide notice of the petition to the Department of State for publication in the first available issue of the Florida Administrative Register. **Any notice under this subsection shall inform interested persons of the right to submit comments. Interested persons or other agencies may submit written comments on the petition for emergency variance or waiver within 5 days after publication of the notice required herein.** The notice and comment requirements in this subsection shall not apply if the agency head finds that an immediate danger to the public health, safety, or welfare requires an immediate final order, which final order shall recite with particularity the facts underlying such finding.

(2) The agency shall grant or deny a petition for emergency variance or waiver or determine that the request is not an emergency within 30 days of its receipt by the agency. If such petition is not granted or denied within this time limit, the petition shall be deemed

approved unless the time limit is waived by the petitioner.

(3) If the agency decides that the situation is not an emergency, the agency shall so notify the petitioner in writing, and the petition shall then be reviewed by the agency on a non-emergency basis as set forth in Section 120.542(7), F.S.

(4) The duration of an emergency variance or waiver shall be determined by the agency.

(5) The agency shall issue a written order granting or denying the petition. The order shall state the facts and reasons supporting the agency's action.

Fla. Admin. Code R. 28-104.005 (emphasis added).

C. Facts of This Case.

On September 17, 2014, AHCA issued Five Points CON #10230 to construct a replacement nursing home in Clay County, Florida. (App. P. 4). The original termination date of the validity period of the CON was March 16, 2016. (App. P. 14) However, Five Points timely submitted a series of eight requests to extend the validity period of its CON. (App. P. 18) After the eighth request was granted, the extended termination date of Five Point's CON was July 17, 2017. (App. P.1)

On July 6, 2017, eleven (11) days prior to the July 17, 2017 termination date, Five Points filed a ninth request with the Agency to extend the validity period of its CON. (App. P. 1)

On July 10, 2017, four (4) days after Five Points had filed its extension request and before the Agency took any action upon that extension request, Five Points filed

an Emergency Petition for Variance of Rule 59C-1.018(3)(a) with the Agency. (App. P. 4)

On July 11, 2017, the Agency forwarded a notice of Five Points' petition for variance to the Florida Department of State for publication. The notice was subsequently published in the Florida Administrative Register on July 12, 2017. (Fla. Admin. Code R. 28-104)

On July 17, 2017, Five Point's CON terminated by operation of law. (App., P. 5 ¶ 4, P. 8 ¶ 8)

On August 8, 2017, the Agency issued an Order denying Five Points' request for variance. (App. P. 19)

On August 28, 2017, Five Points filed a petition requesting a formal administrative hearing, pursuant to section 120.57(1), Florida Statutes, to dispute the denial of its petition for variance, and the Agency moved to dismiss Five Points' Petition. (App. P. 69). In its motion, AHCA argued that DOAH lacked subject matter jurisdiction upon two legal grounds. (App. P. 69) The first basis was that Five Points requested a variance in relation to a request to extend a CON that had already terminated by operation of law. (App. P. 76). The second basis was that, while neither the Agency nor DOAH has the authority to grant a retroactive variance, Five

Points sought a variance in order to extend a CON extension filing deadline that had already passed. (App. P. 82).

On November 2, 2017, ALJ rendered an Order Denying Motion to Dismiss. (App. P. 1). The Order states in relevant part:

ORDER DENYING MOTION TO DISMISS

This cause came before the undersigned on the “Motion to Dismiss Five Points Healthcare Ltd.’s § 120.57(1), F.S. Petition” filed by Respondent, Agency for Health Care Administration (the “Agency”).

The Agency has moved to dismiss Five Points’ petition challenging AHCA’s denial of Five Points’ emergency petition for variance from Florida Administrative Code Rule 59C-1.018(3)(a) (the “Rule”). In its motion to dismiss, the Agency argues that Five Points’ petition is moot because the underlying Certificate of Need (“CON”) at issue in this proceeding has already expired.

The CON at issue, however, was extended by the Agency until July 17, 2017. The letter granting the extension cited the Rule, which includes a requirement that any extension request be made at least 15 days prior to the expiration of the CON. Five Points filed a subsequent extension request on July 6, 2017, only 11 days prior to the expiration date of the CON. No action was taken by the Agency as to the request for exemption. The Agency asserts that the CON expired on July 17, 2017, and is no longer in force and effect.

Meanwhile, on July 10, 2017, Five Points filed an emergency petition for variance from the Rule, seeking to be released from the “15 days before expiration” requirement in the Rule.

