STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTH FLORIDA RACING
ASSOCIATION, LLC, A FLORIDA
LIMITED LIABILITY COMPANY,

Petitioner,

vs. Case No. 14-6129RX

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF PARI-MUTUEL
WAGERING,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case before W. David Watkins, Administrative Law Judge of the Florida Division of Administrative Hearings, on January 27, 2015, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Andrew T. Lavin, Esquire
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For Respondent: Jason L. Maine, Esquire
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STATEMENT OF THE ISSUE

Whether Florida Administrative Code Rule 61D-4.002 constitutes an invalid exercise of delegated legislative authority?

PRELIMINARY STATEMENT

This rule challenge proceeding was initiated on November 12, 2014, when South Florida Racing Association, LLC (Petitioner or SFRA), filed a pleading captioned "Petition for Formal Administrative Proceeding and for Administrative Determination of Invalidity of Existing Rule 61D-4.002, FAC" (Petition) with the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (Respondent or Department).

The Petition contested the agency action of the Department in denying Petitioner's 2012 application for the issuance of a summer jai alai permit, and also challenged the validity of Florida Administrative Code Rule 61D-4.002 (Rule) as an invalid exercise of delegated legislative authority.

The Petition was referred to the Division of Administrative Hearings, whereupon the agency action (denial of the jai alai permit) was bifurcated from the rule challenge.[1/]

Petitioner challenges the Rule as an invalid exercise of delegated legislative authority, for each of the following reasons:

- The Rule is invalid as applied to section 550.0745, Florida Statutes[2/] (Statute), because the Statute is not identified in the Rule as rulemaking authority for the Rule.
- The Rule is invalid as applied to the Statute because the Statute is not identified in the Rule as a law implemented by the Rule.
- Application of the Rule to the Statute is an invalid unadopted Rule.
- The Rule is invalid in its entirety, or in part, because it exceeds any specific authority granted by any statute by:

    - establishing criteria for the evaluation of pari-mutuel permit applications which are not expressly authorized by any of the authorizing statutes;

    - establishing financial criteria for the evaluation of pari-mutuel permit applications which are not expressly authorized by any of the authorizing statutes; and

    - establishing criteria for the issuance of a summer jai alai permit pursuant to the Statute which are not expressly authorized by any of the authorizing statutes.

- The Rule is invalid in its entirety, or in part, because it modifies or contravenes the terms of the statutes it purports to implement, by creating

conditions to the issuance of a summer jai alai permit that are not included in the statutes.

- The Rule is invalid in its entirety, or in part, because it is vague, failing to include any objective, discernable criteria, and improperly granting the Division unbridled discretion with respect to its consideration of an application for a pari-mutuel permit, including in particular, a summer jai alai permit pursuant to the Statute.
- The Rule is invalid in its entirety, or in part, because it is arbitrary and capricious, failing to fulfill the intention of the Rule, the Statute, or of any of the statutes it is to implement.

On January 20, 2015, the parties filed a Joint Prehearing Stipulation, which included stipulated facts. To the extent relevant, those stipulated facts are incorporated herein.

The final hearing was convened as scheduled on January 27, 2015, in Tallahassee, Florida. During the hearing the parties presented their respective legal arguments. There were no witnesses or evidence presented at the hearing.

The parties timely filed their proposed Final Orders on February 25, 2015, both of which have been carefully considered in the preparation of this Final Order.

FINDINGS OF FACT

1. Petitioner is the owner and holder of a pari-mutuel permit that authorizes it to conduct quarterhorse racing at Hialeah Park, in Miami-Dade County. Petitioner is subject to chapter 550, Florida Statutes and the administrative rules promulgated thereunder in Florida Administrative Code Chapter 61D.

2. The Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering is the state agency charged with regulating pari-mutuel wagering, pursuant to chapter 550, Florida Statutes, and the administrative rules promulgated thereunder in chapter 61D.

