

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI JEWISH HOME AND HOSPITAL)
FOR THE AGED, INC.,)
)
Petitioner,)
)
vs.) Case No. 09-0695
)
AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case was heard by David M. Maloney, Administrative Law Judge of the Division of Administrative Hearings, on March 24 and 25, 2009, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

Florida Administrative Code Rule 59C-1.018(3)(c) requires that a request for an extension of a CON's validity period be made 15 days in advance of the period's expiration (the "15-Day

Requirement.") The issue is whether the Agency for Health Care Administration should waive the 15-Day Requirement for Miami Jewish Home.

PRELIMINARY STATEMENT

On February 10, 2009, the Division of Administrative Hearings (DOAH) received a notice from the Agency for Health Care Administration ("AHCA" or the "Agency"). Attached was a request for a formal administrative hearing (the "Petition") from Miami Jewish Home and Hospital for the Aged, Inc. ("MJHHA" or "Miami Jewish Home".)

The Petition challenged: (1) AHCA's Determination that CON 9893 Terminated and (2) AHCA's Denial of its Emergency Petition for Variance or Waiver of Rule 59C-1.018(3), F.A.C. (the "Emergency Petition"). Miami Jewish Home requests entry of a final order "granting a variance or waiver of [the application] of Rule 59C-1.018(3)(c), F.A.C. to Petitioner." The Petition at 11.

The final hearing was held on March 24 and 25, 2009. At the hearing, Miami Jewish Home presented three witnesses: Tanira Ferreira, M.D., accepted as an expert in Medicine with specialties in pulmonary medicine, critical care, internal medicine, sleep disorders, and pulmonary care program development including ventilator programs; Mark Knight, CFO of MJHHA and accepted as an expert in health care finance and

health care system and facilities operations; and, Jay Cushman, accepted as an expert in health planning, Certificate of Need (CON) review and regulation, and Medicare reimbursement. Miami Jewish Home's Exhibits 1 through 33 were admitted into evidence.

Miami Jewish Home also requested official recognition of a composite of documents marked for identification as OR-1 and two other documents marked for identification as OR-2 and OR-3. No objection was raised as to the first and second requests and official notice of them was taken. Objection to the third was raised by AHCA on the ground that the request was made late, that is, on the morning of the second day of hearing after MJHHA had rested its case the day before.

The material requested for recognition by OR-3 is Section 1.01, Florida Statutes, which bears the catchline:

"Definitions." Of particular import to MJHHA's request is subsection (1) which reads:

In construing these statutes and each and every word, phrase, or part hereof, where the context will permit:

(1) The singular includes the plural and vice versa.

§ 1.01 (1), Fla. Stat. The objection by AHCA was overruled and official recognition was taken of the material in OR-3.

The Agency presented its case-in-chief through the testimony of Jeffrey H. Gregg, Chief of AHCA's Bureau of Health

Facility Regulation, accepted as an expert in health care planning, certificate of need review and health care regulation. It offered five exhibits marked consecutively for identification as AHCA 1 through 5. The first of the five was admitted. The Agency withdrew its offer with regard to the other four with the understanding that they were duplicates of MJJHA Exhibits 12, 13, 14, and 15, all admitted into evidence earlier in the case.

The final hearing concluded on March 25, 2009. Proposed recommended orders were timely filed by both parties and have been considered.

FINDINGS OF FACT

CON 9893 and its Construction Timeline

1. On June 29, 2007, AHCA awarded CON 9893 (the "CON") to MJHHA. The CON authorized MJHHA to establish a 30-bed long term acute care hospital (LTCH) in Dade County.

2. The Agency determined that the LTCH authorized by the CON was needed and would be of benefit in the service district (AHCA Acute Care District 11) where it would be located. It also determined that the LTCH would enhance access to health care in conformance with the goals of the Health Facilities and Services Development Act.

3. The determination followed a contested comparative review proceeding at DOAH in which it was found that Miami Jewish Home had "demonstrated need for its project through a

thorough and conservative analysis." MJHHA Ex. 26, p. 49, para. 106. All findings of fact and conclusions of law of the administrative law judge in the Recommended Order were accepted by the Agency in its Final Order that approved MJHHA's CON application. Un-rebutted evidence in this proceeding, moreover, establishes that the need for the LTCH continues to exist in AHCA Acute Care District 11.

4. Miami Jewish Home proposed to locate the LTCH on its Douglas Gardens Campus, the site of a broad array of health and social services that span the continuum of health care. The continuum includes services related to community outreach, independent and assisted living facilities, nursing home diversion, chronic illness, outpatient programs, acute care hospital, rehabilitation and post-acute care, Alzheimer's disease, pain management, skilled nursing and hospice.

5. The community surrounding the campus is an area known as "Little Haiti," one of the most densely populated areas of Dade County. The community is primarily low-income. It is a federally-designated "medically underserved area." Miami Jewish Home is a "safety net" provider of health care services, one of only 20 or so in the entire state. Its skilled nursing facility is the largest provider of Medicaid skilled nursing services in the state.

6. Miami Jewish Home operates Florida's only Teaching Nursing Home program. Medical students, interns, and other health professionals rotate through the service program in the nursing home and hospital on a regular basis. In its teaching capacity, Miami Jewish Home serves as a student and resident training site for the University of Miami and Nova Southeastern University Medical Schools and the Barry University, Florida International University and University of Miami nursing schools.

7. The LTCH was proposed as a hospital-in-a-hospital (HIH), that is, it would be part of an existing hospital and constructed within the hospital's existing structure rather than as a free-standing facility. Its status as an HIH meant that the construction required for it to achieve operable status would be more in the nature of renovation as opposed to breaking new ground as in the case of a free-standing LTCH facility.

The Construction Deadline

8. Paragraph (a) of Subsection 408.040(2), Florida Statutes, requires successful applicants for CONs to commence construction within 18 months of the CON's issuance. If construction is not timely commenced, the CON validity period expires and the CON terminates. By operation of law, therefore, December 28, 2008, was the deadline for the commencement of

construction (the "Commencement of Construction Deadline" or the "Deadline"). See Finding of Fact 1.