Apparently, Five Points was anticipating denial of its request for extension. The petition for variance was filed prior to the alleged expiration of the CON.

Remaining at issue in this proceeding is whether the petition for variance should be granted, and, if so, the effect of granting the petition, as well as the status of the CON.

Based upon the foregoing, it is hereby ORDERED that:

1. The motion to dismiss is Denied;
2. The final hearing in this matter will proceed as scheduled; and
3. The issue at final hearing will be whether Petitioner's petition for variance should be granted, based on the totality of the facts.

DONE AND ORDERED this 2nd day of November 2017, in Tallahassee, Leon County, Florida.

(App P. 1).

A final hearing on the underlying Petition seeking a variance or waiver from rule 59C-1.018(3)(a) is currently scheduled to be held on December 6-8, 2017, at the Division.

NATURE OF THE RELIEF SOUGHT

The Agency requests that this Court render a writ of prohibition that prohibits the Division and the ALJ from the further unlawful exercise of subject matter jurisdiction over Five Point's Petition, which seeks a retrospective variance or waiver to resurrect a CON that previously terminated by operation of law. As explained further below, neither AHCA nor DOAH has the statutory authority to: (1) grant a retrospective variance or waiver; or (2) resurrect a terminated CON. Accordingly, Five Points' Petition does not seek any relief that DOAH or the ALJ

have the authority to grant, and the Agency's Motion seeking dismissal of the matter for lack of subject matter jurisdiction was improperly denied.

There is a merits hearing scheduled to be held on Five Points' petition for variance or waiver on December 6-8, 2017 at DOAH. The Agency requests this Court either act on this Petition prior to December 6, 2017 by the issuance of an Order to Show Cause while the issue of subject matter jurisdiction is resolved.

The above-requested relief is necessary to prevent further harm to the Agency resulting from the unlawful exercise of subject matter jurisdiction.

ARGUMENT

The Agency requests that this Court render a writ of prohibition that prohibits DOAH and ALJ McKibben from the further unlawful exercise of subject matter jurisdiction over Five Point's Petition, which seeks a retrospective variance or waiver to resurrect a CON that previously terminated by operation of law. Neither AHCA nor DOAH has the statutory authority to: (1) grant a retrospective variance or waiver; or (2) resurrect a terminated CON. Accordingly, Five Points' Petition does not seek any relief that DOAH or the ALJ have the authority to grant, and the Agency's Motion seeking dismissal of the matter for lack of subject matter jurisdiction was improperly denied.

A. Law Governing Writs of Prohibition.

Prohibition is an extraordinary writ by which a superior court may prevent an inferior court or tribunal, over which it has appellate and supervisory jurisdiction, from acting outside its jurisdiction. *Mandico v. Taos Const., Inc.*, 605 So. 2d 850, 853 (Fla. 1992).

A writ of prohibition is the “proper vehicle to test a lower tribunal's rejection of a challenge to its subject matter jurisdiction.” *Atlantic Found.*, 582 So. 2d at 11 (citing *English v. McCrary*, 348 So. 2d 293 (Fla. 1977), *receded from on other grounds*, *Terners of Miami Corp. v. Freshwater*, 599 So. 2d 674 (Fla. 1st DCA 1992)); *Lamounette v. Akins*, 547 So. 2d 1001 (Fla. 1st DCA 1989)). Therefore, as a predicate to filing a writ of prohibition, the petitioner must formally raise the issue before the lower tribunal. *State ex rel. Carmichael v. Rowe*, 104 So.2d 134, 137 (Fla. 1st DCA 1958).

As definitely stated by this Court of Appeal within the decision of *Scott v. Francati*, *supra*, prohibition is a proper remedy when the order being reviewed turns on an issue of law, the facts are uncontroverted and the lower tribunal is posed to proceed without subject matter jurisdiction. If the record shows affirmatively that there is no dispute as to the jurisdictional facts, jurisdiction becomes a question of law and is reviewable through a writ of prohibition. *Rehrer v. Weeks*, 106 So. 2d 865, 867 (Fla. 2d DCA 1958) (citations omitted). Importantly, “a court cannot by

