

**STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION**

FILED
AHCA
AGENCY CLERK

NHI SPB OPERATIONS, LLC,

Petitioner,

2019 JAN -7 P 1:53
DOAH CASE NO. 18-1275CON
AHCA NO. 2018002877
RENDITION NO.: AHCA- 19 - 0039 -FOF-CON

vs.

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Respondent.

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (“ALJ”), Elizabeth W. McArthur, conducted a formal administrative hearing. At issue in this proceeding is whether the Agency for Health Care Administration (“Agency”) should grant or deny Petitioner’s second request for a 60-day extension to the validity period of Certificate of Need (“CON”) No. 10412. The Recommended Order entered on July 27, 2018 is attached to this final order and incorporated herein by reference.

RULINGS ON EXCEPTIONS

Respondent filed exceptions to the Recommended Order, and Petitioner filed a response to Respondent’s exceptions.

In determining how to rule upon Respondent’s exceptions and whether to adopt the ALJ’s Recommended Order in whole or in part, the Agency must follow Section 120.57(1)(I), Florida Statutes, which provides in pertinent part:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules

over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. . . .

§ 120.57(1)(l), Fla. Stat. Additionally, “[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.”

§ 120.57(1)(k), Fla. Stat. In accordance with these legal standards, the Agency makes the following rulings on Petitioner’s exceptions:

In its First, Second, Third, Fourth, Fifth and Sixth Exception to the Recommended Order, Respondent takes exception to the following paragraphs of the Recommended Order: 3, 60, 70, 71, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96 and 97, as well as Endnote 2. In doing so, Respondent makes the following arguments: 1) Since Petitioner does not own or have an interest in any land, it cannot be found to have made a good faith effort to commence construction as defined by section 408.032, Florida Statutes, and rule 59C-1.018, Florida Administrative Code; 2) the ALJ erred in equating the term “permitted use” in the Florida Atlantic Research and Development Authority (“FARDA”) handbook with the term “permit” in section 408.040, Florida Statutes; 3) the ALJ erred in finding that exhibits the parties had stipulated to admitting into evidence constituted hearsay; 4) the ALJ erred in concluding

Petitioner met its burden of proof; and 5) the ALJ erred in considering evidence that did not exist at the time the Agency decided to deny Petitioner's extension request.

The Agency is unable to grant any of Respondent's exceptions as they pertain to Paragraphs 3 and 60 of the Recommended Order because these paragraphs contain findings of fact that are based on competent, substantial evidence. See Transcript, Volume II, Pages 221, 231; and Petitioner's Exhibit 12. Thus, the Agency cannot reject or modify them. See § 120.57(1)(l), Fla. Stat.; Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (holding that an agency "may not reject the hearing officer's finding [of fact] unless there is no competent, substantial evidence from which the finding could reasonably be inferred").

The Agency is unable to grant Respondent's Fourth Exception, which pertains to Paragraphs 88, 89, 90 and Endnote 2 of the Recommended Order, because the conclusions of law in these paragraphs concern the evidentiary issue of whether exhibits, which the parties have stipulated can be entered into evidence, are hearsay because the conclusions of law are outside of the Agency's substantive jurisdiction. See Barfield v. Department of Health, 805 So. 2d 1008 (Fla. 1st DCA 2002). Thus, the Agency is unable to reject or modify them.

The Agency denies Respondent's First, Second and Fifth Exceptions¹ to Paragraphs 70 and 71 (which are conclusions of law erroneously labeled as ultimate findings of fact) and Paragraphs 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 91, 92, 93, 94, 95, 96 and 97 of the Recommended Order because, while it does have substantive jurisdiction over the conclusions of

¹ In denying Petitioner's First, Second and Fifth Exceptions, Petitioner's Third Exception, which deals with the issue of whether ALJ erred in equating the term "permitted use" in the Florida Atlantic Research and Development Authority ("FARDA") handbook with the term "permit" in section 408.040, Florida Statutes; and Petitioner's Sixth Exception, which deals with the issue of whether the ALJ erred in considering evidence that did not exist at the time the Agency decided to deny Petitioner's extension request (and is also outside of the Agency's substantive jurisdiction) are rendered moot and need not be addressed.

law in these paragraphs, the Agency is unable to substitute conclusions of law that are as or more reasonable than those of the ALJ.

FINDINGS OF FACT

The Agency hereby adopts the findings of fact set forth in the Recommended Order.


CONCLUSIONS OF LAW

The Agency hereby adopts the conclusions of law set forth in the Recommended Order.

ORDER

Based upon the foregoing, Petitioner's request for an extension of CON No. 10412 is hereby granted, and the validity period of CON No. 10412 is hereby extended for an additional sixty (60) days from the date of rendition of this Final Order. The parties shall govern themselves accordingly.

JMS 9
DONE and ORDERED this 7th day of January, 2018, in Tallahassee, Florida.



JUSTIN M. SENIOR, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

NOTICE OF RIGHT TO JUDICIAL REVIEW

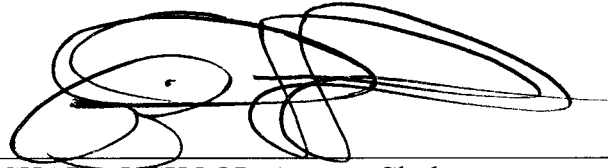
A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO A JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A SECOND COPY ALONG WITH THE FILING FEE AS PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA

APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF
RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order has
been furnished by the method indicated to the persons named below on this 28 day of

January, 2018.



RICHARD J. SHOOP, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, MS #3
Tallahassee, Florida 32308-5403
(850) 412-3630

COPIES FURNISHED TO:

Honorable Elizabeth W. McArthur
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(via electronic filing)

Richard J. Saliba, Esquire
Nicole M. Barrera, Esquire
Assistant General Counsels
(via electronic mail to Richard.Saliba@ahca.myflorida.com,
and Nicole.Barrera@ahca.myflorida.com)

John F. Gilroy III, Esquire
John F. Gilroy III, P.A.
Post Office Box 14227
Tallahassee, Florida 32317
(via electronic mail to john@jgilroylaw.com)

Marisol Fitch
Certificate of Need Unit
(via electronic mail to Marisol.Fitch@ahca.myflorida.com)

Jan Mills
Facilities Intake Unit
(via electronic mail to Janice.Mills@ahca.myflorida.com)

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NHI SPB OPERATIONS, LLC,

Petitioner,

vs.

Case No. 18-1275CON

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

_____ /

RECOMMENDED ORDER

On May 9, 2018, Administrative Law Judge Elizabeth W. McArthur of the Division of Administrative Hearings (DOAH) conducted a disputed-fact hearing in Tallahassee, Florida.

APPEARANCES

For Petitioner: John F. Gilroy, III, Esquire
John F. Gilroy, III, P.A.
Post Office Box 14227
Tallahassee, Florida 32317

For Respondent: Richard Joseph Saliba, Esquire
Nicole M. Barrera, Esquire
Agency for Health Care Administration
Fort Knox Building III, Mail Stop 7
2727 Mahan Drive
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner's second request for a 60-day extension to the validity period of certificate of need (CON) No. 10412 should be granted or denied.

PRELIMINARY STATEMENT

By letter filed with the Agency for Health Care Administration (AHCA or Respondent) on January 29, 2018, NHI SPB Operations, LLC (NHI or Petitioner), requested a second 60-day extension (having previously received one 60-day extension) to the validity period of CON No. 10412, authorizing a 111-bed community nursing home in Palm Beach County.

AHCA responded by letter dated February 6, 2018, setting forth its proposed agency action to deny the extension request, and informing NHI of its right to request a hearing pursuant to chapter 120, Florida Statutes (2017),^{1/} the Administrative Procedure Act (APA).

NHI timely requested a disputed-fact administrative hearing. AHCA transmitted the case to DOAH and requested the assignment of an Administrative Law Judge to conduct the proceeding and submit a recommended order to AHCA.

The final hearing was scheduled for May 9, 2018. At AHCA's request, a video teleconference connection was made available in Fort Lauderdale for the convenience of one or more local witnesses who might be called to testify.