The Approach of the Deadline

9. In the wake of the issuance of the CON, Miami Jewish Home worked to develop the project approved by the CON and to implement it.

10. Shortly after the award of the CON, Miami Jewish Home contracted for the construction and development work with an architectural firm, Louis Sousa & Associates ("Sousa"). The firm was engaged "to do preliminary drawings to cost out [the] project and get ... more detail on ... other issues that [might] be encountered in the renovation of the area." Tr. 68. Garrett's Construction was identified as the construction company that would perform the construction on the basis of the Sousa drawings.

11. After the issuance of the CON, a new Chief Executive Officer took the helm at MJHHA. Eventually, Sousa completed a full scale set of drawings that included changes and expansions in the program that had not been shown on the drawings that accompanied the CON application. Among the expansions were the addition of an elevator tower, a drive-through canopy and a second operating room in which the new CEO took an interest because of his development background.

12. The completed drawings were submitted to the City of Miami for approval and Sousa was engaged to be the architect during construction.

13. There were several surprises during the process of developing the drawings. These were described at hearing by Mr. Knight, MJHHA's Chief Financial Officer:

It was identified that the backup generator located in the Chernin Building was not sufficient and could not bear the load to support a 30-bed acute care hospital [the LTCH.]

* * *

In addition . . . , it was identified that the current O₂ or oxygen tank farm that we have on the west side of the property was problematic. It was freezing up.

. . . it was advised . . . by an external vendor that it would not be able to accommodate the additional 30 beds [beyond] the 30 beds ... in operation.

It was a little over a million two [hundred thousand dollars] for both of those projects . . . , a significant increase over what we had anticipated to be the total cost of the project.

Tr. 69-70. Submitted in June of 2008 to the City of Miami, permits for the generator and the O₂ farm project were received in December of 2008. The O₂ farm project started in the third week of March 2009 and was fully underway at the time of the final hearing in this case. Demolition for the generator

project was scheduled to commence within two weeks of the conclusion of the hearing, that is, in April of 2009.

14. By December of 2008, however, none of the construction plans had been submitted for review to AHCA. (In fact, none had been submitted by the last day of final hearing in this case, March 25, 2009.)

15. AHCA's review "of plans . . . is an essential part of implementing a project that requires construction." Tr. 263. Following cross-examination on this point at hearing, Mr. Gregg was asked by AHCA's counsel to review the definition of "commenced construction" in the Health Facility and Services Development Act:

"Commenced construction" means initiation of and continuous activities beyond site preparation associated with erecting or modifying a health care facility, including procurement of a building permit applying the use of agency-approved construction documents, proof of an executed owner/contractor agreement or an irrevocable or binding forced account, and actual undertaking of foundation forming with steel installation and concrete placing.

§ 408.032(4), Fla. Stat. (emphasis added.) After his review of the definition, Mr. Gregg explained that construction cannot be commenced without AHCA plan review because "it's a[. . . technical . . . area that requires the expertise of the people in [AHCA's] office of plans and construction to give a project

an okay from the health care perspective before it proceeds to the point of construction." Tr. 319.

16. Plans were not submitted and construction was not commenced by the Deadline because of difficulty in financing the construction. The more than one million dollars required to update the generator system and the O2 Farm, unanticipated at the time of the CON approval, contributed to the difficulty. In the main, however, the delay was due to what the stipulation of the parties describes as "unique in the history of Florida's CON regulation," that is, the financial crisis of which the public became generally aware in the early fall of 2008.

Distress in the Financial Markets

17. In the early autumn of 2008, as the Commencement of Construction Deadline neared, the financial markets in the United States became unstable. World-wide financial markets followed suit. The gravity of the financial situation has been widely acknowledged to be the most serious since the Great Depression that immediately preceded World War II. During the years that Florida's CON regime has been in place, there has been no time period during which economic distress has been as severe as the period that commenced in September of 2008 and continued at least into early 2009, after the expiration of the Deadline.

18. The problems in financial markets made further development of the CON unreasonable. Miami Jewish Home had proposed and was approved to pay for the costs of the implementing the LTCH from its cash on hand and other assets. At the time of the approval, the "cash-on-hand" approach was reasonable. It continued to be achievable, despite cost increases, until the late 2008 financial crisis' serious negative impact on MJHHA's investments.

Loss in Investment Income

19. Miami Jewish Home's un-audited balance sheet, admitted into evidence as MJHHA's Ex. 1, shows a steep reduction in Net Assets over the six months from June 30, 2008 to December 31, 2008, the six months in which the financial crisis occurred. The Balance Sheets June 30, 2008 column (audited) shows "Net Assets" of \$101,363,000. The 12/31/2008 column shows "Net Assets" of \$82,209,000 a reduction in net assets of between \$19 million and \$20 million.

20. Over \$12 million of the loss was due to losses suffered by MJHHA's endowment and foundation account which represents Miami Jewish Homes investments. This "investment account" was \$72 million on June 30, 2008 and had shrunk to \$50 million by the end of 2008. At the time of hearing, the investment account had lost another \$40 million, making MJHHA's

decision not to proceed with the LTCH appear to be a prudent one at the time of final hearing.

21. The decision was prudent not merely because of a loss of funds. The impact of the loss of investment funds was compounded for Miami Jewish Home because of the use of income from those funds to keep MJHHA's nursing home operation afloat. Mr. Knight explained, "when the significant decrease in cash occur[red], that also reduced the income potential on that cash and ultimately the subsidy back to the nursing home." Tr. 74.

22. Miami Jewish Home's nursing home operation's financial stability was also threatened by Medicaid reimbursement "looking to be getting worse." Tr. 75. With the Deadline approaching, the situation was summed up by Mr. Knight:

[B]etween the incremental costs that were identified [with regard to the generator and the O2 farm] and the significant decrease in our ability to fund from cash [the loss of investment return produced by the investment account] and ultimately the . . . loss on the nursing home operations, in September and October of '08 [MJHHA] began the process of seeking another developer or another potential acquirer of a certificate of need.