3. Petitioner applied for the issuance of a summer jai alai permit pursuant to the Statute. Pursuant to the Statute, in a county in which there are five or more pari-mutuel permitholders, if one permitholder in the county has the lowest total pool for two consecutive years, the permitholder can convert its permit to a summer jai alai permit. Further, if the qualifying permitholder elects not to convert its permit, a new summer jai alai permit is made available in that county.

4. There are more than five pari-mutuel permits issued in Miami-Dade County. Petitioner had the lowest pool among all permitholders in Miami-Dade County for fiscal years 2010/2011 and 2011/2012. Therefore, pursuant to the Statute, Petitioner

had the right to convert its permit to a summer jai alai permit. Petitioner declined to do so, and instead applied for the issuance of the summer jai alai permit made available pursuant to the Statute as a result of its election not to convert. The Department maintained that no permit was available to be issued. However, the First District Court of Appeal[3/] and Third District Court of Appeal[4/] have both ruled that a summer jai alai permit is available to be issued for 2012 (Permit).

5. Thereafter, the Division denied Petitioner's application for the Permit, applying the Rule and determining that issuance of the Permit to Petitioner would not preserve and protect the pari-mutuel revenues of the State, and that Petitioner does not reflect a prospective permitholder that would enjoy potential profitability from the issuance of the Permit.

6. On November 11, 2014, Petitioner filed a Petition for Formal Administrative Hearing giving rise to the instant proceeding. In the Petition, Petitioner also contended that even if the rule is valid, the Department erred in its application of the Rule to deny the Permit.[5/]

7. In 1996, the Department undertook the rule promulgation process as outlined in chapter 120 to adopt rule 61D-4.002 for "Evaluating a Permit Application for a Pari-Mutuel Facility." The Rule identifies sections 550.0251(4), 550.054(8)(b), and

550.1815(5), Florida Statutes, as rulemaking authority. The Rule identifies sections 550.0251, 550.054, 550.0951, 550.155, and 550.1815, Florida Statutes, as the specific law to be implemented.

8. Part (1)(a) of the Rule provides that the Department shall consider whether the applicant is potentially profitable.

9. Part (1)(b) of the Rule requires the Department to consider whether the applicant would preserve and protect the pari-mutuel revenues of the state.

10. Parts (1)(c) and (d) of the Rule require the Department to consider the holdings, transactions, and investments of the applicant and whether there exists any judgment or current litigation against the applicant.

11. At hearing, counsel for the Department advised that the Department has previously applied the Rule to the Statute on at least two occasions, when West Flagler Associates applied for summer jai alai permits pursuant to the Statute.

CONCLUSIONS OF LAW

I. Jurisdiction, Standing, and Burden of Proof

12. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. § 120.56, Fla. Stat.

13. As stipulated by the parties, Petitioner has standing pursuant to section 120.56(1) to participate in this proceeding as a person substantially affected by the Rule.

14. Petitioner seeks a Final Order determining that the Department's existing rule 61D-4.002 constitutes an invalid exercise of delegated legislative authority in violation of section 120.52(8), Florida Statutes. Sections (1) and (3) of section 120.56 provide in pertinent part, as follows:

> 120.56 Challenges to rules. –
>
> (1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.
>
> (a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.
>
> * * *
>
> (e) Hearings held under this section shall be de novo in nature. The standard of proof shall be the preponderance of the evidence . . . .
>
> * * *
>
> (3) CHALLENGING EXISTING RULES; SPECIAL PROVISIONS. –
>
> (a) . . . The petitioner has a burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised.
>
> (b) The administrative law judge may declare all or part of a rule invalid.

15. In a challenge to an existing rule, unlike a challenge to a proposed rule, the burden of proof never shifts to the agency. See Bd. of Clinical Lab. Personnel v. Fla. Ass'n of Blood Banks, 721 So. 2d 317 (Fla. 1st DCA 1998).

II. Rulemaking Standards

16. Rulemaking is a legislative function, and as such, it is within the exclusive authority of the Legislature under the separation of powers provision of the Florida Constitution. See S.W. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 598-99 (Fla. 1st DCA 2000). An administrative rule is valid only if adopted under a proper delegation of legislative authority. See Id.; Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260 (Fla. 1991); Askew v. Cross Keys Waterways, 372 So. 2d 913 (Fla. 1978).