an erroneous decision acquire jurisdiction which it does not have.” *Id.* Indeed, prohibition is a proper remedy when the order being reviewed turns on an issue of law, the facts are uncontroverted, and the lower tribunal is poised to proceed without subject matter jurisdiction. *Nikolits v. Hanna*, 92 So. 3d 299 (Fla. 4th DCA 2012) (granting a writ of prohibition where it was undisputed that the plaintiffs failed to comply with a statutory requirement to bring a suit to challenge a tax assessment); *DHL Express (USA), Inc. v. State, ex rel. Grupp*, 60 So. 3d 426, 428 (Fla. 1st DCA 2011) (granting a writ of prohibition where there was no disputed issue of fact and it was clear that the court lacked subject matter jurisdiction over the proceeding). On the other hand, when the question of the trial court’s jurisdiction rests on controverted facts and the court has jurisdiction to make a factual determination, a writ of prohibition may not be granted. See *Dressler v. Dressler*, 967 So. 2d 1009, 1010 (Fla. 4th DCA 2007) (denying a writ of prohibition in a dissolution of marriage proceeding because any attack on the validity of the parties’ marriage would not affect the trial court’s subject matter jurisdiction).

Prohibition is appropriate when the court attempts to proceed in a case when it has lost jurisdiction. *Dep’t of High. Saf. & Motor Veh. v. Lopez*, 188 So. 3d 95 (Fla. 3d DCA 2016); *Travelers Cas. & Sur. Co. of Am. v. Culbreath Isles Prop.*

Owners Ass'n, 103 So. 3d 896 (Fla. 2d DCA 2012); *Scott*, 214 So.3d 742 (Fla. 1st DCA 2017).

B. Applicable Standards of Review.

The ALJ's findings of fact should be upheld if supported by competent and substantial record evidence. § 120.68(7)(b), (8), (10), Fla. Stat.; *Dep't of Banking & Fin. v. Osbourne Stern & Co.*, 670 So. 2d 932, 933 (Fla. 1996); *Legal Envtl. Assistance Found., Inc. v. Clark*, 668 So. 2d 982, 987 (Fla. 1996); *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957); *Fla. Bd. of Med. v. Fla. Acad. of Cosmetic Surgery*, 808 So. 2d 243, 257 (Fla. 1st DCA 2002). A reviewing court may not reweigh evidence. § 120.68(7)(b), Fla. Stat.

This Court should review the ALJ's interpretation or application of law over which AHCA has no substantive jurisdiction, such as chapter 120, Florida Statutes, and chapter 28-1, Florida Administrative Code, *de novo*. § 120.68(7) (d), Fla. Stat.; *Armstrong v. Harris*, 773 So. 2d 7, 12 n.10 (Fla. 2000); *Parlato v. Secret Oaks Owners Ass'n*, 793 So. 2d 1158, 1162 (Fla. 1st DCA 2001). However, judicial deference should be given to AHCA's interpretation and application of laws that it administers or enforces, including chapter 408, part I, and chapter 59C-1, Florida Administrative Code, unless "clearly erroneous." § 120.68(7) (d), Fla. Stat.; *Verizon Fla., Inc. v. Jacobs*, 810 So. 2d 906, 908 (Fla. 2002); *Legal Envtl. Assistance Found.*

v. Bd. of Cnty. Comm'rs of Brevard Cnty., 642 So. 2d 1081, 1083-84 (Fla. 1994). "If the agency's interpretation is within the range of possible and reasonable interpretations, it is not clearly erroneous and should be affirmed." *Dep't of Educ. v. Cooper*, 858 So. 2d 394, 396 (Fla. 1st DCA 2003).

The ALJ's compliance with the procedural requirements of law is reviewed for "abuse of discretion." § 120.68(7) (c), Fla. Stat.; *J.D. v. Dep't. of Child. & Fams.*, 114 So. 3d 1127, 1130 (Fla. 1st DCA 2013); *Strickland v. Fla. A & M Univ.*, 799 So. 2d 276, 278 (Fla. 1st DCA 2001). "The court shall not substitute its judgment for that of the agency on an issue of discretion." § 120.68(7) (e), Fla. Stat.

C. Limits on Agency Authority.

It is a well-established principle that administrative agencies, including DOAH and AHCA, are creatures of statute, and have only such powers as the Legislature confers, either expressly or by necessary implication, and cannot expand upon their own jurisdiction. *Florida Virtual Sch. v. K12, Inc.*, 148 So. 3d 97, 99 (Fla. 2014); *WHS Trucking LLC v. Reemp't Assistance Appeals Com'n*, 183 So. 3d 460, 462 (Fla. 1st DCA 2016); *Dep't of Rev. v. Vanamburg*, 174 So. 3d 640, 642 (Fla. 1st DCA 2015). An agency may not enlarge, modify, or contravene the provisions of statute through its actions or its rules; such action or rule "constitutes an invalid exercise of delegated legislative authority." § 120.52(8) (b), (8) (c), Fla.