Tr. 77.

Looking for a Purchaser of the CON

23. As Miami Jewish Home became aware of the deterioration of its financial situation, it began to seek alternative means to finance the development of the LTCH, including standard loans

and alternative financing. It approached its commercial banker SunTrust. The deterioration of MJHHA's finances, however, was occurring at the same time as "the credit crunch came into place." Tr. 96. SunTrust was not interested in financing the LTCH.

24. With the realization that it could not reasonably fund the development of the LTCH and still believing it to be a needed service, MJHHA began to seek out other operators and developers.

25. At first, MJHHA looked for a known LTCH company or a compatible provider to develop the LTCH on the Miami Jewish Home campus. Promise Health Care and Mt. Sinai were approached. For various reasons, no firm commitments were forthcoming.

26. As autumn wore on, Miami Jewish Home continued to make progress toward the permits necessary to develop the LTCH, but it became clear it was not in a financial position to go forward with construction. It scheduled a call with AHCA for December 18, 2009, to inform AHCA that it would be abandoning the project.

27. Nearly resigned to the loss of the project, MJHHA management met with principals of the Sanderling group in mid-December 2008. Sanderling showed a desire to work through the details of the LTCH project with Miami Jewish Home.

28. A general agreement was reached between Sanderling and Miami Jewish Home by the time of the scheduled call with AHCA. When the call took place on December 18, 2008, instead of relinquishing the CON, MJHHA informed AHCA that there was a provider compatible with Miami Jewish Home that intended to purchase the CON and develop the LTCH. During the call, the Agency responded verbally that MJHHA should do whatever it needed to do to keep the project moving forward. Miami Jewish Home took immediate action. It submitted a written request for the extension of the validity period of the CON.

The December 18 Written Request for an Extension

29. On the same day as the call, Miami Jewish Home provided AHCA with written notice of intent to transfer the CON. The letter informed AHCA of MJHHA's financial difficulty due to "additional costs . . . required to develop the LTCH which were material, . . . the large (20%) losses to the Homes endowment . . . and] [g]iven these changed circumstances, . . . [that] the Home . . . cannot justify the development costs to implement [the CON] without impacting other services." MJHHA Ex. 11. Dated December 18, 2009, the letter bears the heading, "Via Electronic Mail". Id.

30. The letter went one step further. It specifically noted that paragraph (c) of Florida Administrative Code Rule 59C-1.018(3) (the "Transfer Extension Paragraph"), provides that

a 60-day extension of the life of the CON would be granted upon receipt of a notice and application for a transfer if the notice and application were received 15 days prior to the deadline for commencement of construction. After quoting the paragraph verbatim, the letter asked for relief under the variance and waiver provision of the Administrative Procedure Act, "[p]ursuant to Section 120.542, F.S., we are requesting a waiver of the 15 days prior notice provision." Id. at 2. Noting that "there is no statutory requirement for the 15 days notice," the letter asserted that the notice and proof of the closing of the acquisition would be submitted "with the initial transfer application as soon as possible and before the December 28, 2008 termination date." Id.

31. The written request that comprised the letter (the "December 18 Written Request") was furnished five days later than required by the Transfer and Extension Paragraph. Had it been submitted on December 13, 2008, instead of December 18, 2008, it would have been timely.

32. Before AHCA responded in writing to the December 18 Written Request, Miami Jewish Home took further action. It submitted a more formal request for relief: an emergency petition.

The Emergency Petition

33. On December 24, 2008, six days after the submission of the December 18 Written Request, Miami Jewish Home filed with AHCA a document entitled, "Emergency Petition for Variance of Waiver of Rule 59C-1.018(3)(c), F.A.C." (the "Emergency Petition"). See MJHHA Ex. 12. Denominated an emergency "because the CON is scheduled to terminate on December 28, 2008," id. at 2, the Emergency Petition pointed out that "the 90 days typically provided for review of petitions for variance or waiver would not allow the resolution of this petition." Id.

34. Substantially similar to the December 18 Written Request, the petition expressed one new fact and pointed out an additional significant feature for AHCA's consideration. The new fact was that the initial application for transfer of the CON to Sanderling had been submitted to AHCA on December 24, 2009, along with the petition. The featured consideration was asserted in the petition's final paragraph:

Granting the waiver will foster the goals of the Health Facility and Services Development Act as stated in the Recommended Order and Final Orders in DOAH Case No. 06-557 (AHCA No. 2006000716) approving CON 9893.

Id. at para. 12., p. 4 (emphasis added.) This assertion amounted to the claim that the statute underlying the Transfer Extension Paragraph and the entire Termination and Extension

Rule is not merely the law implemented by the rule but the entire Health Facility and Services Development Act.

The Act

35. The Act is a subset of one part of Chapter 408, Florida Statutes. The chapter governs "Health Care Administration" and is composed of Parts I - IV.

36. Part I consists of Sections 408.031 through 408.7071. Fifteen sections, Sections 408.031 through 408.045, comprise the Act. "Sections 408.031-408.045 shall be known and may be cited as the "Health Facility and Services Development Act."

§ 408.031, Fla. Stat.

37. Of the Act's fifteen statutory sections, several stand out as having been applied by the Agency and the DOAH in the process that led to the approval of Miami Jewish Home's application and the award of the CON. These include Section 408.037, which prescribes the content for a CON application, Section 409.035, which delineates the criteria for review of a CON application, and Section 408.039, which establishes the process for review of a CON application.

38. The Act recognizes the transfer of CONs from the holder of a CON to another. See § 408.042, Fla. Stat., the catchline of which is: "Limitation on Transfer." This recognition is reflected in the section's opening sentence: "The holder of a certificate of need shall not charge a price

for the transfer of the certificate of need to another person that exceeds the total amount of the actual costs incurred by the holder in obtaining the certificate of need." (emphasis added.)