AHCA filed a Motion to Relinquish [Jurisdiction] on April 12, 2018, to which NHI responded on April 19, 2018. The motion was denied by Order issued April 27, 2018. AHCA filed a Motion in Limine on April 30, 2018, to which NHI responded on

May 4, 2018. The motion was denied on the record at the outset of the hearing. (Tr. at 10-12).

At the hearing, Petitioner presented the testimony of three witnesses: Christopher Peters, an asset management consultant who represented the sellers of the sub-leasehold interests in the property intended for the nursing home site; Gary Dunay, Esquire, real estate counsel to NHI, its parent company, and a related company for the project at issue; and Paul Walczak, Petitioner's corporate representative, who is the managing member of the parent company that wholly owns both NHI and the related company. Petitioner's Exhibits 1 through 8, 11, and 12 were admitted in evidence. Petitioner's Exhibit 9 was admitted in evidence, but not for the truth of the matters asserted therein. Petitioner's Exhibit 10 was officially recognized.

AHCA offered the testimony of Marisol Fitch, supervisor of AHCA's CON unit, who was accepted as an expert in certificate of need and health care planning. AHCA's Exhibits 1 through 17 and 21 were admitted in evidence by stipulation, subject to any hearsay issues.^{2/}

At the conclusion of the hearing, the undersigned informed the parties of the uniform rule's standard ten-day deadline after the filing of the transcript for the parties to file proposed recommended orders (PROs). The two-volume Transcript was filed June 1, 2018. On June 6, 2018, Petitioner filed an agreed motion

for a seven-day extension to the PRO filing deadline, which was granted.^{3/} The parties timely filed their PROs by the extended deadline, and their filings have been considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Petitioner NHI holds CON No. 10412, which authorizes the establishment of a 111-bed community nursing home by new construction in Palm Beach County. CON 10412 was issued June 16, 2016, and had an initial termination date of December 17, 2017.

2. The nursing home was not approved pursuant to a determination that additional beds were needed under a "fixed need pool" calculation. See Fla. Admin. Code R. 59C-1.008(2) (fixed need pool rule); Fla. Admin. Code R. 59C-1.036 (nursing facility bed need rule). Instead, as set forth in the CON's conditions, the 111-bed nursing home will replace a 51-bed nursing home, which will delicense its beds, and 60 beds of a 120-bed nursing home, which will delicense half of its beds.

3. NHI is a wholly-owned subsidiary of NuVista Health Care Investors ("NuVista"); NuVista is NHI's sole member. The parent, NuVista, has structured this project in a manner common for this type of project, with one wholly-owned entity created to serve as the asset holder or "prop-co" (i.e., property company) and another wholly-owned entity created to serve as the license holder or "op-co" (i.e., operating company). NHI is the "op-co"

that obtained the CON and that will license and operate the facility. A different entity, SPB HRE Investments, LLC (SPB HRE), whose sole member is also NuVista, was created to serve as the "prop-co" for asset ownership. The two entities, which have the same principal address and same mailing address, were formed on the same day, about six weeks before a letter of intent was filed with AHCA as the first step to be eligible for filing a CON application in the review cycle in which NHI applied.

4. The parent, NuVista, is coordinating this nursing home project. NuVista is experienced in the health care industry, and has successfully completed projects in multiple states, including Florida, that involved funding, designing, constructing, licensing, and operating health care facilities. At its peak, NuVista had 27 facilities in Florida that it owned, operated, constructed, and/or renovated. It has developed four Florida CON-approved facilities from the ground up, including two in Palm Beach County: a nursing home in Wellington that has been in operation since 2011, and another nursing home in Jupiter that is under construction. No evidence was offered to question NuVista's experience or successful track record in this regard.

5. CON 10412 authorizes the nursing home project at issue to be located anywhere in Palm Beach County.^{4/} NuVista chose to pursue establishing this project in a research park adjacent to the Florida Atlantic University (FAU) Boca Raton campus, known as

the Research Park at FAU. The location was chosen because of its unique potential for a collaborative, research-driven endeavor, integrating the activities of FAU's colleges of nursing, medicine, business, and engineering by providing training, educational, and research opportunities.

6. The Research Park at FAU is the trademarked name for the property under the leasehold control of the Florida Atlantic Research and Development Authority (FARDA). FARDA is a research and development authority established pursuant to sections 159.701 through 159.7095, Florida Statutes. FARDA was created in 1985 as a public instrumentality through the combined resolutions of Palm Beach County and Broward County for the purposes of development, operation, management, and financing of a research and development park. See § 159.703(1), Fla. Stat. As a research and development authority, FARDA's statutory purpose is to promote scientific research and development affiliated with and related to the research and development activities of one or more institutions of higher education, and to foster the economic development and broaden the economic base of the two counties. See § 159.701, Fla. Stat.

7. FARDA is a collegial body with seven members: three members are appointed by Palm Beach County; three members are appointed by Broward County; and the seventh member is FAU's president or the president's designee. As a collegial

governmental body, FARDA meets at noticed public meetings to take official action. Regular meetings are held every other month, six times per year. In addition, when needed, special meetings can be noticed and held.

8. The Research Park at FAU (Research Park) includes 55 acres of land on the north side of FAU's Boca Raton campus, in the city of Boca Raton, near the southern border of Palm Beach County. This was FARDA's first property, and remains the main property under FARDA's jurisdiction to carry out its statutory functions and purposes. The land is owned by the state Board of Trustees of the Internal Improvement Trust Fund and was leased to FARDA in 1986. In 2003, FARDA added to the property under its jurisdiction, by leasing 16 acres from the City of Deerfield Beach in Broward County.

9. FARDA members do not devote full time to the development, administration, and management of the property in their charge. The members all have day jobs and professions apart from their FARDA service. FARDA's bylaws authorize FARDA to create "non-member administrators" to assist FARDA members to carry out their responsibilities. The two administrative offices authorized are the position of President/Chief Executive Officer, who is responsible for carrying out FARDA's plans, purposes, and objectives, and the position of legal counsel to address the legal sufficiency of FARDA actions and to represent FARDA.

Andrew Duffell is the administrative officer in the position of President/CEO. George Pincus is FARDA's legal counsel.

10. In 1995, FARDA took action to develop the Research Park indirectly, by selecting a third party "developer," Boca/Research Park Ltd., to whom most or all of the parcels in the Research Park would be subleased. In preparation for that sublease, FARDA adopted a Declaration of Covenants and Restrictions to bind and run with the Research Park property. The Declaration provided that the day-to-day administration and management of the Research Park would be turned over to a not-for-profit corporation to be formed and known as the Florida Atlantic University Research and Development Park Maintenance Association (Maintenance Association).

11. While not itself a governmental entity, the Maintenance Association was created pursuant to FARDA's Declaration to function similarly to a homeowner's association by, among other things, maintaining the Research Park's common areas and utility easements, identifying and approving needed capital improvements, imposing regular assessments on parcel sub-lessees to cover maintenance costs and special assessments to fund capital improvements, and administering the ARB functions to review and approve planned improvements to be constructed on Research Park parcels, and make recommendations to FARDA to approve (or not approve) the planned improvements. Creating this type of

property owners' association was necessary to spread the maintenance and capital improvement costs among the Research Park sub-leasehold owners, because FARDA does not have the power to impose taxes or assessments.

12. FARDA more directly controls the uses and users of property in the Research Park, pursuant to a section of the Declarations called Regulation of Uses/Users. According to the Declarations, a proposed sublease transaction is subject to a FARDA approval process, which requires one of the following: an "Authority permitted use" consistent with FARDA's public purposes; an "approved user relationship" with FAU; or a provision in the sublease for the sub-lessee to pay a user surcharge.

13. The procedure by which a prospective sub-lessee is to seek and obtain FARDA's approval for the proposed sublease and the intended use of the parcel(s) is not formally defined or described in any document. Historically, FARDA has followed a practice of requiring the prospective tenant to prepare a "white paper" describing the intended use and collaborative relationships with FAU. FARDA provides the white paper to a "Technology Review, Advisory and Innovation Committee" (TRAC) for its review and recommendation, and then FARDA makes the final decision whether to approve the proposed tenant and intended use as set forth in the white paper.