17. The Legislature defines the standard for determining whether a rule is supported by legislative authority, South West Florida Water Management District, supra at 598, and has done so in section 120.52(8), which provides in relevant part, as follows:

> "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

* * *

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)l.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational . . ..

18. Pursuant to section 120.54(3)(a)(l), a rule must make:

. . . a reference to the grant of rulemaking authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented or interpreted.

19. Further, pursuant to section 120.536(1):

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory

> language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

20. Chapter 120 was amended during 1996, and again during 1999, to make the standard for agency rulemaking more restrictive. State Bd. of Trustees of the Int. Improv. Tr. Fd., 794 So. 2d at 699. Under the 1996 and 1999 amendments to the APA, it was made clear that agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency. Id. at 700; see also Lamar Outdoor Adver. Lakeland v. Fla. Dep't of Transp., 17 So. 3d 799, 801-02 (Fla. 1st DCA 2009). An agency only has rulemaking authority when statutory language "explicitly" authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term "rule." § 120.52(17), Fla. Stat.; see Fla. Elections Comm'n v. Blair, 52 So. 3d 9, 12 (Fla. 1st DCA 2010) (words "explicit" and

"specific" are interchangeable; agency must have explicit or specific statutory authority to adopt a rule).

21. Either the enabling statute authorizes a particular rule or it does not. S.W. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., supra at 599. The statutory provisions governing rulemaking must be interpreted in light of the Legislature's stated intent to clarify significant restrictions on agencies' exercise of rulemaking authority. State Bd. of Trustees of the Int. Improv. Tr. Fd., supra at 700. If reasonable doubt exists as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested. Id. at 701.

22. A rule is an agency statement of general applicability that implements, interprets, or prescribes law or policy. § 120.52(16), Fla. Stat. When an agency makes such a statement without adopting a rule, the action constitutes an invalid unadopted rule in violation of 120.54(l)(a). Fla. Quarter Horse Track Ass'n, Inc. v. State of Fla., Dep't of Bus. and Prof. Reg., Div. of Pari-Mutuel Wagering, 133 So. 3d 1118, 1119 (Fla. 1st DCA 2014). An unpromulgated agency rule is an invalid exercise of delegated legislative authority, and unenforceable. Dep't of Rev. v. Vanjara Enter., Inc., 675 So. 2d 252, 255 (Fla. 5th DCA 1996).

III. The Statute

550.0745 Conversion of pari-mutuel permit to summer jai alai permit.—

(1) The owner or operator of a pari-mutuel permit who is authorized by the division to conduct pari-mutuel pools on exhibition sports in any county having five or more such pari-mutuel permits and whose mutuel play from the operation of such pari-mutuel pools for the 2 consecutive years next prior to filing an application under this section has had the smallest play or total pool within the county may apply to the division to convert its permit to a permit to conduct a summer jai alai fronton in such county during the summer season commencing on May 1 and ending on November 30 of each year on such dates as may be selected by such permittee for the same number of days and performances as are allowed and granted to winter jai alai frontons within such county. If a permittee who is eligible under this section to convert a permit declines to convert, a new permit is hereby made available in that permittee's county to conduct summer jai alai games as provided by this section, notwithstanding mileage and permit ratification requirements. If a permittee converts a quarter horse permit pursuant to this section, nothing in this section prohibits the permittee from obtaining another quarter horse permit. Such permittee shall pay the same taxes as are fixed and required to be paid from the pari-mutuel pools of winter jai alai permittees and is bound by all of the rules and provisions of this chapter which apply to the operation of winter jai alai frontons. Such permittee shall only be permitted to operate a jai alai fronton after its application has been submitted to the division and its license has been issued pursuant to the application. The license is renewable from year to year as provided by law.