39. One of the 15 provisions of the Act bears particular relevance to this proceeding: Section 408.040, Florida Statutes, the "Conditions and Monitoring" Section.

Section 408.040, Conditions and Monitoring

40. Section 408.040 has two subsections: the first is concerned primarily with "conditions," the second with "monitoring." The section, accordingly, bears the catchline, "Conditions and monitoring."

41. Subsection (2), the "monitoring" subsection, is directly at issue in this case because it is cited in Rule 59C-1.018 as its "law implemented." It provides, in pertinent part:

(2)(a) Unless the applicant has commenced construction . . . , a certificate of need shall terminate 18 months after the date of issuance. The agency shall monitor the progress of the holder of a certificate of need in meeting the timetable for project development specified in the application, and may revoke the certificate of need, if the holder of the certificate is not meeting such timetable and is not making a good faith effort, as defined by rule, to meet it.

* * *

(c) The certificate-of-need validity period for a project shall be extended by the

agency, to the extent that the applicant demonstrates to the satisfaction of the agency that good-faith commencement of the project is being delayed by litigation or by governmental action or inaction with respect to regulations or permitting precluding commencement of the project.

§ 408.040(2), Fla. Stat. Because the subsection is concerned with termination and extension of the deadlines for commencement of construction of CON project, the subsection will be referred to in this order as the "Termination and Extension Subsection."

42. Paragraph (a) of the Termination and Extension Subsection focuses on the 18-month CON validity period during which the agency is to monitor the progress toward project development. It provides for revocation of a CON if a good faith effort is not being made toward meeting the 18-month timetable. It further provides for termination of the CON at the end of the 18-month CON validity period.

43. Paragraph (c) of the Termination and Extension Subsection focuses on when the time for termination may be extended and the circumstances for such an extension: in cases plagued by litigation or when governmental action or inaction causes delay.

44. One observation of the Termination and Extension Subsection is of particular import to this proceeding. It is silent with regard to extensions of a deadline for commencement of construction when a CON is transferred.

45. Although not mentioned as a basis for an extension in the Termination and Extension Statute, transfer of a CON is a basis for an extension under paragraph (c) of Section (3) of Florida Administrative Code Rule 59C-1.018 (the "Termination Rule").

The Termination Rule

46. The Termination Rule is divided into three sections.

47. The first, denominated "Validity Period of Certificate of Need," restates the Termination and Extension Subsection's prescription that a CON shall terminate 18 months after issuance "unless the holder meets the applicable conditions for an extension set forth in Section 408.040(2), F.S., and this rule." Fla. Admin. Code R. 59C-1.018(1).

48. The second section of the Termination Rule, called "Undertaking a Project Authorized by a Certificate of Need," prescribes minimum requirements to prevent termination of a CON and the expiration of its validity period. These requirements govern both new construction or renovation projects and non-construction projects that involve capital expenditures.

49. The third section of the Termination Rule governs extension of a CON's validity period. It is divided into three paragraphs.

50. Paragraph (a) deals with extensions when there is a demonstration that "good faith commencement of the project is

being delayed by litigation or governmental action or inaction," Fla. Admin. Code R. 59C-1.018(3)(a), related to regulation which precludes commencement. Delay caused by litigation or government are the two bases for an extension provided by the statutory Termination and Extension Subsection. Unlike the case where extensions are sought because of a transfer, the filing of a request under paragraph (a) does not extend the validity period of a CON. A paragraph (a) extension request requires the Agency to pay close attention to a number of details in its review. The requester must make a showing of good faith. Other details the Agency must examine are revealed by the following provisions:

The request must provide the agency a detailed explanation of the problem and a plan of action to be undertaken by the holder to resolve the problem within the time frame requested.

1. Land zoning issues will be considered for extension of the certificate of need validity period beyond the 18 months, if the certificate of need holder can demonstrate that action has been initiated to obtain proper zoning for the proposed site for the facility, and that such action was timely with respect to the requirements for obtaining proper zoning.

2. Untimely filing of submission of plans and requests for local and state permits, based on the processing time required by the state and local governments for such plans and permits, will not be considered as justification for an extension beyond the 18-month period.

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

51. Paragraph (b) contains yet another consideration for the Agency in cases of extensions requests on the basis of litigation. The extension "shall be granted for the actual time of the validity period which is equivalent to the period of litigation, including appeal." Fla. Admin. Code R. 59C-1.018(3)(b).

52. Paragraph (c) (the "Transfer Extension Paragraph") deals with extensions requests in the case of transfers, as in this case:

Upon written request from the holder of a certificate of need received at least 15 days prior to the termination date of the certificate of need, and upon submission of a transfer application by the proposed transferee, the agency will extend the validity period of the proposed transferred certificate of need for a period of 60 days to ensure that the certificate of need remains valid throughout the agency's timetable for review of the transfer application. Only one such request for a 60 day extension will be granted under the provisions of this subsection.

Fla. Admin. Code R. 59C-1.108(3)(c) (emphasis added.)

53. The terms of the Transfer Extension Paragraph that govern "transfer extensions" are significantly different from the terms of paragraphs (a) for other extensions.

54. For one, there is no showing of "good faith" required on the part of the holder of the CON as there is with paragraph

(a). Instead, Paragraph (c) directs extension upon the submission of two documents: a written request and a transfer application ("the agency will extend the validity period . . .", emphasis added). By comparison, paragraph (a) is written in "discretionary" language: "[e]xtensions . . . may be requested by a certificate of need holder . . .". (emphasis added.)

55. Paragraph (a) extensions require much more review by the Agency; the paragraph sets up points at which the Agency may exercise discretion in turning down the request. In addition to the "good faith" demonstration by the holder of the CON, there must be a detailed explanation offered and a plan of action to resolve the problem within the time frame requested. In contrast, review triggered under the Transfer Extension Paragraph by a written extension request is minimal. All the Agency need determine is whether a transfer application has been submitted by the transferee and that no other requests on the basis of a transfer have been granted previously.