14. Before CON 10412 was issued, representatives of NuVista began negotiations with representatives of the sub-lessees of two adjacent parcels in the Research Park (parcels five and eight), for the sale and purchase of the sub-leasehold interests. The NuVista plan from the beginning was to combine the two adjacent parcels for use as the nursing home site.

15. Representatives of the sellers and NuVista met with FARDA's administrator, Mr. Duffell, to determine the process necessary to obtain FARDA approval for the proposed transaction and the intended use. Mr. Duffell explained the process FARDA had followed in the past, and reported that the process would take roughly four months based on past experience. That information helped guide the terms of the Agreement for Sale and Purchase of the sub-leasehold interests in parcels five and eight in the Research Park.

16. The Agreement for Sale and Purchase was executed on June 15, 2016, the day before CON 10412 was issued. For the seller, the contract was executed by two subsidiary-entities of Boca R & D Finance, which was the assignee of the original developer, Boca/Research Park, Ltd.^{5/} For the buyer, the contract was executed by SBP HRE, the NuVista "prop-co" for the project that had become known as NuVista Living at Boca Raton.

17. The contract terms provided for a fairly short window of time for the buyer to obtain a survey of the property and to

submit plans and specifications for the improvements to be constructed on the combined parcels to the sellers and to FARDA for review and approval. A longer (and extendable) period of 210 days after the contract was executed was provided for obtaining specified approvals necessary to allow the parcels to be combined and used as the site for construction of the nursing home. These included obtaining FARDA approval of the intended use and user, and securing the abandonment or vacation of the portion of a roadway—Northwest Seventh Avenue—that ran between the two adjacent parcels so the nursing home could be built across the combined parcels. The contract gave the NuVista “prop-co” the right to pursue these necessary approvals, and NuVista immediately took steps to accomplish them.

18. With regard to obtaining FARDA approval, NuVista followed the procedures outlined by Mr. Duffell. A NuVista team of professionals participated in a series of meetings with FAU representatives from the colleges of nursing, medicine, engineering, and business to discuss collaborative activities. The NuVista team then worked together to develop the white paper, which was completed in the first month after the CON was issued. The white paper was submitted to Mr. Duffell for presentation to FARDA and to the TRAC for review and recommendation. FARDA considered the white paper at its July 27, 2016, public meeting,

as reflected in the following excerpt of the FARDA official minutes:

NuVista White Paper

President Duffell informed the Authority that NuVista had presented a White Paper and held multiple meetings with FAU faculty and staff to establish collaborative relationships. The concept is for the construction of a 120-bed^[6/] post-acute care facility that would provide multiple learning and research opportunities for FAU while improving patient outcomes. The meetings and ensuing discussions had led to a positive recommendation from TRAC. He then invited NuVista to discuss their project with the Authority.

Ms. Fago outlined the concept of the project and later Mr. Walczak added comments; both discussed the possibility of improving outcomes and cutting waste in healthcare. NuVista is already innovating in this industry and has a facility in Wellington, FL with another under construction in Jupiter next to the FAU campus.

Authority members asked how the company would interact with the University and discussed the direction the Research Park was taking: a critical mass of healthcare and healthcare IT companies that complemented the direction of FAU's Boca Raton campus.

RESOLUTION 16-7 OF THE FLORIDA ATLANTIC RESEARCH AND DEVELOPMENT AUTHORITY APPROVING SPB HRE INVESTMENTS, LLC D/B/A NUVISTA LIVING AT BOCA RATON'S TENANCY IN THE RESEARCH PARK AT BOCA RATON; PROVIDING FOR SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.

A motion to approve the Resolution 16-7 was made . . . and seconded The motion passed 5-0, with 2 members absent.

19. NuVista also proceeded immediately after entering into the contract for the sublease to put together the plans and specifications on the improvements to be constructed, as required for submission to FARDA. The required submissions were prepared by two different architectural firms. In addition, at the recommendation of the asset manager for the sellers, NuVista retained Mark Smiley as project engineer. Mr. Smiley had been working as an engineer consultant for the Maintenance Association for many years, and was very familiar with the Research Park.

20. One of the NuVista architectural firms submitted the following package to Mr. Duffell on July 15, 2016:

- White Paper
- Certificate of need
- Preliminary Site Plan
- Preliminary Landscape Plan
- Schematic Building Elevations
- Schematic Building Floor Plans
- Survey
- Schematic Engineering Plans

21. The plans and specifications were provided to the ARB for its review, approval, and recommendation to FARDA.

22. An ARB meeting was held on August 17, 2016, at which detailed comments were made with regard to the submissions, in the following categories: site plan; elevation; landscape; civil; deviation and variance table; and interlocal agreement issues. NuVista's architects prepared responses, point by point, in an August 29, 2016, submission.

23. One ARB comment was to ask for a traffic analysis to gauge the impact on existing streets. Accordingly, NuVista retained the Wantman Group, Inc., which prepared a traffic analysis and evaluation, dated August 23, 2016. The traffic analysis was submitted with the architects' August 29, 2016, response to the ARB.

24. In the "civil" area, one ARB question was: "When will confirmation of the sanitation plan be available?" The response was as follows: "The proposed route is reflected on the revised plan. Due to elevations, re-route of [wastewater lines from] existing building to the north to go to the existing R&D Lift Station. This will assist with future decisions by the Park as discussed with John Wargo and the Park. Capacity to the lift station is not an issue." (AHCA Ex. 2, 8/29/16 response letter at 4).

25. Follow-up ARB meetings were held on September 12 and 15, 2016, generating a second round of comments. A significant comment in the "civil" section was as follows:

The [ARB] Committee has been advised that the University's Hubbard Lift Station, which is the current downstream receiver for the Park's wastewater, is at full capacity and cannot receive additional flows without an upgrade/replacement. The Applicant is strongly advised to consult with its engineer, the Developer and FARDA to explore alternatives for addressing the issue. (emphasis added).

26. Shortly after these follow-up ARB meetings, at the September 28, 2016, FARDA meeting, Mr. Duffell reported in his "President's Report" that he was "[w]orking with NuVista on its plans in the Research Park, which has involved liaison with the City [of Boca Raton], Maintenance Association, and others."

27. NuVista's architects responded similarly to the ARB's wastewater comment, reporting as follows in the November 7, 2016, point-by-point response to the ARB's second round of comments: "Mark Smiley, the Project Engineer, is coordinating this with FARDA."

28. Despite the unresolved wastewater capacity issue, which remained looming, the ARB gave its approval of the site plan submission, and recommended it for approval by FARDA. FARDA reviewed and approved the site plan submission at its regular meeting on January 25, 2017.^{7'}

Impediment One: Resolving the Wastewater Capacity Problem

29. In fact, Mr. Smiley had been attempting to coordinate with FARDA and the Maintenance Association regarding the wastewater disposal system for the Research Park for many years preceding NuVista's involvement. The additional development represented by the NuVista project, as well as FARDA's desire to make the Research Park viable for future development, spurred movement in the direction of resolving the problem.

30. Wastewater disposal in flat terrains such as the Research Park and FAU campus depends on lift stations, which operate as pumps to lift up sewage flowing in sewage lines so that the flow will continue down to the next lift station. Historically, wastewater disposal lines ran from the Research Park to the Hubbard lift station, which is owned and operated by FAU on FAU's campus. From the Hubbard lift station, the sewage is pumped through lines running to the east and connecting to the City of Boca Raton's sewage system. There is one lift station within the Research Park, and it has been used to move wastewater from more remote Research Park parcels to the Hubbard lift station. Thus, as historically configured, all wastewater from the Research Park flowed through FAU's Hubbard lift station.

31. Wastewater disposal is a utility service, and a perpetual easement is recognized for the establishment, maintenance, and improvement of the sewage disposal lines throughout the Research Park. The cost of establishing, maintaining, and improving the lines and any other necessary capital improvements for the sewage disposal system is raised through the Maintenance Association's regular and special assessment authority, as set forth in FARDA's Declaration of Covenants. Ultimately, though, FARDA must ensure that the Research Park at FAU is serviced by appropriate utilities.

