STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VENICE HMA HOSPITAL, LLC, d/b/a
VENICE REGIONAL BAYFRONT HEALTH,

Petitioner,

vs. Case No. 17-3108RX

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent,

and

SARASOTA COUNTY PUBLIC HOSPITAL
DISTRICT, d/b/a SARASOTA
MEMORIAL HOSPITAL,

Intervenor.
_____/

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its designated Administrative Law Judge, W. David Watkins, held a formal hearing in the above-styled case on September 19 and 22, 2017, in Tallahassee, Florida.

APPEARANCES

For Venice HMA Hospital, LLC d/b/a Venice Regional Bayfront Health:

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For Sarasota County Public Hospital District, d/b/a Sarasota Memorial Hospital:

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STATEMENT OF THE ISSUE

Whether Florida Administrative Code Rule 59C-1.008(4) (Rule) constitutes an invalid exercise of delegated legislative authority because it enlarges, modifies, or contravenes the specific provisions of law implemented.

PRELIMINARY STATEMENT

This Rule challenge proceeding was initiated on May 25, 2017, when Venice HMA Hospital, LLC, d/b/a Venice Regional Bayfront Health (VRBH), filed a pleading captioned "Petition to Determine the Invalidity of Rule 59C-1.008(4)" (Petition) against the Agency for Health Care Administration (AHCA) at the Division of Administrative Hearings (DOAH).

The Petition challenges the Rule as an invalid exercise of delegated legislative authority in that it enlarges, modifies,

or contravenes the specific provisions of law implemented. According to VRBH, it does so by requiring applicants for a general hospital certificate of need (CON) to provide information that VRBH contends the statutes clearly do not require, to wit, audited financial statements for the applicant or the applicant's parent.

Background

Sarasota County Public Hospital District, d/b/a Sarasota Memorial Hospital (SMH), and VRBH both filed CON applications for general hospitals in AHCA Subdistrict 8-6, Sarasota County, in the second batching cycle of 2016. Following AHCA's preliminary approval of both CON applications, petitions were filed by several parties challenging those approvals. Ultimately, the petitions were referred to DOAH as Case Nos. 17-0510CON, 17-0551CON, 17-0553CON, 17-0556CON, and 17-0557CON (referred to collectively as the "CON cases") and were consolidated.

Prior to the final hearing in the CON cases, VRBH filed a motion in limine to exclude testimony as to the inadequacy of its CON application with respect to its audited financial statements. VRBH argued the applicable statutes, specifically sections 408.035 and 408.037, Florida Statutes,[1/] did not require general hospital applicants to submit audited financial statements with their CON applications.

The filing of the Rule challenge Petition was precipitated by the undersigned's ruling on the motion in limine in the CON cases, which included the statement that "[b]y its express terms, the requirements of [the Rule] are applicable to [VRBH's] application, and the extent to which [VRBH's] application complied with the rule's application content requirements is a relevant inquiry in this proceeding." Order Denying Motion in Limine, Sarasota Mem'l Hosp. v. Venice Reg'l Bayfront Health, Case No. 17-0556CON (Fla. DOAH May 22, 2017).

After VRBH received this adverse ruling in the CON cases, the instant Rule challenge was filed on May 25, 2017.

VRBH challenges rule 59C-1.008(4) as an invalid exercise of delegated legislative authority on the grounds that the Rule enlarges, modifies, or contravenes the specific provisions of law implemented in violation of section 120.52(8)(c), Florida Statutes. No other grounds for the alleged invalidity were pled.

On May 26, 2017, VRBH moved to consolidate the Rule challenge with the CON cases. On May 31, 2017, SMH moved to intervene, which motion was subsequently granted.

On June 1, 2017, AHCA moved to dismiss the Rule challenge. AHCA argued that VRBH was not substantially affected and lacked standing because AHCA interprets the Rule as not requiring VRBH

to submit an audited financial statement. VRBH and SMH responded to AHCA's Motion to Dismiss on June 7, 2017, and June 8, 2017, respectively.

On June 21, 2017, the undersigned denied AHCA's Motion to Dismiss, consolidated the Rule challenge with the CON cases for purposes of hearing only, and ordered that the final hearing for the Rule challenge be held concurrently with the CON cases.