56. Miami Jewish Home seeks a waiver from only one clause in the Transfer and Extension Paragraph: that its written request must have been received fifteen days prior to the termination date of the CON (the "15-day Requirement"). It makes the request for the waiver under Section 120.542, Florida Statutes.

Section 120.542: the Variance and Waiver Statute

57. Section 120.542, Florida Statutes (the "Variance and Waiver Statute") was enacted in 1996 as part of a major revision to Chapter 120, Florida Statutes. Described as perhaps "the most significant aspect of the revised APA," Loosening the Chains that Bind: the New Variance and Waiver Provision in Florida's Administrative Procedure Act, Vol. 24, at 353, Florida State University Law Review (1997), the section sets forth the legislative intent in two straightforward sentences:

Strict application of uniformly applicable rules requirements can lead to unreasonable, unfair and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation.

§ 120.542, Fla. Stat.

58. The operative part of the Variance and Waiver Statute is found in subsection (2), the first sentence of which reads, "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."

59. The Variance and Waiver Statute provides a process for agencies in dealing with variance and waiver petitions. The agency is to give notice to the Department of State within 15

days of receipt of the petition. The Department of State, in turn, publishes notice of the petition in the first available issue of the Florida Administrative Weekly. See § 120.542(6), Fla. Stat. Within 30 days of receipt of the petition, the agency is to review it and request additional information it is permitted to require, see Section 120.542(7), Florida Statutes, "except for requests for emergency variances or waivers". Id.

Agency Response to the December 18 Written Request

60. The Agency did not rule on the December 18 Written Request prior to the expiration of the CON's validity period on December 28, 2008.

61. The December 18 Written Request was hand-delivered to Mr. Gregg's office six days before the filing of the Emergency Petition (December 24, 2008). Mr. Gregg took the December 18 Written Request to the legal staff and said "please respond to this." Tr. 265.

62. Before any response to the December 18 Written Request was issued in writing, the Emergency Petition was filed with AHCA together with the transfer application.

Agency Response to the Emergency Petition

63. The timing of the filing of the Emergency Petition, Christmas Eve, was problematic for the Agency. Mr. Gregg explained at hearing:

[B]eing the holiday season, various key people were not there . . .

The chief facilities counsel had broken his foot. The deputy secretary was out before Christmas. I was out after Christmas. This is a perfect example, apart from the fact that we all are juggling many different subjects, of why we would need [a] review period [as called for by the 15-Day Requirement] in order to develop an opinion about any request for extension or a request for a variance and transfer.

Tr. 273. Since Mr. Gregg was not available to review the Emergency Petition the day of its submission, it was reviewed by the Deputy Secretary and Acting General Counsel. They formulated the Agency response: denial. Later, after Mr. Gregg had returned to the office and read the Emergency Petition, "we all agreed it was not something that we could grant." Tr. 266.

64. In the wake of the receipt of the Emergency Petition and the transfer application, the Agency followed prescribed process. It issued a CON application omissions letter to Sanderling. Notice of the receipt of the Emergency Petition was published on January 16, 2009 in the Florida Administrative Weekly. Notice was also published on the Agency internet site.

65. In the meantime, AHCA notified counsel for MJHHA that the CON had expired. The Agency letter, dated January 15, 2009, states:

It has been determined that the holder of CON Number 9814 for the above referenced project [CON 9893] has violated the

provision of section 408.040(2)(a), Florida Statutes . . . and Rule 59C-1.018(2) Florida Administrative Code in that the project has not commenced continuous construction, as defined in section 408.032(4), F.S., by the December 28, 2008 termination date. Therefore the CON has expired.

* * *

The final determination on your request for an emergency waiver could have an impact on whether or not this CON remains valid.

Exhibit "E" attached to MJHHA Ex. 13.

66. On January 22, 2009, written comments in opposition to the Emergency Petition were received from Victoria Healthcare, Inc., a wholly owned subsidiary of Select Medical Corporation and from Kindred Hospitals East, L.L.C. No comments were received in support of the petition.

67. On January 23, 2009, the Agency issued a Final Order denying the Emergency Petition.

The Agency's Final Order

68. The findings of fact in the Final Order relate the history of the CON and the filing of the Emergency Petition. The order does not make reference to the December 18 Written Request.

69. The findings of fact also cite and quote text from relevant statutory and rule provisions. The sixth and last finding of fact in the final order is:

Since CON 9893 expired on December 28, 2008, Rule 59C-1.018(3)(c) required . . . the request and transfer application be received by the Agency no later than December 13, 2008. The petition and transfer application were received on December 24, 2008, eleven days late.

MJHHA Ex. 13, at 2-3.

70. The Final Order does not identify the specific statute underlying the Termination and Extension Rule. Nonetheless, it concludes with regard to the first prong of the Waiver and Variance Statute that the Emergency Petition comes up short:

Beyond the bare, unsupported, and conclusory allegation in paragraph 9 of the Petition that "requiring the CON to terminate would be detrimental to the goals of the Health Facility and Services Development Act and the accessibility and quality of health care services to the community," and a reference in passing to the Recommended and Final Orders in DOAH Case No. 06-0557 CON, the Petition does not address or provide specifics explaining how waiving the 15 day prior notice rule requirement would achieve the purpose of the statute.

Id.

71. After its conclusion that MJHHA failed to meet the first prong, the Final Order reflects the Agency's conclusion that it was not necessary to address the second prong of the Variance and Waiver Statute. The order, however, reflects the Agency's decision to deal with the second prong "briefly." MJHHA Ex. 13, at 5. The Final Order finds that MJHHA failed to demonstrate that application of the rule would work create a

substantial hardship or that principles of fairness had been violated. Accordingly, the Final Order denies the Emergency Petition.

Section 120.57(1) Petition

72. The Final Order's denial of MJHHA's request for a variance was challenged by a petition filed on February 2, 2009 (the "Section 120.57(1) Petition"). In the Section 120.57(1) Petition, MJHHA characterizes the December 18, 2009 Written Request, as a "written request" within the meaning of the term in the Termination Rule and characterizes the Emergency Petition as a "second" written request.