Otherwise, FARDA will be unable to meet its responsibilities to promote development and economic growth within the Research Park.

32. As early as 2009, Mr. Smiley, the Maintenance Association's engineer, determined that there could be problems with wastewater disposal in the future without improving/upgrading the FAU Hubbard lift station or coming up with alternative system improvements to re-route the Research Park wastewater to flow directly to and connect with the City of Boca Raton's sewage disposal system.

33. The FAU Hubbard lift station was apparently adequate to receive the capacity generated by the Research Park with no additional development, but with the addition of NuVista's nursing home and more future development in the Research Park, the Hubbard lift station would require upgrades if the Research Park continued to route its wastewater through FAU's lift station for disposal. FAU apparently was pushing the Maintenance Association to help pay for upgrades to the Hubbard lift station. However, Mr. Smiley conducted an analysis of the options, which led to the decision to re-route the Research Park's wastewater discharge to go through the existing Research Park lift station and connect directly to the City of Boca Raton sewage system. This was seen as the more economical and appropriate way, in the long run, to address the future wastewater disposal needs of the Research Park, rather than to upgrade the Hubbard lift station.

34. Mr. Smiley met with City of Boca Raton staff in December 2016 to plan for the re-routing of wastewater discharge directly into the City's system.

35. The FARDA Economic Development Plan for 2017-2022, prepared during the months leading up to FARDA's March 22, 2017, meeting where it was approved by FARDA, included the following:

The Authority has the opportunity to enhance the Research Park's Boca Raton property through a number of initiatives.

* * *

Partner with stakeholders to enhance the sense of place:

* * *

- Maintenance Association, City of Boca Raton - waste water capacity

36. While it is unclear what actions FARDA has taken pursuant to this initiative, at least FARDA has acknowledged its responsibility for ensuring that appropriate infrastructure is in place to allow development.

37. The contract to purchase the sub-leasehold interests in parcels five and eight has been amended three times to keep the contract viable and extend the closing. The third amendment, executed on September 19, 2017, added as a condition precedent to the closing that the Maintenance Association must have substantially completed the new sewer line installation up to the property being acquired. It would then be the buyer's

responsibility to install lines from the property to connect to the new sewer line that will carry the wastewater to the City of Boca Raton's system.

Impediment Two: A Roadway Runs Through It

38. Meanwhile, NuVista has been working on one other impediment to proceeding with its project. Unlike the wastewater capacity issue, which was not revealed to NuVista until the ARB site plan review meetings in the months after the contract was signed, this other impediment was known as an obvious hurdle from the outset, albeit the solution was viewed to be a relatively easy, standard one. As explained by Mr. Peters, the then-asset manager for the sellers, road abandonment issues are not uncommon in developments like this one, where the proposed project necessitates combining separate parcels. Combining separate parcels into one parcel renders the bisecting roadway unnecessary. Usually, such roadway abandonment issues are easy to solve because the roadway is owned by a municipality or county and the solution is as simple as providing some compensation for the property.

39. As is obvious from a quick glance of any schematic showing parcels five and eight in the Research Park, there is a roadway between the adjacent parcels, identified as Northwest Seventh Avenue. From the outset, NuVista has been working on a solution that would have FARDA, as the lessee of the Research Park

property pursuant to the Senior Lease with the Board of Trustees of the Internal Improvement Trust Fund, abandon the roadway so as to allow the two parcels to be joined as one for construction of the nursing facility building. As shown by repeated references in FARDA meetings, FARDA appeared to be amenable to solving this problem. This would stand to reason, as FARDA approved the site plan showing a building built across both parcels, and, thus, across the roadway.

40. After a long search to identify the right lease instruments covering the roadway, a lease produced by Mr. Pincus was believed to be the right one, and FARDA adopted a resolution in March 2017, that purported to abandon the roadway. However, it was later determined that the lease used for the resolution was not the right one, so the resolution was not effective to abandon the road.

41. NuVista's attorneys attempted more records searches, and then went to work to craft language to effectively abandon the roadway, despite not having the correct lease. The document believed to accomplish this was completed in August 2017, and provided to Mr. Duffell with a request to present the matter at a FARDA meeting. That had not happened by November 15, 2017.

42. The document to accomplish the abandonment of the roadway segment between parcels five and eight is an exhibit to the third amendment to the contract to acquire the sub-leasehold

interests in those parcels. The buyer's receipt of executed signature pages from all parties to the instrument was made the second condition precedent to closing on the contract.

CON Extension Requests

43. With the delays caused by the wastewater capacity problem and the roadway abandonment problem, on November 15, 2017, NHI had its Tallahassee health planning consultant and authorized representative before AHCA submit a request to AHCA for a 60-day extension to CON 10412, pursuant to section 408.040(2)(c), Florida Statutes, and Florida Administrative Code Rule 59C-1.018(3).

44. As an overall point, the request noted that there have been "unanticipated delays related to planning and zoning requirements[,] " and that the location of the project within the FAU Research and Development Park, which is governed by FARDA, "delays the approval process for development but offers advancements in senior care through research and training opportunities once the project materializes."

45. The request summarized the sewer capacity problem within the Research Park that has stymied additional development, but that "[u]nder authority of FARDA, Smiley & Associates, Inc., is developing plans to add capacity to the park by tying into the city's sewer system." Documentation attached to the letter included the ARB site plan review comments that identified the problem and urged NuVista to coordinate with Mr. Smiley and FARDA

to come up with alternative solutions that did not involve the Hubbard lift station, as well as Mr. Smiley's October 30, 2017, letter summarizing his numerous meetings to identify and develop solutions, including meetings with the City of Boca Raton. Based on the information available at that time, the sewer tie-in was not expected to be complete until the first quarter of 2018 at the earliest.

46. The extension request also raised the problems encountered in securing an effective abandonment of Northwest Seventh Avenue, which remained pending.

47. The extension request concluded by noting: "Until the road abandonment and sewer tie in issues are resolved, [construction] plan submission to the ARB and to AHCA, Office of Plans and Construction (OPC) are delayed."

48. An updated Project Completion Forecast was provided with the request, estimating that pursuant to the revised forecast, construction was expected to commence by January 1, 2019. As such, the request noted: "Therefore, in addition to the current request for a 60-day extension, additional extensions will be necessary to allow sufficient time to resolve the road abandonment and sewer tie in issues and to meet the regulatory requirements from both [AHCA] and FARDA."

49. AHCA approved the documented request and updated project completion forecast, and issued the requested 60-day extension.

The new CON termination date was set at February 14, 2018, but AHCA also noted that another request for a 60-day extension could be submitted by January 30, 2018.

50. A second request for extension was timely filed on January 29, 2018, by the same health planning consultant. This request reported that the same two impediments detailed in the first request continued to delay commencement of construction. The evidence at hearing supported this assertion. Completion of the sewer tie-in project and abandonment of the roadway must first occur for the contract to close. Once these impediments are removed and the contract is closed, then the pathway to construction will return to the more typical path of finalizing construction documents in conjunction with AHCA's Office of Plans and Construction, the City of Boca Raton, and FARDA, finalizing construction financing, securing approvals for construction, and finally, commencing construction.

The Sideshow: FARDA Limited-Life Approval and Do-over

51. In addition to the two impediments of the wastewater capacity and road abandonment, another point had developed before FARDA that had to be resolved. As of the submission of the second extension request, resolution of the matter was pending.

52. In short, FARDA staff took the position that the resolution approving NuVista as a tenant and approving the intended use expired when NuVista had not commenced construction

within one year. That is, indeed, what the resolution says, although it is unclear why the duration of user and use approval would expire in one year or why the approval is cast in terms of commencing construction.

53. NuVista made two arguments against the position of FARDA's staff: one, that the approval could be extended because construction was delayed due to the sewer capacity problem in FARDA's Research Park and the problems identifying the right documentation to effect the necessary road abandonment; or two, that the FARDA approval was a development order that was tolled by a series of executive orders declaring states of emergency for one reason after another, each of which extended the effective date.