Stat. (2013); *McKenzie Check Advance of Florida v. Betts*, 928 So. 2d 1204 (Fla. 2006); *Campus Comm'ns, Inc. v. Dep't of Rev.*, 473 So. 2d 1290, 1291 (Fla. 1985) (internal quotations omitted).

Relevant to this case, the First District Court of Appeal has ruled that AHCA may not extend a CON without color of statutory authority. *Baker Cnty. Med. Svcs., Inc. v. Ag. for Health Care Admin.*, 178 So.3d 71, 77 (Fla. 1st DCA 2015), *rvw* denied, SC15-2217, 2016 WL 1083235 (Fla. Mar. 18, 2016).

D. Argument.

Five Points did not submit a timely extension request. The validity period of Five Points' CON terminated on July 17, 2017, by operation of law and without Five Points having submitted a timely request for extension or AHCA having granted an extension. Section 408.040 authorizes AHCA to extend the validity period of a CON that is about to terminate, but it does not authorize AHCA to resurrect and extend the validity period of a CON that has already terminated. Indeed, there is no statutory provision that permits AHCA to extent a CON after it has terminated by operation of law. It follows that neither AHCA nor DOAH has the authority to resurrect an expired CON either directly or through the application of a variance or waiver from Rule 59C-1.018(3)(a).

- 1. The issue before the Division and ALJ McKibben is moot because neither AHCA nor DOAH has statutory authority to resurrect an CON that has terminated by operation of law.**

AHCA did not have sufficient time to and could not render an order disposing of Five Points Petition for variance prior to the July 17, 2017 CON termination date.¹ Neither AHCA nor DOAH has the authority to resurrect a CON that has terminated by operation of law. Accordingly, Five Points' Petition is moot and/or does not set forth any claim upon which DOAH can grant relief, and the Agency's Motion seeking dismissal for lack of subject matter jurisdiction was erroneously denied.

In the instant matter, the Petition for emergency variance or waiver was received by AHCA on July 10, 2017, at 2:34 P.M. and was forwarded for publication on July 11, 2017, and published in the Florida Administrative Register on July 12. Thus, the Agency expeditiously published notice of the emergency petition. Rule 28-104.005(1)-(2), which governs an Agency's time for considering emergency petitions for variance, requires that an agency allow a five (5) day period for public comment on an emergency petition for variance after notice of its receipt is published in the Florida Administrative Register. The five (5) day comment period ran through July 17, 2017. Thus, the very soonest the Agency could have rendered an order

¹ Pursuant to Chapter 38-104 the Agency is required to publish on its website and forward a notice to the Department of State for publication in the Florida Administrative Weekly and is required to wait five days for comments from interested persons.

disposing of the variance under Florida law would have been on July 18, 2017—one day after the expiration of Five Points' CON. Thus, AHCA could not have ruled on the Petition in time to prevent the expiration of Five Points CON.

The Respondent filed a Petition for emergency variance from rule 59C-1.018(3)(a) F.A.C. – it is noteworthy that under this rule even timely submittal of a request for extension does not itself extend the certificate of need validity period.

Further, Five Points' filing of the emergency petition for variance to waive the 15-day advance filing requirement was a retroactive request for variance and constitutes a nullity.

It is uncontested that the termination date of Five Points' CON expired by operation of law on July 17, 2017. Respondent specifically asserted within the petition seeking an emergency variance that the date of July 17, 2017, constitutes the termination date of CON 10230. Five Points asserts such twice within its variance petition. *App. P. 5 ¶4, P.8. ¶ 8.*² Neither the Agency nor DOAH has the authority to extend an expired CON. In *Baker County Medical Services, Inc. v. State*, 178 So.3d 71, 74-75, 77-78 (Fla. 1st DCA 2015), this Court observed that the

² Respondent states within paragraph numbered four of the petition seeking an emergency variance that 'this is an emergency petition because the CON is scheduled to terminate on July 17, 2017. (app. P.5 ¶ 4) 'Respondent also states within the same petition that the termination date of CON 10230 is currently July 17, 2017. (App. P5. ¶.8)

Agency cannot extend or otherwise enlarge the validity period of a CON, except as authorized by statute.