(2) Such permittee is entitled to the issuance of a license for the operation of a jai alai fronton during the summer season as fixed in this section. A permittee granted a license under this section may not conduct pari-mutuel pools during the summer season except at a jai alai fronton as provided in this section. Such license authorizes the permittee to operate at any jai alai permittee's plant it may lease or build within such county.

(3) Such license for the operation of a jai alai fronton shall never be permitted to be operated during the jai alai winter season; and neither the jai alai winter licensee or the jai alai summer licensee shall be permitted to operate on the same days or in competition with each other. This section does not prevent the summer jai alai permittee from leasing the facilities of the winter jai alai permittee for the operation of the summer meet.

(4) The provisions of this chapter which prohibit the location and operation of jai alai frontons within a specified distance from the location of another jai alai fronton or other permittee and which prohibit the division from granting any permit at a location within a certain designated area do not apply to the provisions of this section and do not prevent the issuance of a license under this section.

History.— s. 14, ch. 92-348.

23. Pursuant to the Statute, an eligible existing pari-mutuel permitholder can convert its permit to a summer jai alai permit. However, if an eligible permitee declines to convert, a new summer jai alai permit is available in that county.

24. The Statute does not include any express authorization for the Department to promulgate rules to implement the Statute.

IV. The Rule

25. The challenged rule provides as follows:

> **61D-4.002 Evaluating a Permit Application for a Pari-Mutuel Facility.**
>
> An applicant for a Florida Pari-Mutuel Facility permit shall submit a Form DBPR PMW-3010, Permit Application; https://www.flrules.org/gateway/reference.asp?NO=Ref-01552, a Form DBPR PMW-3030, Personal History Record; https://www.flrules.org/gateway/reference.asp?NO=Ref-01553, and a Form DBPR PMW-3195, Request for Release of Information and Authorization to Release Information; https://www.flrules.org/gateway/reference.asp?NO=Ref-01555, all of which are effective 9-12-12 and adopted herein by reference. The forms can be obtained at www.myfloridalicense.com/dbpr/pmw or by contacting the Division of Pari-Mutuel Wagering at 1940 North Monroe Street, Tallahassee, Florida 32399-1037.
>
> (1) In evaluating a permit application, the division shall take into consideration the following:
>
> (a) The potential profitability and financial soundness of the prospective permitholder;
>
> (b) The ability to preserve and protect the pari-mutuel revenues of the state and to ensure the integrity of the wagering pool;
>
> (c) The holdings, transactions, and investments of the applicant connected to previous business ventures;

(d) The existence of any judgment or current litigation, whether civil, criminal, or administrative, involving the applicant.

(2) After initial approval of the permit and the source of financing, the terms and parties of any subsequent financing shall be disclosed by the applicant or the permitholder, to the division within 30 days.

(3) A pari-mutuel wagering permitholder who transfers an ownership or equity interest in its permit to another licensed pari-mutuel wagering permitholder or who transfers a permit to an entity exclusively composed of ownership interests that have been approved under the provisions of Sections 550.054 and 550.1815, F.S., must file with the division Form DBPR PMW-3040, Permit Transfer Application From One Existing Permitholder to Another Existing Permitholder, effective 9-12-12, adopted herein by reference, https://www.flrules.org/gateway/reference.asp?NO=Ref-01554, which can be obtained at www.myfloridalicense.com/dbpr/pmw or by contacting the Division of Pari-Mutuel Wagering at 1940 North Monroe Street, Tallahassee, Florida 32399-1037.

Rulemaking Authority 550.0251(3), 550.054(8)(b), 550.1815(5) FS. Law Implemented 550.0251, 550.054, 550.0951, 550.155, 550.1815 FS. History–New 10-20-96, Amended 12-15-97, 3-4-07, 9-12-12.

26. The Rule identifies the following statutes as the rulemaking authority for the Rule:

a. § 550.025(3).
b. § 550.054(8)(b).
c. § 550.1815(5).

27. Further, the Rule identifies the statutes implemented by the Rule as follows:

a. § 550.0251.
b. § 550.054.
c. § 550.0951.
d. § 550.155.
e. § 550.1815.