54. At the time of NHI's first 60-day extension request, FARDA had recently met and addressed NuVista's request to extend the approval. FARDA's attorney questioned FARDA's authority to extend or reissue its approval of NuVista as tenant and the intended use for a nursing facility, even though there were no changes. Rather than extend or reissue its approval, FARDA instead invited NHI to "resubmit" a new white paper, while assuring NuVista that the process would be expedited.

55. This hitch was not mentioned in the first extension request. AHCA may have assumed the omission was for nefarious purposes, but the credible evidence at hearing does not support that inference. Instead, it was not unreasonable for NuVista to

assume at that time that the resubmittal of what had already been reviewed and approved was a mere formality, since nothing had changed in terms of the tenant or the intended use. The delay caused by having to go back through FARDA's use approval process was not viewed as itself an impediment to commencing construction, because the wastewater discharge project was still slowly making its way through multiple levels.

56. By the time of the second extension request, there were signs that FARDA's re-approval would not be easily secured as a formality. Included with the second extension request was documentation of the December 2018 meeting at which several FARDA members wanted more details fleshed out with FAU colleges, and NuVista agreed to try to provide what was requested. Also included was documentation of the January 23, 2018, FARDA meeting at which FARDA wanted more concrete relationships with FAU, in the form of memorandums of understanding from four colleges. FARDA voted to conditionally approve the resubmitted white paper, conditioned on obtaining the memorandums of understanding in 60 days, and returning before FARDA for final approval.

57. As recently observed by several FARDA members, NuVista was made to go through more steps than any other applicant seeking use approval in FARDA's history.

58. AHCA denied the second extension request. Although AHCA was satisfied with the CON holder's showing in the first extension

request that good faith commencement of construction was delayed due to governmental action/inaction in providing adequate wastewater disposal capacity and accomplishing the road abandonment, AHCA questioned the sufficiency of the same grounds for the second extension, because of the ancillary issue that NuVista was in the process of seeking re-approval from FARDA for the intended use, and had only attained conditional approval as of the second request.

59. At hearing, Ms. Fitch explained that in her view, if the CON holder did not have use approval from the governmental entity, FARDA, its good faith commencement of construction could not be delayed by the wastewater capacity problem or the road abandonment problem. Yet the evidence is clear that FARDA had given conditional approval of the resubmitted white paper by the time of the second extension request. FARDA had certainly not denied use approval. Instead, FARDA had asserted its position that NuVista's use approval lapsed, and while NuVista had a valid contrary argument, NuVista also chose to acquiesce in the process that FARDA had "invited" NuVista to follow, by resubmitting the white paper and jumping through whatever hoops FARDA was asking of it.

60. At hearing, NHI was permitted (over AHCA's objection) to present evidence proving that on April 25, 2018, FARDA met again and approved the resubmitted white paper. Thus, NuVista has once again secured FARDA approval and has an "Authority permitted use"

of the property if it commences construction within one year from April 25, 2018.

61. At the April 25, 2018, FARDA meeting, FARDA members asked many questions about the delay in resolving the wastewater capacity problem. The questions reflected the impression that the City of Boca Raton was taking too long. Mr. Maclaren, attorney for both the developer and the Maintenance Association responded: "By any measure, efforts have been ongoing to address that issue, but it is not a simple issue, because . . . [e]very time you get one peg it's like whack-a-mole, another one pops up."

62. FARDA member Whelchel, who is one of two FARDA members on the Maintenance Association board, made the following observations about the sewage disposal capacity:

Ms. Whelchel: I have a question. . . . Maybe more of a statement. I attended as a new member, everyone has a position on the board, you know, the president, the chairman, the secretary . . . and in my case I was appointed to that [Maintenance Association] board, and we met, I met one time, [Mr. Maclarin was] in the room, John Wargo was in the room, et cetera. I haven't met with that board since so it's been quite some number of months ago. So I guess I am just, I guess, since, until we [solve] a water sewer problem, then nothing is ever going to change, because you got to have it. I mean, you just can't build buildings and not, not have a system, you know, that's working.

Mr. Maclarin: I think no one understands that issue, better than you.

Ms. Whelchel: So what, what's the delay again? I know, I am asking rhetorical questions here, but

Mr. Maclarin: It would appear, based on experience, that there is no delay. . . . [F]rom my experience, it would be inappropriate and perhaps mischaracterized as a delay we think is moving forward with a pace that can be achieved, certainly it could go quicker, but anytime you're dealing with multiple parties, particularly a circumstances like this -

Ms. Whelchel: -- Well, I guess my concern, I am not sure why, I don't know that we have to do it, but someone's got to do it, and if we have to do it, then we should do it. I mean somebody's got to, have to move forward.

Mr. Daskal: Well, I think the issue is that, that, that they need, they need approval on the white paper, they need to get the water and sewer, they need to get the [road] abandonment, they need all of these things to go forward, but you know, right now we're only dealing with the approval, we're not dealing with the maintenance association today, that's just a point they're making. (Pet. Ex. 12 at 25-27).

63. At the request of FARDA members, the asset manager for the sellers/developer provided an update to FARDA on the wastewater disposal project. As stated in the first extension request, neither the Research Park's ARB nor AHCA are going to approve final construction documents for the nursing facility until the City of Boca Raton has completed the upgrades needed to its system to allow the tie-in for the whole Research Park, followed by completion of sewer line installation by the

Maintenance Association from the City's sewer system to parcels five and eight. The updated report was as follows:

The preliminary phases of the sewer project are, for the most part, completed. The construction drawings are completed. They were submitted to the city, we received comments back from the city, the comments were woven into the documents, resubmitted to the city, and we've obtained approvals. Permits have been processed, and we have what are known as "bid documents," we have construction documents that are ready to be submitted to a group of general contractors, so that they can bid on the project. We have an estimated cost to complete the project, to put things in perspective for the board. We have roughly between five- and \$700,000.00, um 76% of that is funded by the developer. So, yes there are other stake holders in the process, but the developers for the most part, a majority funds in that process. The developer has funded these funds, we're fully funded on that. We're holding them in escrow, subject to the documents being ((INAUDIBLE)). We expect the bid documents to be submitted to the general contractor the week of May 7th, we expect to award a contract the week of May 21, and we expect that project to be completed roughly, August 15th. So while this has been a need and Meir Whelchel, you had asked a question earlier, why this hadn't been addressed earlier? It was- I believe the board, I believe the maintenance association was aware of the need for increased capacity should the park continue to expand in its development and its need. So, as a result of the continued expansion and development within the park, it's now come to the board's attention that this is required. So it's sort of a shifting here between the University and the city, as it relates to the sewer capacity, because there are a number of stake holders and users that these, for the sewer facilities, but to be perfectly clear, we're, we're 80% there.

The construction drawings are done, the permits have been issued, we're going to let the contracts to the general contractors, and expected completion date on this is mid-August. (Pet. Ex. 12 at 31-33).

64. The bottom line is that for FARDA to carry out its responsibility to promote development of the Research Park, it must see to it that the sewage capacity problem is solved to allow future development, starting with Petitioner's project. While technically correct to say to that it is the function of the Maintenance Association to carry out the tasks of planning the capital improvement, levying the special assessment, collecting the funds, and working with the City of Boca Raton to accomplish the extension of sewage lines from the City's system, all of these tasks are for the purpose of allowing new development in FARDA's Research Park, apparently the first new development in over a decade, according to FARDA member Mr. Rosetto ("This park hasn't done much of, of anything over the last ten years") (Pet. Exh. 12, second segment, at 4), and Mr. Maclarin, attorney for the Maintenance Association and the developer ("[W]e have not had any development occur in the park in 12 years. This is our opportunity to have it.") (Pet. Exh. 12 at 19). Indeed, FARDA has adopted an initiative to partner with the Maintenance Association and the City to address the wastewater capacity problem so as to attract new development.