Fraser Hospital sought a declaratory judgment that the certificate at issue, by the terms of the applicable statute, must terminate after 18 months and thereby expired on or about June 7, 2012. It also claimed that AHCA lacked the statutory authority to extend or delay the start of the validity period of the certificate. Rather than extend or delay the start of the validity period, Fraser Hospital contended that the only appropriate process would be for West Jacksonville to initiate a new request for a certificate of need. . . . No one disputes that the certificate at issue is subject to the statute providing that “[u]nless the applicant has commenced construction ... a certificate of need *shall terminate* 18 months after the date of issuance” Fraser Hospital points to this definitive statutory termination date as its first building block, the second being that AHCA cannot point to a statute that gives it “colorable” authority to delay or extend this 18 month period. . . . *See, e.g., Fla. Virtual Sch. v. K12, Inc.*, 148 So.3d 97, 99–100 (Fla.2014) (“An agency created by statute does not possess any inherent powers. Rather, the agency is limited to the powers that have been granted, either expressly or by necessary implication, by the statute that created the agency.”); *see also Dialysis Solution, LLC v. Mississippi State Dep’t of Health*, 31 So.3d 1204, 1213–14 (Miss.2010) (statute limiting duration of certificates of need “indicates that the Legislature wanted to control through statute the time period for which a CON could be outstanding. Presumably, the Legislature would not have enacted [the statute] if it had intended CONs to remain valid indefinitely or until the [agency] chose to revoke them.”). . . . Under ordinary circumstances, the certificate of need at issue would have expired after 18 months, on June 7, 2012, but was extended well beyond that date by the agency's action; indeed, the validity period did not

commence until a year later on June 1, 2013. Even then, AHCA agreed *not* to license the hospital prior to December 1, 2016. Whatever authority AHCA has, colorable or apparent, is not so elastic as to allow an effective quadrupling of the statutorily set validity period. To do so would allow the “banking” of certificates well-beyond their legislatively-set duration, which runs contrary to the statutory framework allowing for applications (and reapplications) in biennial review/batching cycles so that health care projects can be proposed, compared, and authorized expeditiously by AHCA in response to the dynamics of the often-shifting health care marketplace. *See* § 408.039, Fla. Stat.

Baker Cnty. Med Svcs., 178 So.3d at 74-75, 77-78.

Since section 408.040, Florida Statutes, is clear on its face that the CON expires by operation of law at the end of its validity period, the Agency was divested of authority to extend Five Points’ CON once it expired. The Agency has no authority to extend or resurrect an expired CON. To do so would be to act outside the Agency’s delegated authority.

As a result of the termination of Five Points’ CON, the Petition seeking to extend it through a variance from rule 59C-1.018(3)(a) is moot. Five Points simply cannot obtain an extension of a CON that has already expired; nor does AHCA or DOAH have the authority to grant such an extension. The Division lacks jurisdiction to hear a matter without a justiciable controversy.

Florida Courts have addressed the issue of mootness. Under Florida law, mootness has been defined as “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 1209, 63 L.Ed.2d 479, 491 (1980). An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect. *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992). Mootness occurs “when the issues presented are no longer ‘live’ or [when] the parties lack a legally cognizable interest in the outcome.” *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

The rule discouraging review of moot cases is derived from the requirement of the United States Constitution, Article III, under which the existence of judicial power depends upon the existence of a case or controversy. *Liner v. Jafco, Inc.*, 375 U.S. 301, 84 S.Ct. 391, 11 L.Ed.2d 347 (1964). It is the function of a judicial tribunal to decide actual controversies by a judgment which can be carried into effect, and not to give opinions on moot questions, or to declare principles or rules of law which cannot affect the matter in issue.” *Montgomery v. Dept. of HRS*, 468 So. 2d 1014, 1016-17 (Fla. 1st DCA 1985).

The Agency submitted a timely filed Motion to Dismiss in the lower tribunal, citing in part the hearing officer's lack of jurisdiction to decide the moot issue. The hearing officer denied the Agency's motion, but failed to rule or address the question of subject matter jurisdiction. For the reasons cited herein, the lower tribunal lacks jurisdiction to hear the instant suit.

2. The issue before the Division and ALJ McKibben is moot because neither AHCA nor DOAH has statutory authority to grant a retroactive variance.