73. The Section 120.57(1) Petition, of course, raises the issue of whether it demonstrated that both prongs of the Variance and Waiver Statute had been met. It also raises a number of issues surrounding the emergency nature of the Emergency Petition, whether the CON terminated, and whether there is a statutory basis for the 15-Day Requirement. See Section 120.57(1) Petition, at 7-9.

Stipulated Facts

74. Prior to hearing, the parties filed a joint pre-hearing stipulation. The stipulation contains a section entitled, "Facts Which Are Admitted and Require No Proof at Hearing." The section contains the following:

AHCA is the state agency responsible for the administration of the Certificate of Need program in Florida.

AHCA did not provide MJHHA copies of the relevant statutes and rules when it was presented with a request for relief (the December 18 letter) from the provisions of the rule. (Item a of the petition)

The current financial crisis is unique in the history of the Florida's CON regulation. (Item g of the petition)

Joint Pre-hearing Stipulation, at. 4.

Final Hearing

75. At final hearing, the Agency identified the statute it believes underlies the Termination and Extension Rule: Section 408.040(2), Florida Statutes, referred to in this order as the Termination and Extension Subsection.

76. The Agency offered further evidence of the context in which its decision was made. Mr. Gregg opined that Miami Jewish Home was not positioned to request an extension. Construction plans had not been submitted for AHCA review. The extension request was first presented to AHCA ten days before the Construction Deadline; normally, AHCA is informed months in advance of the need for an extension. The Agency denied the request in an "attempt to be consistent and treat each situation in the same way." Tr. 274. Mr. Gregg further opined:

And in the case of CON, given that we know that the financial situation is very widespread, if we were to be too liberal in

our application of these laws and rules, I can guarantee you that we would quickly have other people asking us to do a similar thing, based upon financial problems. And we don't feel we have [that] flexibility . . .

In recognition of that, we have proposed . . . a total extension of the CON validity period that would extend it from 18 month to three years. And that is included in a bill that is generally referred to in this season as the agency's regulatory reform bill.

[Without such legislation] we don't think we have authority to [give MJHHA an extension.]

Tr. 275-6.

77. Mr. Gregg also mentioned another instance in which a CON holder "had communicated . . . that they have financial problems . . . but they also happen to have local planning and zoning issues and environmental issues as well." Tr. 274. That instance was a case involving Hillsborough Extended Care, LLC.

The Hillsborough Case

78. On August 30, 2005, CON 9814 was issued to Hillsborough Extended Care, LLC, ("Hillsborough") to relocate 120 existing community nursing home beds from one facility in Tampa to a new freestanding 120-bed facility. The deadline for commencing construction of the project authorized by CON 9814 was February 28, 2007.

79. Prior to November of 2007, Hillsborough invoked the Termination and Extension Rule on four separate occasions.

Extensions were granted each time on February 1, May 17, June 15, and August 13, 2007.

80. The letter granting the last extension informed Hillsborough that the CON validity period expired October 7, 2007 "and specifically stated that to request another extension pursuant to Rule 59C-1.018, Florida Administrative Code, that the extension request must have been received by the Agency no later than October 7, 2007." MJHHA Ex. 21 at 2; see also the fourth page of Exhibit "B" attached to MJHHA Ex. 21.

81. On October 16, 2007, nine days late, Hillsborough filed a fifth extension request. The Agency sent a letter to Hillsborough on October 23, 2007. It denied the request and informed Hillsborough as follows:

It has been determined that the holder of CON Number 9814 . . . has violated the provisions of section 408.040(2)(a), Florida Statutes . . . and Rule 59C-1.018(2), Florida Administrative Code in that the project has not commenced continuous construction, as defined in Section 408.032(4), F.S., by the October 22, 2007 termination date. Therefore, the CON has expired.

Fifth page of Exhibit "B" attached to MJHHA Ex. 21.

82. Hillsborough filed an emergency petition for a variance from or a waiver of the Termination Rule. The emergency petition invoked the Variance and Waiver Statute. The emergency petition recognized the law implemented by the

Termination Rule to be the Termination and Extension Subsection, Section 408.040(2), Florida Statutes. With regard to the "underlying statute," Hillsborough took a position similar to that of Miami Jewish Home in this proceeding, that is, that the underlying statute is the Act. See MJHHA Ex. 20 at 2. The emergency petition asserted that in support of the end promoted by the Act, "the orderly development of health facilities and services in the State," id., the Agency had determined a need for the nursing home beds authorized to be relocated by CON 9814.

83. The Agency issued a Final Order denying Hillsborough's emergency petition on December 28, 2007 (the "Hillsborough Final Order of December 28, 2007.") The Agency found that although a need for the nursing home beds had been determined when CON 9814 was issued, "there is no longer a need for these beds in Hillsborough County." MJHHA Ex. 21. The Agency at first, see Finding of Fact 86, below, concluded that the statute underlying the Termination Rule was the Termination and Extension Subsection not the Act.

84. The Agency in the order further concluded that while "it appears there may have been ongoing litigation or other matters pending relating to permitting which may have justified a fifth extension of CON 9814," id. at 5, that the issue was whether a variance from or waiver should be granted as to the

15-Day Requirement. The Agency recognized that the 15-Day Requirement is not statutory. See MJHHA Exhibit 21 at 6, para. 18: "[i]t is true that there is nothing in the statute explicitly requiring that CON validity extension requests be received at least 15 days prior to the extension date . . .".

85. The Agency further concluded that Hillsborough did not demonstrate that the purpose of the underlying statute, the Termination and Extension Subsection, would be met by a variance from or waiver of the 15-Day Requirement. In fact, the Agency wrote an untimely request "is contrary to the purpose of the underlying statute, which requires the Agency to determine whether an extension is justified before the CON has expired." Id. at 7.