65. As AHCA previously determined, the impediments to commencing construction are due to governmental action or inaction with respect to regulations or permitting. Having made that determination on the first extension request, it would be arbitrary for AHCA to find otherwise now.

66. In terms of the timeline for the sewage system project, it is unclear whether the process has been unduly delayed, but it has taken time for the governmental action necessary to allow the project to go forward to completion. Once the problem was brought home as one that had to be resolved to allow NuVista's project to go forward, steps were taken to identify options, determine the costs of those options (including the City of Boca Raton identifying the upgrades needed to its system to accept the connection of new Research Park lines, and then pricing those upgrades), and have the capital improvement approved by the Maintenance Association Board. Then the Maintenance Association had to make and collect special assessments. Then the Maintenance Association had to obtain permits to lay the sewage lines from the City of Boca Raton's system to the Research Park lots. Meanwhile, the City of Boca Raton had to carry out the improvements to its system that it had determined were necessary to accommodate the Research Park connection.

67. As to the roadway abandonment, consideration of the new document was placed on the FARDA agenda for its January 23, 2018,

meeting. However, Mr. Duffell asked FARDA to defer the item so the document language could be studied further, and FARDA agreed.

68. Now that FARDA has reissued its user/use approval, it is anticipated that the road impediment will be resolved soon.

69. AHCA's CON supervisor, Marisol Fitch, testified that the "good faith" part of the CON extension statute is an inquiry into whether there is evidence of stalling to buy time, instead of moving the project forward to commencement. She was unable to offer a reasonable explanation of what record evidence would cause her to question Petitioner's good faith. Instead, she said that there might be some discrepancies as to timelines, and she pointed to the fact that NuVista had not closed on the contract to acquire the sublease or arranged construction financing. However, under the circumstances, it is reasonable for NuVista to defer these steps until the sewage capacity and road abandonment impediments are removed. The sellers who are parties to the executory contract acknowledged the reasonableness of awaiting those steps, by agreeing to the third contract amendment to add those conditions precedent.

Ultimate Findings of Fact

70. Based on the greater weight of the credible testimony and documentary evidence, Petitioner has demonstrated that good faith commencement of construction for the project continues to be delayed by government action and inaction with respect to

regulations and permitting precluding commencement of the project.

71. The CON holder here has proven "good faith" in connection with the project. There is no evidence of any stalling on this project to buy more time. Instead, the parent company NuVista, and the prop-co and op-co created by the parent for this project, have all carried out their assigned roles to move this project forward, attempting to resolve the impediments to the extent they could. NuVista has taken on a very ambitious project because of the complicated structure of the Research Park and the added layers necessary before the project can commence. But that is not a reason to deny a second 60-day extension. The "good faith" found here is a reason to grant the 60-day extension, where, as here, AHCA previously granted an extension based on the same governmental action/inaction that continues.

CONCLUSIONS OF LAW

72. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties, pursuant to sections 120.569 and 120.57(1), Florida Statutes.

73. Petitioner is seeking its second 60-day extension to the validity period of CON 10412, pursuant to section 408.040(2)(c) and rule 59C-1.018(3). As the one requesting an extension, Petitioner is asserting the affirmative of the issue, and, as such, bears the burden of proving by a preponderance of

the evidence that its extension request should be granted. See Young v. Dep't of Cmty. Aff., 625 So. 3d 831, 833 (Fla. 1993); Balino v. Dep't of Health & Rehab. Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977) (the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal); § 120.57(1)(j), Fla. Stat.

74. Section 408.040(2) provides in pertinent part:

(a) Unless the applicant has commenced construction, if the project provides for construction, [or] unless the applicant has incurred an enforceable capital expenditure commitment for a project, if the project does not provide for construction, . . . a certificate of need shall terminate 18 months after the date of issuance. . . . The agency shall monitor the progress of the holder of the 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.

75. Elaborating on the CON extension process, rule 59C-1.018(3) provides:

(3) Extension of Validity Period.

(a) Extensions of up to 60 calendar days per each request may be requested by a certificate of need holder who is approaching the end of the 18-month validity period. The holder must submit a written request to the agency for approval at least 15 calendar days before the certificate of need terminates. The filing of a request does not extend the validity period of a certificate of need. Failure to timely file is a waiver of the right to request an extension. This request for an extension must demonstrate that good faith commencement of the project is being delayed by litigation or by governmental action or inaction with respect to regulations or permitting which precludes commencement on the project. 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.

(b) Where the holder of a valid certificate of need is precluded from commencement of the project due to litigation, including appeal, or if the holder's certificate of need is the

subject of an appeal of a final order approving the issuance of the certificate of need, an extension of the validity period shall be granted for the actual amount of time of the validity period which is equivalent to the period of litigation, including appeal. The holder of a certificate of need shall submit a request for an extension to the agency, in writing, not later than 15 calendar days prior to the termination date.

76. It is undisputed that the project at issue involves construction, and it is likewise undisputed that Petitioner did not commence construction by the CON termination date, as extended by the first 60-day extension. That is why Petitioner requested a second 60-day extension.

77. Petitioner met the requirements of AHCA's rule by timely submitting its second request for extension, as Petitioner had forewarned AHCA that it would need to do in light of the revised project timetable submitted with the first extension request.

78. Based on the findings above, Petitioner met its burden of proving that good faith commencement of construction continues to be delayed by governmental action or inaction with respect to regulations or permitting. Sewage disposal is plainly a regulatory matter. The need for increased wastewater capacity to allow additional development, starting with the NuVista project, as well as future projects in the Research Park, was raised during the site plan review process shortly after the CON was

issued. Resolution of that problem was complicated, involving three different governmental bodies: FARDA (as the ultimate stakeholder to pave the way for development of the Research Park, as is its charge); FAU (as the current owner/operator of the Hubbard lift station, improvement of which was one of the options considered); and the City of Boca Raton, which became the focal point of the best option ultimately approved by the Maintenance Association Board.

79. AHCA's argument that expanding wastewater capacity to the entire Research Park should not be considered "governmental" for the reason that the Maintenance Association is organized as a private non-profit corporation is rejected for several reasons. First, AHCA ruled otherwise in granting the second extension request. Second, AHCA has not considered the FARDA-specific initiative to partner with the Maintenance Association and the City of Boca Raton to solve the Research Park's wastewater capacity problem, or the comments in the April 25, 2018, FARDA meeting, at which FARDA expressed its concern with completing this project with one member stating emphatically that FARDA should just take it over and get it done. FARDA has the power to itself construct the improvements for utilities and other necessities to allow the development of Research Park parcels, and financing could be accomplished under the Florida Industrial Development Financing Act. See § 159.705(8), Fla. Stat. That

FARDA chose the alternative structure of accomplishing these needs through the conduit of the Maintenance Association created pursuant to FARDA's Declaration of Covenants, and financing them through assessments, does not make the actions any less governmental. Indeed, the Maintenance Association's ARB itself directed NuVista to coordinate with the engineer and FARDA in coming up with a solution to the Research Park's wastewater capacity problem. Finally, AHCA's argument ignores the central role of the other governmental body involved, the City of Boca Raton, which had to make improvements to its own system to accommodate the tie-in of sewer lines directly from the Research Park, as well as permit the Maintenance Association to install the sewer lines to re-route all of the Research Park's wastewater flow from the Hubbard lift station to instead flow through the Research Park's lift station and directly connect to the city's system.

80. Standing alone, the wastewater capacity impediment is sufficient to warrant issuance of 60-day extensions to CON 10412 until that project is completed and NuVista can proceed to finalize its construction plans and get its own permits that will include installation of sewer line(s) to tie into the new Research Park lines once they are extended to the property.

81. In addition, the roadway abandonment impediment also requires resolution by governmental action to allow commencement

of construction. While in one sense this problem is a "title" matter, for this project it is more akin to a land use/zoning matter in that two adjacent parcels must be combined and the current land use for the roadway must be changed from road usage to allow construction of a nursing home. Again, AHCA granted the first extension request based on the wastewater capacity and roadway abandonment problems, and these continue to be the two impediments to commencing construction.