Respondent seeks a retroactive variance or waiver from Rule 59C-1.018(3)(a) due to its prior noncompliance with the rule; but section 120.542 does not authorize agencies – including both AHCA and DOAH – to grant variances or waivers retroactively. As described previously, the substantive issues Five Points seeks to address through a retroactive variance or waiver are also moot.

The Respondent seeks a variance from an administrative rule, to be applied retroactively to conduct that occurred and concluded prior to the filing of the petition for variance. Specifically, the Respondent is seeking a variance from a rule that required the Respondent to provide written notice of a request for an extension of the certificate of need fifteen (15) calendar days prior to the termination date. After

the fifteen (15) day deadline passed, the Respondent filed a petition seeking “variance” from the rule.

A variance or waiver from an administrative rule applies prospectively, not retroactively. An applicant is not entitled to a variance as a matter of right under section 120.542. Section 120.542(2), Florida Statutes, specifically states that “Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness.”

Five Points failed to timely file its extension request. After missing the deadline prescribed by rule 59C-1.018(3)(a), it then requested variance from the rule’s requirement that extensions be requested at least fifteen (15) day advance of the CON termination date. Thus, rather than seeking excusal from a rule’s requirements to apply to ongoing or future conduct, Five Points effectively seeks ratification of a prior rule violation.

Florida law is not generally supportive of the retroactive application of statutory authority. The Florida Supreme Court has stated, “The general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities, and duties is presumed to apply prospectively.” *Metro. Dade Cnty. v.*

Chase Fed. Hous. Corp., 737 So.2d 494, 499 (Fla. 1999) (citing *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So.2d 106 (Fla. 1996); *Arrow Air, Inc. v. Walsh*, 645 So.2d 422 (Fla. 1994)).

In 2011, the Florida Supreme Court addressed the issue of retroactive application of a statute again in 2011, stating that the presumption against retroactive application is a well-established rule of statutory construction, and appropriate in the absence of an express statement of legislative intent to the contrary, since a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that [the legislature] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to [the legislature] responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate. *Arrow Air, Inc. v. Walsh*, 645 So.2d 422, 425 (Fla.1994) (bracketed material in original) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 272–73, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)). The presumption is rebutted by clear evidence of legislative intent. Thus, we have consistently required the first prong of a retroactivity analysis to inquire into whether there is clear evidence of

legislative intent. *Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 195 (Fla. 2011)

In the instant matter, the Respondent seeks variance from a rule, to be applied retroactively to prior conduct. Such request is not authorized under Florida Law. There is no express evidence of legislative intent that a variance or waiver granted under § 120.542, Florida Statutes be applied retroactively to rule violations. To the contrary, the statute contemplates prospective application, directing that variances be granted to a petitioner when application of a rule would create a substantial hardship or would violate principles of fairness. The statute also gives an agency authority to set and limit the duration of a granted variance or waiver: "An agency may limit the duration of any grant of a variance or waiver or otherwise impose conditions on the grant only to the extent necessary for the purpose of the underlying statute to be achieved." § 120.542(1), Fla. Stat. (2017) This demonstrates the legislature's intent that a variance apply prospectively to afford a petitioner relief from strict application of certain rule requirements in limited circumstances. The statutory authority does authorize agencies to grant and apply variances retrospectively to ratify or vindicate prior nonconformities with rule requirements. Such a construction belies logic.

The petition for variance thus constitutes a nullity. . The lower tribunal lacks subject matter jurisdiction to hear a dispute involving a retrospective variance related to an untimely filing. This would be analogous to a party requesting a variance as to the expiration of the statute of limitations after that party failed to file within the time proscribed by law.

CONCLUSION

For the foregoing reasons, the Division of Administrative Hearings lacks subject matter jurisdiction. Again, AHCA requests this Court issue an order to show cause directing Five Points to file a response pursuant to Florida Rule of Appellate Procedure 9.100(h), and subsequently to render a writ prohibiting the Division of Administrative Hearings and ALJ McKibben from any further exercise of jurisdiction over this matter.

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CERTIFICATE OF SERVICE

I certify that the foregoing document with attached appendix has been furnished by electronic mail to ALJ R. Bruce McKibbon at :
askojcc@doah.state.fl.us and by mail delivery to 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by electronic email to Karl David Acuff, Esquire, kd_acuff@floridacourts.com, Law Offices of Karl David Acuff, 1615 Village Square Blvd, Suite 2, Tallahassee, Florida 32309, this 20th day of November 2017.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l).

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