86. The Agency expanded upon the meaning of the term, "underlying statute" when it wrote the following in the Hillsborough Extended Care final order:

Moreover, the entire CON statute, found at Chapter 408, Part I, [the Act] is dedicated to the principle that a CON is granted when there is a demonstrated need.

* * *

Therefore, the purpose of the underlying CON statute [emphasis added] has not been met in this case: this district does not need these beds [any longer.] The issue, always, in the CON program is whether there is a need for a facility or service, not whether it would be desirable to have additional options and choices beyond that need. In

this case, the need does not exist. The Petitioners have not demonstrated that they have met the purpose of the underlying statute. [emphasis added.]

Id. at 7-8. Thus, the Agency concluded that the Act is the statute underlying the Termination Rule as well as the law implemented, a provision contained within the Act. The Hillsborough Final Order of December 28, 2007, accordingly denied Hillsborough's emergency petition.

87. Hillsborough challenged the decision by filing two petitions for formal administrative hearings. On February 19, 2008, the Agency entered a second final order (the "Hillsborough Final Order of February 19, 2008.") It reports, "[t]he Agency and Hillsborough have reached a settlement by which the AHCA notices are superseded and Hillsborough is given an extension to begin continuous construction pursuant to the time line schedule included in the Settlement Agreement." MJHHA Ex. 22 at 2. The final order approves and adopts the Settlement Agreement as part of the final order.

88. The Settlement Agreement in its "whereas" clauses describes action and inaction of the local government that justified an extension. See MJHHA Ex. 22, Settlement Agreement at 3-4.

89. With regard to the 15-day Requirement that its earlier letter had found Hillsborough to have violated, the Settlement

Agreement recites the following in a "whereas" clause: "the parties agree that AHCA has evenly enforced its fifteen day requirement for filing an extension request and did nothing incorrect in denying the late filed extension request and canceling the CON ...". Id. at 5. Neither the Hillsborough Final Order of February 19, 2008 nor the Settlement Agreement attached to it provides any explanation as to why the 15-Day Notice Requirement was no longer to be enforced against Hillsborough. The lack of explanation is particularly worthy of observation in light of the agreement that AHCA did nothing incorrect in enforcing it in the first place.

90. The Settlement Agreement sets out a detailed schedule for plan review, commencing construction and continuing construction. Id.

91. As for future extensions, the Settlement Agreement contained a few additional provisions that relate to circumstances that would support further extensions and timely requests for extensions:

e. The schedule and continuous construction commencement date of CON 9814 may only be extended by agreement of the parties because of governmental action or inaction or for unforeseen natural disasters or Acts of God.

f. If such an extension or extensions become necessary, the Petitioner agrees to timely file the request(s) for extension in full compliance with the requirements of Rule 59C-1.018(3)(a), F.A.C., and upon

failure to fully comply with the requirements of said rule, Petitioner agrees that CON 9814 shall become null and void by operation of law, without further action by the agency, and without any further administrative or legal remedies being available to the Petitioner.

Id. at 7-8.

The Agency's Position at Final Hearing

92. At final hearing, the Agency embellished upon the circumstances that led to its decision to deny the Emergency Petition, including its view of why the outcome in the Hillsborough case is justifiably different from the Agency's preliminary denial in the Final Order in this case. See Finding of Fact 76.

93. In essence, the Agency adhered to the position taken in the Final Order in this case: that MJHHA's Emergency Petition should be denied because it was filed eleven days late and Miami Jewish Home had failed to demonstrate a basis for waiving the 15-Day Requirement.

CONCLUSIONS OF LAW

94. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

95. As the party seeking a variance or waiver, Miami Jewish Home has the burden of establishing entitlement to the relief it seeks. It must prove its case by a preponderance of

the evidence. Dep't of Banking and Finance, Div. of Securities and Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Florida Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

The Hillsborough Case

96. As AHCA recognizes, the extensions in the Hillsborough Case were entered on the basis of litigation or government action and inaction whereas the extension in this case is sought on the basis of a transfer. The Hillsborough Case, therefore, is not on all fours with this case. The difference in the bases for the extensions serves the Agency attempt to distinguish the two cases.

97. The Settlement Agreement attached to the Hillsborough Final Order of February 19, 2008, that granted the fifth extension also demonstrates the import that the Agency places on the 15-Day Requirement. This emphasis is appropriate in a case in which an extension is sought on the basis of litigation or government action or inaction. In such a case, the Agency is called upon to determine a number of matters that require careful review that is often time-consuming. The Agency must determine that the holder of a CON seeking the extension has acted in good faith after it received the CON in moving toward the commencement of construction. The Agency must evaluate the

nature and effect of litigation or the nature and effect of what government is or is not doing. These determinations are required by statute when an extension is sought on the basis of delay caused by litigation or government. In addition, the Termination Rule requires that the Agency pay close attention to a number of details dependent on what type of government action or inaction serves as the basis for the request. See Finding of Fact 48.

98. The review period under such a request not only requires close attention to a number of details but also requires evaluation and analysis of facts related to governmental concerns or litigation if there is to be a good decision about whether to grant the extension or not.

99. Unlike the extensions sought in the Hillsborough Case, however, the extension in this case required no such detailed analysis. All the Agency is required to do under the Transfer Extension Paragraph of the Termination Rule when the 15-Day Requirement is observed is to check for two matters that do not require evaluation or analysis: (1) is the written request supported by a transfer application by the proposed transferee and, (2) has the Agency ever granted a extension before on the basis of a transfer.

100. There is no contention in this case that any other extension of the Construction Deadline for the CON had ever been

granted. The Agency's documents of record, moreover, show that a transfer application by Sanderling had been submitted to the Agency long before it entered the Final Order denying the extension.