82. AHCA took the position in a prehearing motion to relinquish jurisdiction, and maintained at hearing, that there are no disputed issues of material fact for the reason that all of the actions to move this project forward were taken by the related entity SPB HRE instead of by the CON holder, NHI.

83. This argument was rejected before hearing and remains unpersuasive. Neither the CON laws nor AHCA's rules can be read so restrictively to require that CON projects be developed solely by the CON holder instead of a related entity. The CON extension statute and rule only require that the CON holder be the one to submit the request for an extension and make the required showing: that good faith commencement of the project has been delayed by governmental action or inaction with respect to regulations or permitting precluding commencement of the project. AHCA's interpretation would require the injection of qualifying words, shown in brackets: that good faith commencement of the

project [by the CON holder] has been delayed by governmental action or inaction with respect to regulations or permitting [being applied to the CON holder or for which the CON holder has applied] precluding commencement of the project [by the CON holder]. Those qualifying words are not set forth in the CON extension rule, so if this were AHCA's interpretation of the CON extension statute, not codified in an adopted rule, the interpretation would be a rule by definition. § 120.52(16), Fla. Stat. Neither the undersigned nor AHCA may take action in this proceeding based on a rule that has not been adopted pursuant to the APA. § 120.57(1)(e), Fla. Stat.

84. AHCA's interpretation is also contrary to one of the very few appellate decisions addressing the CON extension statute, Health Quest Corporation IV v. Department of Health and Rehabilitative Services, 593 So. 2d 533 (Fla. 1st DCA 1992) (Health Quest). In Health Quest, the court reversed the denial of a CON extension request by AHCA's predecessor, the Department of Health and Rehabilitative Services (HRS). The court held that a CON holder was entitled to an extension, even though the CON holder itself had done nothing to move forward on the project to construct a new nursing home. Near the end of the CON validity period, the parent corporation of the CON holder negotiated a sale-leaseback with an unrelated corporation, which allowed a subsidiary to take over the project (without notifying HRS).^{8/}

Shortly before the end of the CON validity period, the design of the facility was completely redone by the new entity taking over the project. The new entity also brought a lawsuit against the county to contest a requirement that a new sewer line had to be built instead of tapping into an existing line. The litigation was unsuccessful, and the new entity submitted construction plans for the redesigned facility to HRS for approval the next week, too late to be reviewed and approved quickly enough to allow commencement of construction before the termination date.

85. The court rejected the conclusions of the DOAH hearing officer in the Recommended Order, adopted by HRS in its Final Order, that the statutory standard for an extension was not met. Then, as now, the CON extension statute provided:

The certificate-of-need validity period for a project shall be extended by the department, to the extent the applicant demonstrates to the satisfaction of the department 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.

§ 381.710(2)(c), Fla. Stat. (1987).

86. HRS maintained on appeal in Health Quest that the delay in commencing construction by the termination date was not caused by governmental action or inaction, but rather, was due to the choices of the new entity taking over the project to initiate litigation in an attempt to save money on sewage disposal and to

completely redesign the facility. However, the court focused on the good-faith requirement, concluding as follows:

The record reflects no evidence that FPMC redesigned the facility for construction with noncombustible materials for any purpose other than improving the facility's safety. The record also reflects no evidence that FPMC chose to litigate Dade County's sewer-line requirement for any reason other than its honest business judgment that it had a reasonable chance of saving \$150,000 in construction costs. . . . Because the sewer litigation affected even foundation-only plans, FPMC could not have obtained local approval of its plans prior to the end of the litigation.

Health Quest, 593 So. 2d at 535.

87. Even more clearly in this case, a coordinated effort by related entities to carry out a project was established, without contradiction. Unlike in Health Quest, there was no inaction until the CON validity period was nearing an end. But just like in Health Quest, it should be irrelevant that entities other than the CON holder took the action to move the project forward.

88. AHCA has also argued before, during, and after the hearing that Petitioner should not have been allowed to present evidence that FARDA's conditional approval of the resubmitted white paper, as of the second extension request, had become full approval without condition as of the hearing. According to AHCA, since the statute requires Petitioner to make the required showing "to the agency's satisfaction," then Petitioner should be

restricted to presenting evidence of its extension request, and not allowed to present any evidence of events subsequent to its submission. AHCA argues that this proceeding should be transformed into a restricted review proceeding, in which deference should be given to the agency's decision that extension request did not make the showing to the agency's satisfaction.

89. As stated on the record at the outset of the hearing (Tr. 10-12), AHCA's argument is rejected as contrary to the APA, which requires a de novo hearing. See § 120.57(1)(k), Fla. Stat. ("All proceedings conducted under this subsection shall be de novo."); J.D. v. Ag. for Pers. with Disab., 114 So. 3d 1127 (Fla. 1st DCA 2013). While there is a temporal element to the determination to be made in this case, in that Petitioner must meet its burden of making the good-faith showing that commencing construction was precluded by the extended termination date, the door cannot be shut to evidence of subsequent events to the extent they evolve from and put in perspective the circumstances existing when the second extension request was submitted. That was precisely the situation here, where the recent events proven at hearing were the continuation and culmination of processes that were ongoing and pending as of the second extension request.

90. The statutory language "to the agency's satisfaction" that is AHCA's focus does not change the APA's requirement that an agency cannot make a final decision determining a party's

substantial interests until after affording the party a de novo hearing. The de novo hearing is an opportunity to formulate agency action based on evidence presented at hearing.

91. Finally, AHCA proposed in its PRO a bright-line rule that would deem Petitioner ineligible to request a CON extension because it did not own the land or a leasehold interest in the land on which the nursing home would be constructed. Once again, there is no such requirement in the CON extension statute or rule. To impose such a requirement here would be impermissibly basing agency action on an unadopted rule.

92. AHCA's argument is also inappropriately predicated on the statutory requirements for commencing construction. AHCA offers its interpretation of the definition of "commenced construction" as requiring that the CON holder must own the land or a leasehold interest in the land on which the facility is being constructed. Once again, the statute does not say that; the part of the definition of "commenced construction" that AHCA relies on requires "proof of an executed owner/contractor agreement or an irrevocable or binding forced account."

§ 408.032(4), Fla. Stat. Even if AHCA's argument had merit, it would not be germane to this case, because this issue is not subject to determination here. The question is not whether Petitioner has met the requirements for commencing construction.

93. AHCA cannot borrow requirements for commencing construction and import them into the CON extension statute. The CON extension statute only applies when the requirements to commence construction are not met. Just as AHCA could not contend that a building permit must have been obtained applying AHCA-approved construction documents (one component of commencing construction), or that foundation-forming must have begun (another component of commencing construction), AHCA could not reasonably contend that a CON holder must prove there is an executed owner/contractor agreement or an irrevocable or binding forced account to be eligible for an extension to the CON validity period.

94. Both parties offer as relevant authority Baker County Medical Services, Inc. v. Agency for Health Care Administration, 178 So. 3d 71 (Fla. 1st DCA 2015). AHCA argues that the case stands for the notion that it must strictly follow the extension statute. Petitioner argues that the case stands for the proposition that if the standard for granting an extension is met, AHCA is required to grant the extension. Really, though, Baker County has little to do with the issues presented here for determination. In that case, AHCA, an existing provider, and a CON applicant agreed to settle litigation over whether a CON should be issued. The agreement provided that the CON would be issued, but not until after an extended period of time. The

court simply determined that AHCA does not have any statutory authority to defer issuance of a CON, in effect frontloading an extension to the CON's validity period. The court referred to the CON extension statute for the purpose of making it clear that that statute did not apply:

Under ordinary circumstances, the certificate of need at issue would have expired after 18 months, on June 7, 2012, but . . . the validity period did not commence until a year later on June 1, 2013. Even then, AHCA agreed not to license the hospital prior to December 1, 2016. Whatever authority AHCA has, colorable or apparent, is not so elastic as to allow an effective quadrupling of the statutorily set validity period.