The final hearing on the consolidated cases was held on August 7 through 11, August 14 through 18, August 21 through 25, and September 19 and 22, 2017. The portion of the final hearing specifically addressing the Rule challenge occurred primarily on September 19 and 22, 2017.

At the final hearing portion dedicated to the Rule challenge, VRBH presented the testimony of Patricia Greenberg and AHCA presented the testimony of Marisol Fitch. The final hearing transcript pages dedicated to the Rule challenge are pages 4457-4497, 4678-4686, 4718-4725, and 4825-4863. VRBH offered its exhibits 196-200, which were received into evidence. Two additional VRBH exhibits that are related to the Rule challenge received into evidence during the CON portion of the final hearing are VRBH's Exhibits 135 and 136. AHCA offered its exhibit 2, which was received into evidence.

The official Transcript of the final hearing was filed at DOAH on October 23, 2017. On November 29, 2017, AHCA, VRBH, and SMH timely filed Proposed Final Orders, each of which has been carefully considered in the preparation of this Final Order.

FINDINGS OF FACT

The Parties

1. VRBH is an existing hospital in Sarasota County. In the second batching cycle of 2016, VRBH applied to AHCA for a CON to establish a Class I Acute Care Replacement Hospital of up to 312 beds in AHCA District VIII, Subdistrict 8-6, Sarasota County. The CON application was preliminarily approved by AHCA on December 2, 2016.

2. SMH is a public hospital system serving Sarasota County. In the second batching cycle of 2016, SMH applied for a CON to establish a new acute care hospital with 90 beds in AHCA District 8, Acute Care Subdistrict 8-6, Sarasota County. As with the VRBH application, the SMH application also received preliminary approval from AHCA on December 2, 2016.

3. AHCA is designated as the single state agency responsible for administering the CON program under the Health Facility and Services Development Act, sections 408.031 through 408.045, Florida Statutes.

The Challenged Rule

4. In part, Florida Administrative Code Rule 59C-1.008(4) requires that CON applications contain the audited financial statements of the applicant, or the applicant's parent corporation. The Rule states as follows:

> (4) Certificate of Need Application Contents. An application for a Certificate of Need shall contain the following items:
>
> (a) All requirements set forth in Sections 408.037(1), (2) and (3), F.S.
>
> (b) The correct application fee.
>
> (c) An audited financial statement of the applicant or the applicant's parent corporation if the applicant's audited financial statements do not exist. The following provisions apply:
>
> 1. The audited financial statement of the applicant, or the applicant's parent corporation, must be for the most current fiscal year. If the most recent fiscal year ended within 120 days prior to the application filing deadline and the audited financial statements are not yet available, then the prior fiscal year will be considered the most recent.
>
> 2. Existing health care facilities must provide audited financial statements for the two most recent consecutive fiscal years in accordance with subparagraph 1. above.
>
> 3. Only audited financial statements of the applicant, or the applicant's parent corporation, will be accepted. Audited financial statements of any part of the applicant or the applicant's parent corporation, including but not limited to subsidiaries, divisions, specific facilities

> or cost centers, will not qualify as an audit of the applicant or the applicant's parent corporation.
>
> (d) To comply with Section 408.037(1)(b)1., F.S., which requires a listing of all capital projects, the applicant shall provide the total approximate amount of anticipated expenditures for capital projects which meet the definition in subsection 59C-1.002(7), F.A.C., at the time of initial application submission, or state that there are none. An itemized list or grouping of capital projects is not required, although an applicant may choose to itemize or group its capital projects. The applicant shall also indicate the actual or proposed financial commitment to those projects, and include an assessment of the impact of those projects on the applicant's ability to provide the proposed project; and,
>
> (e) Responses to applicable questions contained in the application forms.