V. Absence of Citation to the Statute in the Rule

28. The parties stipulated that the Statute is not a statute identified in the Rule as authority for the Rule. Further, there is no dispute that the Rule does not include the Statute among the laws implemented by the Rule.

29. An agency engaged in rulemaking must identify both the statutory authority for the rulemaking and a statute or act to be implemented by the rulemaking. State Dep't of Child. and Fam. Servs. v. I.B., 891 So. 2d 1168, 1171 (Fla. 1st DCA 2005). After adoption of a rule, an agency may not rely on statutory provisions not cited in the rule as statutory authority. Id., and cases cited therein.

30. Petitioner asserts that the failure of the Ru1e to identify the Statute as either the enabling authority for the Rule, or as a law to be implemented by the Rule renders the Rule invalid when applied to the Statute. Moreover, according to Petitioner, regardless of whether the Ru1e is invalid with respect to its application to the statutes identified in the Rule as the basis for its rulemaking authority, the Rule is invalid as applied to the Statute because the Statute is not identified as a basis for establishment of the Rule. Also,

regardless of whether the Rule is valid with respect to any of the statutes identified in the Rule as the laws to be implemented, it is invalid as applied to the Statute because the Statute is not identified as a law to be implemented.

31. While Petitioner's argument regarding the alleged fatal omission may or may not have merit, it is unnecessary to reach that determination here.[6/] This is because Petitioner's premise is built upon a faulty interpretation of section 550.0745 that the Statute is exempted from the general permit application requirements, conditions, and qualifications set out in section 550.054 and the rules of the Department.

32. When construing a statute, one looks first to the statute's plain meaning. Moonlit Waters Apts., Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996). Furthermore, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (citing A.R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (1931)).

33. A careful reading of the Statute reveals only exemptions for mileage and permit ratification requirements, not from the application submittal and approval requirements set

forth in section 550.054. Indeed, the Statute expressly references the application process:

> The owner or operator of a pari-mutuel permit who is authorized by the division to conduct pari-mutuel pools on exhibition sports in any county having five or more such pari-mutuel permits and whose mutuel play from the operation of such pari-mutuel pools for the 2 consecutive years next prior to filing an application under this section has had the smallest play or total pool within the county may apply to the division to convert its permit . . .

and

> Such permittee shall only be permitted to operate a jai alai fronton after its application has been submitted to the division and its license has been issued pursuant to the application. The license is renewable from year to year as provided by law.

§ 550.0745, Fla. Stat. (emphasis added)

34. In this instance, the clear meaning of section 550.0745 is that if a permit is created and made available to be applied for, applicants must adhere to the requirements, conditions, and qualifications set forth in chapter 550, specifically section 550.054, and the rules of the Department, including rule 61D-4.002, with the specific exceptions of the mileage and permit ratification requirements.

35. Notwithstanding the clear and unambiguous meaning of the Statute, the Department's interpretation of section 550.0745, a statute it is charged with administering, is

entitled to great deference. Verizon Fla., Inc. v. Jacobs, 810 So. 2d 906, 908 (Fla. 2002); Bellsouth Telecomms., Inc. v. Johnson, 708 So. 2d 594, 596 (Fla. 1998). The deference to an agency interpretation of a statute it is charged with enforcing applies even if other interpretations or alternatives exist. Atlantic Shores Resort v. 507 S. St. Corp., 937 So. 2d 1239, 1245 (Fla. 3d DCA 2006); Miles v. Fla. A & M Univ., 813 So. 2d 242, 245 (Fla. 1st DCA 2002); Int. Improv. Tr. Fd. v. Levy, 656 So. 2d 1359, 1364 (Fla. 1st DCA 1995). Accordingly, the undersigned concludes that the Rule is not rendered invalid for failure to include the Statute among the statutes being implemented, or as rulemaking authority for the Rule.

VI. An Invalid Unadopted Rule?

36. Petitioner asserts that the Department's policy of applying section 550.054 to all applications for summer jai alai permits requested pursuant to the Statute is a statement of general applicability having the force and effect of law, and therefore constitutes a rule as defined by 120.52(16), Florida Statutes. Inasmuch as the policy has not been adopted as a rule, application of the Rule to the Statute violates section 120.54(1)(a), as an unadopted rule, according to Petitioner.