101. The minimal review required by the Transfer Extension Paragraph of the Termination Rule defeats the Agency's "Christmas Eve" argument. The argument is defeated, too, by the fact that the December 18 Written Request was sufficient to trigger the review required by the Transfer Extension Paragraph. Including the day the request first appeared at the Agency, AHCA had four working days before Christmas Eve to make the relatively simple determinations of whether a transfer application had been filed and whether an extension had been granted previously. That the transfer application was not received until December 24 is of little moment. The December 18 Written Request had promised the transfer application would be filed before the Commencement of Construction Deadline. All that needed to be done after review of the request under the circumstances was to instruct appropriate staff to be alert for the filing of the transfer application and to grant the request once it was filed.

102. The Hillsborough Case has additional value in this case: it is precedent in one significant way. It demonstrates that AHCA, despite its claim to the contrary, does have

authority for waiving the 15-Day Notice Requirement. The authority is that used in the Hillsborough Case: Section 120.542, Florida Statutes, the Variance and Waiver Statute.

Application of the Variance and Waiver Statute

103. As the Agency has recognized and as evident from the statute's plain meaning, the test for granting a waiver of the 15-Day Notice Requirement is two-pronged.

104. The Findings of Fact here easily satisfy the second of the two prongs: a demonstration by Miami Jewish Home that application of the Termination Rule would create a substantial hardship or would violate principles of fairness.

105. Application of the 15-Day Notice Requirement in this case would create substantial hardship. Substantial hardship was created by the interaction of a number of factors beyond Miami Jewish Home's control. These included an environment in which MJHHA lost investment income necessary to fund the project (at a time when the entire country suffered a massive reduction in the value of equities), a moment when credit necessary to substitute for the loss of cash had become generally unavailable, and an inability despite diligence to find a transferee for the CON until a point in time at which notice to the Agency was untimely.

106. Whether Miami Jewish Home has demonstrated that the purpose of the underlying statute will be or has been achieved

by other means is a more difficult question. The answer requires identification of the statute that underlies the Termination Rule.

The Underlying Statute.

107. The Agency's claim that the Termination Subsection underlies the Termination Rule and the Transfer Extension Paragraph is certainly correct. After all, "408.040(2) FS" is shown as the law implemented by the Termination Rule in the Florida Administrative Code. Certainly, the law implemented by a rule should be a statute underlying the rule.

108. But the claim is beset by a curiosity. There is not a single word in the Termination Subsection nor in all of Section 408.040, Florida Statutes, about extensions in the case of "transfers," the basis of the extension sought by Miami Jewish Home.

109. Nor is the 15-Day Requirement, the clause in the Transfer Extension Paragraph, mentioned in Section 408.040, Florida Statutes. That the 15-Day Requirement is not statutory is a fact the Agency wrestled with in the Hillsborough Case. See Finding of Fact 84.

110. At the same time, the place in the statutes which references CON transfers is Section 408.042, Florida Statutes, which governs "limitations on transfers." Section 408.042 is

not listed by the Florida Administrative Code as a law implemented under the Termination Rule.

111. Here the Hillsborough Case is again of assistance. The Agency referred in the Hillsborough December 28, 2007, Final Order to "the entire CON statute, found at Chapter 408, Part I," MJHHA Exhibit 21 at 7, paragraph 20, as the statute underlying the 15-Day Requirement and the Termination Rule. See MJHHA Exhibit 21 at 7-8 and Finding of Fact 86.

112. In the Hillsborough Final Order of February 19, 2008, when AHCA granted the extension instead of denying it as in the earlier final order, it did not retreat from its language with regard to the meaning of "underlying statute." Without such a retreat which would have necessitated a reasonable explanation for the departure, the Agency is required to follow the Hillsborough Case's December 27, 2007, Final Order's construction of "underlying statute," that is, that "underlying statute" means the Act, not just the law implemented by the Termination and Extension Rule. See Nordheim v. Dep't of Env'tl. Prot., 719 So. 2d 1212, 1214 (Fla. 3d DCA 1998); Gessler v. Dep't of Bus. & Prof. Reg., 627 So. 2d 501, 503-4 (Fla. 4th DCA 1993).

113. Furthermore, unlike substantive CON statutes and its own rules for which the Agency's interpretation is given deference because of its expertise in substantive CON Law, the

term "underlying statute" occurs in this case in a procedural context. The Agency enjoys no deference in construing terms in the Waiver and Variance Statute, a provision of the Administrative Procedure Act, Chapter 120, Florida Statutes. See generally Barfield v. Dep't of Health, 805 So. 2d 1008 (Fla. 1st DCA 2001) and Deep Lagoon Boat Club, Ltd., v. Sheridan, 784 So. 2d 1140, 1144 (Fla. 2d DCA 2001).

114. The view as to the meaning of the term "underlying statute" as used in the Variance and Waiver Statute taken by the Agency in the December 28, 2007 Final Order in the Hillsborough Case, moreover, is a better one than the construction AHCA advances in this case.

Need

115. Finally, it should be stressed that the un-rebutted evidence in this case is that the need for the LTCH authorized by the CON continued as of the time of final hearing. To reiterate what the Agency stated with such clarity in its December 27, 2007 Final Order in the Hillsborough Case, "[t]he issue, always, in the CON program is whether there is a need for a facility or service, not whether it would be desirable to have additional options and choices beyond that need." MJHHA Ex. 21 at 7-8 (emphasis added.)

MJHHA Has Met its Burden


116. Miami Jewish Home has demonstrated that the purpose of the underlying statute (the Act) will be achieved by waiving the 15-Day Notice Requirement. It has also demonstrated that application of the 15-Day Notice Requirement will create a substantial hardship.

117. Having demonstrated that both prongs of the test under the Variance and Waiver Statute have been met, the 15-Day Requirement should be waived, the CON should be determined to still have validity, and the CON validity period should be extended for 60 days from the issuance of a final order by the Agency after consideration of this Recommended Order.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Agency waive the 15-Day Requirement for Miami Jewish Home with regard to its written request to extend the validity period of CON 9893, revoke the termination of the CON, and grant an extension of 60 days of the CON's validity period upon issuance of a final order.

DONE AND ENTERED this 11th day of May, 2009, in
Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.