The 2008 CON Legislative Changes

5. In 2008, the Florida Legislature made numerous changes to streamline the CON application process for general hospitals. It is these changes that VRBH asserts removed the requirement for general hospitals to submit audited financial statements with CON applications. Section 408.035 was amended to provide as follows:

> 408.035 Review criteria.—
>
> (1) The agency shall determine the reviewability of applications and shall review applications for certificate-of-need determinations for health care facilities and health services in context with the

following criteria, **except for general hospitals as defined in s. 395.002:**

(a) The need for the health care facilities and health services being proposed.
(b) The availability, quality of care, accessibility, and extent of utilization of existing health care facilities and health services in the service district of the applicant.

(c) The ability of the applicant to provide quality of care and the applicant's record of providing quality of care.

(d) The availability of resources, including health personnel, management personnel, and funds for capital and operating expenditures, for project accomplishment and operation.

(e) The extent to which the proposed services will enhance access to health care for residents of the service district.

(f) The immediate and long-term financial feasibility of the proposal.

(g) The extent to which the proposal will foster competition that promotes quality and cost-effectiveness.

(h) The costs and methods of the proposed construction, including the costs and methods of energy provision and the availability of alternative, less costly, or more effective methods of construction.

(i) The applicant's past and proposed provision of health care services to Medicaid patients and the medically indigent.

(j) The applicant's designation as a Gold Seal Program nursing facility pursuant to s. 400.235, when the applicant is requesting

additional nursing home beds at that facility.

(2) For a general hospital, the agency shall consider only the criteria specified in paragraph (1)(a), paragraph (1)(b), except for quality of care in paragraph (1)(b), and paragraphs (1)(e), (g), and (i).

(Emphasis added).

6. Section 408.035 has not been revised since 2008.

7. Additionally, section 408.037 was amended to read as follows:

408.037 Application content.—

(1) Except as provided in subsection (2) for a general hospital, an application for a certificate of need must contain:

(a) A detailed description of the proposed project and statement of its purpose and need in relation to the district health plan.

(b) A statement of the financial resources needed by and available to the applicant to accomplish the proposed project. This statement must include:

1. A complete listing of all capital projects, including new health facility development projects and health facility acquisitions applied for, pending, approved, or underway in any state at the time of application, regardless of whether or not that state has a certificate-of-need program or a capital expenditure review program pursuant to s. 1122 of the Social Security Act. The agency may, by rule, require less-detailed information from major health care providers. This listing must include the applicant's actual or proposed financial commitment to those projects and an

assessment of their impact on the applicant's ability to provide the proposed project.

2. A detailed listing of the needed capital expenditures, including sources of funds.
3. A detailed financial projection, including a statement of the projected revenue and expenses for the first 2 years of operation after completion of the proposed project. This statement must include a detailed evaluation of the impact of the proposed project on the cost of other services provided by the applicant.

(c) **An audited financial statement of the applicant or the applicant's parent corporation if audited financial statements of the applicant do not exist.** In an application submitted by an existing health care facility, health maintenance organization, or hospice, financial condition documentation must include, but need not be limited to, a balance sheet and a profit-and-loss statement of the 2 previous fiscal years' operation.

(2) An application for a certificate of need for a general hospital must contain a detailed description of the proposed general hospital project and a statement of its purpose and the needs it will meet. The proposed project's location, as well as its primary and secondary service areas, must be identified by zip code. Primary service area is defined as the zip codes from which the applicant projects that it will draw 75 percent of its discharges. Secondary service area is defined as the zip codes from which the applicant projects that it will draw its remaining discharges. If, subsequent to issuance of a final order approving the certificate of need, the proposed location of the general hospital changes or the primary service area materially changes, the agency shall revoke the certificate of need. However, if the

agency determines that such changes are deemed to enhance access to hospital services in the service district, the agency may permit such changes to occur. A party participating in the administrative hearing regarding the issuance of the certificate of need for a general hospital has standing to participate in any subsequent proceeding regarding the revocation of the certificate of need for a hospital for which the location has changed or for which the primary service area has materially changed. **In addition, the application for the certificate of need for a general hospital must include a statement of intent that, if approved by final order of the agency, the applicant shall within 120 days after issuance of the final order or, if there is an appeal of the final order, within 120 days after the issuance of the court's mandate on appeal, furnish satisfactory proof of the applicant's financial ability to operate.** The agency shall establish documentation requirements, to be completed by each applicant, which show anticipated provider revenues and expenditures, the basis for financing the anticipated cash-flow requirements of the provider, and an applicant's access to contingency financing. **A party participating in the administrative hearing regarding the issuance of the certificate of need for a general hospital may provide written comments concerning the adequacy of the financial information provided, but such party does not have standing to participate in an administrative proceeding regarding proof of the applicant's financial ability to operate.** The agency may require a licensee to provide proof of financial ability to operate at any time if there is evidence of financial instability, including, but not limited to, unpaid expenses necessary for the basic operations of the provider.