37. Petitioner's contention that the application of section 550.054 to aspiring permittees for summer jai alai permits pursuant to the Statute is an invalid unadopted rule, is

rejected. While it is true that the Department has determined that entities wishing to avail themselves of the opportunities afforded under the Statute must still file an application pursuant to section 550.054, that determination is consistent with the clear and unambiguous language of section 550.054. Moreover, section 550.054, which is entitled "Application for Permit to Conduct Pari-Mutuel Wagering," mandates that "[t]he Division shall require that each applicant submit an application setting forth . . .." § 550.054(3), Fla. Stat. Thus, it is self-evident from the face of the Statute itself that entities wishing to conduct pari-mutuel wagering in Florida must file an application pursuant to section 550.054. In requiring that an applicant for a summer jai alai permit file an application, the Department is simply applying the express language of the Statute, not an unadopted rule.

VII. Specific Powers and Duties Implemented

38. Petitioner next argues that the Rule is invalid on its face because it fails to implement or interpret specific powers and duties.

39. An agency may adopt rules only where the Legislature has enacted a specific statute and authorized the agency to implement it, and then only if the rule implements or interprets specific powers or duties. Frandsden v. Dep't of Envtl. Prot., 829 So. 2d 267, 269 (Fla. 1st DCA 2002). The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Id.

40. A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required, and only ru1es that implement or interpret the specific powers and duties granted by the enabling statute are valid. § 120.52(8), Fla. Stat.; § 120.536(1), Fla. Stat.; supra, 829 So. 2d at 269. The authorizing statute must explicitly authorize or require the agency to adopt the rule. Fla. Elections Comm'n v. Blair, 52 So. 3d 9, at 12.

41. The Rule identifies sections 550.0251, 550.054, 550.0951, 550.155, and 550.1815, as specific law it serves to implement.

42. Section 550.054(3) commands the Department to collect financial information, operational information, liability information, and "other information the Department requires." Section 550.054(5) then imposes on the Department a duty to evaluate and investigate the information contained in an application to determine whether to issue a permit.

43. The manifest intent of section 550.054 requires the Department to qualitatively evaluate applicants for a permit to conduct pari-mutuel wagering. See State Bd. Of Optometry v. Fla. Soc. of Opthalmology, 538 So. 2d 878, 888 (Fla. 1st DCA 1988) (the statute must be read with reference to its manifest intent and spirit and interpreted according to the ordinary sense in which the words of common usage were employed.) The Legislature would not have required the Department to collect the financial, operational and liability information if it did

not intend for the Department to rely upon it in the process of qualitatively evaluating applicants.

44. Discretionary authority is necessary for agencies involved in the issuance of licenses and the determination of fitness of applicants for licenses. See Astral Liquors, Inc. v. Dep't of Bus. Reg., 463 So. 2d 1130, 1132 (Fla. 1985) (citing inter alia, Solimena v. State, Dept. of Bus. Reg., 402 So. 2d 1240 (Fla. 3rd DCA 1981)). This discretionary authority is particularly necessary where an agency regulates occupations which are practiced by privilege rather than by right and which are potentially injurious to the public welfare. Id.

45. In this instance, the challenged Rule relates to licensing and the fitness of the applicants to be licensed, and serves to regulate a business operated as a privilege rather than as a right, and which is potentially dangerous to the public.

46. The Rule specifically attempts to implement the legislative mandate issued in the enabling statute, section 550.054, Florida Statutes. Furthermore, while the Rule is impermissibly vague for the reasons set forth below, it does not modify, contravene, or enlarge the enabling statue.