Id. at 77-78. In Baker County, then, AHCA could not transform the CON extension statute to broaden its reach to apply to "extensions" before a CON is even issued (by delaying issuance of the CON) and after construction has commenced (by delaying licensure of the constructed facility). This case involves the opposite: here, AHCA wants to add restrictions to the statutory standard for a CON extension by injecting requirements not found in the statute. Insofar as Baker County holds that AHCA may not expand its authority by rewriting the statute and rule, the case supports the conclusions herein that AHCA also cannot narrow the statute and rule by adding restrictions not found in either statute or rule.

95. AHCA relies on State Board of Optometry v. Florida Society of Ophthalmology, 538 So. 2d 878, 884 (Fla. 1st DCA 1998), as authority for the proposition that its interpretations of its statutes and rules are entitled to deference, even though the interpretations might not be the only ones possible or the best ones possible. AHCA's argument is an admission that AHCA's interpretations offered in this case add meaning to the CON extension statute and rule and, as such, constitute impermissible unadopted rules. The cited case does not legitimize AHCA's interpretations that add requirements to the statute and rule. The cited case was an appeal of a final order in a challenge to the validity of an agency's adopted rule. The court applied the principle that reviewing courts accord wide discretion to an agency in the lawful exercise of its rulemaking authority to set forth an interpretation of its statute (which need not be the only or best interpretation) in a promulgated rule.

96. In all respects, Petitioner has met its burden of proving that it is entitled to a second 60-day extension to the validity period of CON 10412. AHCA's strained arguments in opposition to the request were neither supported nor reasonable. Instead, they were puzzling; it remains unclear why AHCA has so vigorously opposed this extension request.


97. In accordance with its precedent, AHCA should grant a 60-day extension from the date of rendition of its final order.

See Miami Jewish Home and Hosp. for the Aged, Inc. v. Ag. for Health Care Admin., Case No. 09-0695 (Fla. DOAH May 11, 2009), adopted, in part, and modified, (AHCA July 2, 2009).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Health Care Administration issue a final order granting an extension of an additional 60 days to the validity period of CON No. 10412, to go into effect upon rendition of a final order.

DONE AND ENTERED this 27th day of July, 2018, in Tallahassee, Leon County, Florida.



ELIZABETH W. MCARTHUR
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of July, 2018.

ENDNOTES

^{1/} References herein to Florida Statutes are to the 2017 codification, unless otherwise noted, as the law in effect at the time of hearing. The substantive statute and rule governing CON extension requests have not changed subsequent to the hearing.

^{2/} AHCA initially requested official recognition of the documents by a Motion for Judicial Notice filed on April 12, 2018. At the outset of the hearing, the undersigned ruled that for the most part, the documents were not appropriate for official recognition, but that since Petitioner did not oppose allowing the documents to become part of the record, the documents could be admitted in evidence as exhibits. The undersigned noted that regardless of whether documents were officially recognized or admitted in evidence, to the extent the documents were, or contained, hearsay, the parties should be prepared to address the hearsay issues because of the limitation on using hearsay in administrative proceedings, even without an objection. See § 120.57(1)(c), Fla. Stat.; and Fla. Admin. Code R. 28-106.213(3). AHCA's argument to the contrary in its PRO, that admission of evidence with a stipulation as to authenticity should be viewed to waive or cure any hearsay problems, is rejected as contrary to the APA and uniform rules and also contrary to the undersigned's admonitions in admitting the evidence.

^{3/} By agreeing to an extended deadline for post-hearing submissions beyond 10 days after the filing of the transcript, the 30-day time period for filing the recommended order was waived. See Fla. Admin. Code R. 28-106.216.

^{4/} In its PRO, AHCA proposed a finding to the effect that NHI had identified a specific location for the nursing home in its CON application. No part of the CON application was offered in evidence. The record citation offered as support for the proposed finding was AHCA Exhibit 16, which is the CON itself, not the application. The CON does not identify a location for the project other than Palm Beach County. No evidence in the record supports this proposed finding.

^{5/} The sellers' organizational structure is more complicated than the NuVista structure that uses a wholly-owned prop-co and op-co in tandem. The seller of the parcel five sublease is Boca R & D Finance 16 Parcel 5, LLC. The seller of the parcel eight sublease is Boca R & D Finance 7 Parcel 8, LLC. The original third-party developer identified in FARDA's Declaration of Covenants was Boca/Research Park, Ltd. In approximately 2011, that entity assigned its interest in the Research Park to Boca R & D Finance 16, a sovereign investment fund of the Kuwaiti government, which assumed the role of developer. That entity parsed out ownership of the sub-leasehold interests to separate wholly-owned entities for each parcel. Mr. Peters was the investment management consultant charged with oversight of this

investment for a two-year period that started in the midst of negotiations with NuVista for the sale and purchase of parcels five and eight, and ended in March 2018. Mr. Peters was an active participant on behalf of the sellers in the activities relevant to this case, and his testimony offered a credible perspective of one with personal knowledge of the relevant events.

^{6/} It is noted that the nursing facility was described in FARDA's minutes as a 120-bed facility, not a 111-bed facility as approved by the CON. AHCA has not raised this discrepancy as relevant to consideration of NHI's extension request, nor would the undersigned find it relevant. Ultimately, the CON would serve as a limitation to the number of beds that could be licensed after the facility is constructed. It might be possible for the building to be constructed with sufficient physical capacity to house 120 licensed beds, but no more than 111 beds would be licensed under the authority of CON 10412.

^{7/} In attempting to discount the significance of FARDA's approval of the NuVista site plan submission, AHCA relied solely on hearsay evidence despite being warned at the outset of the hearing that hearsay issues in AHCA's exhibits would have to be addressed, particularly in reference to correspondence authored by persons who were not identified as prospective witnesses. AHCA's PRO repeatedly relied on and quoted at length from a letter written by FARDA's non-member administrative officer, Mr. Pincus (legal counsel), on which FARDA's other non-member administrative officer, Mr. Duffell, was copied. AHCA went so far as to inaccurately characterize the letter as the "FARDA position summary." Instead, a more accurate characterization of the letter is that it was one of a series of back-and-forth accusatory, finger-pointing letters, bristling and defensive in tone, and not reliable on top of being hearsay that cannot be the sole basis for a finding of fact. § 120.57(1)(c), Fla. Stat.; Fla. Admin. Code R. 28-106.213(3). Suffice it to say that communications issues apparently developed, and unfortunately, the views of FARDA's administrative officers appear to have been colored by those issues. At the recent FARDA meeting, Mr. Duffell expressed his resentment over being threatened with lawsuits and dragged in to testify in deposition in this administrative hearing, which was scheduled for later that same day. Mr. Duffell was admonished by the FARDA chair for not being objective, and he responded by saying, in effect, that it was not his job to be objective. Hopefully, NuVista can restore relations with Mr. Duffell and Mr. Pincus, as they should be

working together to accomplish what the FARDA members believe is a project that will be good for the Research Park.

^{8/} As mentioned at the hearing, the court's opinion does not focus on the multiple entities involved, although three of them were appellants: the CON holder (Health Quest Corporation IV); its parent (Health Quest Corporation), and the unrelated parent (Federal Property Management Corporation) that turned the project over to a wholly-owned subsidiary. The entity details are laid out in the underlying Recommended and Final Orders. See Health Quest Corp. IV, Health Quest Corp. and Fed. Prop. Mgmt. Corp. v. Dep't of Health & Rehab. Servs., Case No. 88-3019 (Fla. DOAH Dec. 9, 1988; HRS Jan. 20, 1989).

COPIES FURNISHED:

John F. Gilroy, III, Esquire
John F. Gilroy, III, P.A.
Post Office Box 14227
Tallahassee, Florida 32317
(eServed)

Richard Joseph Saliba, Esquire
Agency for Health Care Administration
Fort Knox Building III, Mail Stop 7
2727 Mahan Drive
Tallahassee, Florida 32308
(eServed)

Nicole M. Barrera, Esquire
Agency for Health Care Administration
Mail Stop 7
2727 Mahan Drive
Tallahassee, Florida 32308
(eServed)

Richard J. Shoop, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

Justin Senior, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)

Stefan Grow, General Counsel
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

Shena Grantham, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

Thomas M. Hoeler, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

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.