VIII. Vagueness

47. Petitioner contends that even if one were to concede that section 550.054 applies to an application for a summer jai alai permit pursuant to the Statute, the Rule is vague, fails to establish adequate standards for agency decisions, and vests unbridled discretion in the agency. § 120.52(8)(d), Fla. Stat. An administrative rule is invalid under section 120.52(8)(d) if

it forbids or requires the performance of an act in terms that are so vague that persons of common intelligence must guess at its meaning, and may differ as to its application. State v. Peter R. Brown Constr., Inc., 108 So. 3d 723, 728 (Fla. 1st DCA 2013). The Legislature may not delegate the power to enact the law, to declare what a law shall be, or to exercise unrestricted discretion in applying a law. Fla. East Coast Indus. v. State, 677 So. 2d 357, 360 (Fla. 1st DCA 1996). The Constitution requires that agency rules include standards to guide regulated persons or entities to comply with the rule, and to govern the agency in applying it. Barrow v. Hollins, 125 So. 2d 749, 752 (Fla. 1960). An administrative rule which creates discretion not articulated in the statute it implements must specify the basis on which the discretion is to be exercised. Otherwise the lack of standards for the exercise of discretion vested under the rule renders it incapable of application in a manner susceptible of review. Cortes v. State Bd. of Regents, 655 So. 2d 132, 138 (Fla. 1st DCA 1995).

48. The undersigned is in agreement with Petitioner that sections (a) through (d) of section (1) of the Rule are impermissibly vague, and do not include any standards that explain how any one of the identified criteria are to be applied in the evaluation of an application. Further, there is no explanation of how the four criteria relate to one another, or are to be weighted, in the context of the Department's evaluation of an application for a permit. As a result, the Department is improperly afforded unbridled discretion, untethered by any guidelines or objective standards with respect

to its review of permit applications. Pursuant to the Rule, the Department can approve or deny a permit application in its discretion, without any consistency in its decisions because of the "play" in the Rule's criteria.[7/]

49. The first criterion is the "potential profitability and financial soundness of the prospective permitholder." Material questions fairly raised, but left unanswered are: What constitutes "potential profitability"? How is potential profitability projected? When must profitability be achieved-the first year, the fifth? How is profitability calculated? How profitable must the prospective permitholder be? At hearing, counsel for the Department stated that projecting that the applicant will earn $1.00 qualifies as being potentially profitable. The Rule does not so state, highlighting the lack of objective standards. What assurance does an applicant have that the Department will apply the "$1.00 equals profitability" interpretation of the Rule? As the Rule is currently worded, the Department has unbridled discretion in deciding what constitutes "potential profitability." Similarly, on its face one cannot discern what is meant by "financial soundness." Such general criteria, without objective standards, afford the Department unauthorized discretion in evaluating permit applications. An applicant could not reasonably ascertain from reviewing the Rule what is required by the Department, or the likelihood of its application being approved. Moreover, meaningful review of the Department's decision would not be possible.

50. The second criterion is "the ability to preserve and protect the pari-mutuel revenues of the state and to ensure the integrity of the wagering pool." Again, questions fairly raised, but left unanswered are: What exactly does this mean? How is it measured? Must the Department conclude that the new permit will increase overall pari-mutuel revenues as a condition to granting the permit? Is it sufficient that the new permit will not have an adverse impact on pari-mutuel revenues? Does it matter if the new permit will have an adverse impact on other permitholders if the net effect is an overall increase in pari-mutuel revenues? How much of an impact must the new permit have before the application will be denied based on this criterion?

51. The third criterion authorizes the Department to consider "the holdings, transactions, and investments of the applicant connected to previous business ventures." Here, some of the questions raised are: How far back in time may the Department look? What is the significance of this criterion? What type of information might the Department learn that would warrant the denial of an application? How important is this criterion in relation to the other three criteria included in the Rule? What if an applicant was involved in an unsuccessful business venture years ago and, thereafter, had many successful business ventures? None of these questions are answered by the Rule. As a result, the Department is impermissibly granted discretion to decide what the terms mean and how they are to be applied in reviewing an application.

52. The fourth criterion is "the existence of any judgment or current litigation, whether civil, criminal, or

administrative, involving the applicant." Unknown is the significance of this criterion. Will the Division apply this criterion and deny a permit application if the applicant has judgments entered in its favor? What if the applicant's holdings are substantial yet it has had judgments entered against it?

53. Based upon the extremely vague wording of the Rule, it is unlikely that an applicant could reasonably surmise what information it should include in its application to enhance the chances of approval. Then, having been made to divine what information might be meaningful to the Department, the applicant is left to guess as to whether its application will be approved, based on the vague criteria included in the Rule.

54. For the reasons stated above, the Rule is impermissibly vague, and therefor invalid.

IX. Arbitrary or Capricious?

55. Finally, Petitioner asserts that the Rule is an invalid exercise of delegated legislative authority because it is arbitrary and capricious. Petitioner maintains the Rule fails to fulfill the intention of the Rule, the Statute, or of any of the statutes it is intended to implement.

> A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational.

§ 120.52(8)(e), Fla. Stat.

56. The analysis for whether a rule is arbitrary and capricious is (1) whether the rule is supported by logic or the necessary facts; and (2) whether the rule was adopted without

thought or is irrational. See Las Mercedes Home Care Corp. v. Ag. for Health Care Admin., Case No. 10-0860RX (Fla. DOAH July 23, 2010); aff'd, 67 So. 3d 1262 (Fla. 1st DCA 2011).

57. As explained in Agrico Chemical Company v. Department of Environmental Protection, 365 So. 2d 759 (Fla. 1st DCA 1979):

> A capricious action is one which is taken without thought or reason and irrationally. An arbitrary decision is one not supported by facts or logic, or despotic. Administrative discretion must be reasoned and based upon competent substantial evidence. Id. at 763.

58. While the undersigned has found that the Rule is invalid due to its vagueness and its failure to establish adequate standards for agency decisions, thereby vesting unbridled discretion in the agency, it cannot be concluded that the Rule is arbitrary and capricious. The Rule was adopted with the intent of giving effect to the application content and evaluation requirements set forth in statute, and therefore cannot be said to be arbitrary. Similarly, the four criteria set forth at section (1) of the Rule do not appear to be the product of caprice, but instead simply lack the clarity, specificity, and standards necessary to give meaningful guidance to applicants and to ensure a fair and consistent evaluation of applications submitted to the Department.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Florida Administrative Code Rule 61D-4.002 constitutes an invalid exercise of delegated legislative authority.

DONE AND ORDERED this 25th day of March, 2015, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of March, 2015.

ENDNOTES

[1/] The agency action challenge was assigned DOAH Case No. 15-0157, and was placed in abeyance pending the issuance of the Final Order in the instant case.

[2/] Unless otherwise noted, all references are to the 2014 version of the Florida Statutes.

[3/] West Flagler Associates, Ltd. v. Dep't of Bus. & Prof. Reg., Division of Pari-Mutuel Wagering, 139 So. 3d 419 (Fla. 1st DCA 2014).

[4/] South Florida Racing Associates, LLC. v. Dep't of Bus. and Prof. Reg., Division of Pari-Mutuel Wagering, 143 So. 3d 1149 (Fla. 3rd DCA 2014).

[5/] In the instant proceeding, the only matter that will be determined is SFRA's rule challenge. By agreement of counsel, all other matters raised in the Petition have been bifurcated from this proceeding, and will be considered at a later hearing, if necessary, in the context of Case No. 15-0157.

[6/] Some Florida courts have held that the failure to name the statute a rule implements should ordinarily be deemed harmless error, in the same way erroneous or incomplete economic impact statements do not render administrative rules invalid unless the deficiencies are material, and impair either the fairness of the rulemaking proceedings or the correctness of the rule. See, e.g., Humhosco, Inc. d/b/a Humana Hosp. Mandarin v. Dep't of Health and Rehab. Servs., 476 So. 2d 258 (Fla. 1st DCA 1985); State Dep't of Ins. v. Ins. Serv. Office, 434 So. 2d 908 (Fla. 1st DCA 1983).

[7/] The lack of articulated standards for qualitative evaluation of applications would be particularly problematic in the instance of multiple applicants comparatively and competitively vying for a single permit franchise.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.