(3) The applicant must certify that it will license and operate the health care

> facility. For an existing health care facility, the applicant must be the licenseholder of the facility.

(Emphasis added).

8. Section 408.037 has only been amended once since 2008. The revisions are not relevant to the issue presented in this Rule challenge.[2/]

The Parties' Positions

9. In support of its argument that the Rule contravenes the statutes, VRBH asserts that the Rule is an invalid exercise of delegated legislative authority because it enlarges, modifies, or contravenes the laws implemented. Simply put, VRBH contends that the Rule is contrary to sections 408.035 and 408.037. VRBH advances three reasons for its position that the Rule modifies the laws implemented; all three center on the assertion that in 2008, the Legislature removed the requirement for the submission of audited financial statements with general hospital CON applications:

> (1) Requiring a general hospital to comply with the requirements of section 408.037(1), Florida Statutes, by submitting an audited financial statement with its CON application violates the express provision of the statute which specifically excludes general hospitals from the requirements of subsection (1);
>
> (2) Requiring a general hospital to submit an audited financial statement with the CON application directly contradicts the submission requirements set forth in section

> 408.037(2), Florida Statutes, which only requires a general hospital to provide a statement of intent that it will "furnish satisfactory proof of the applicant's financial ability to operate" if the CON application is approved by final order of the agency.
>
> (3) Requiring a general hospital to submit an audited financial statement with the CON application contradicts the 2008 legislative changes to section 408.035, Florida Statutes, which streamlined the application process for general hospitals by removing the short and long term financial feasibility of the project as a review criteria.

(VRBH Petition, ¶¶ 15-17).

10. AHCA's ultimate position is that the Rule should be interpreted as not requiring audited financial statements for general hospital CON applicants. To reach this conclusion, AHCA relies on 59C-1.008(4)(a), which provides that a CON application must contain "all requirements set forth in Sections 408.037(1), (2), and (3), Florida Statutes."

11. AHCA interprets the introductory phrase contained in section 408.037(1)--"except as provided in subsection (2) for a general hospital, an application for a certificate of need must contain"--to mean that only subsection (2) of section 408.037 applies to an application for general hospitals. Because section 408.037(2) does not mention audited financial statements, AHCA reasons that they are not required.

12. Therefore, despite the plain language of the Rule, AHCA contends that the Rule does not require the submission of audited financial statements because: the Rule references sections 408.037(1), (2), and (3); AHCA interprets only section 408.037(2) as applying to general hospitals; and section 408.037(2) does not mention audited financial statements.

13. SMH contends that the Rule does not enlarge, modify, or contravene the laws implemented and, therefore, is a valid exercise of delegated legislative authority. Specifically, SMH contends that section 408.037 itself requires general hospital applicants to submit audited financial statements because subsection (2) does not wholesale replace subsection (1) for general hospitals. Subsection (1) applies to general hospitals, unless there is an exception to those requirements listed in subsection (2). Subsection (1) requires the submission of audited financial statements for all CON applicants; nothing in subsection (2) creates an exception to that requirement.

14. SMH also argues that audited financial statements are reliable documents that AHCA can quickly access for relevant information, including an applicant's provision of health care services to Medicaid patients and the medically indigent, both of which are prominent considerations during the review of a general hospital's CON application. See § 408.035(1)(i), (2), Fla. Stat.

Post 2008 Rule

15. Challenged Rule 59C-1.008(4) does not expressly exclude or differentiate between general hospital CON applications and other CON applications. Instead the Rule cross-references to the statutory requirement. AHCA asserts that by doing so, the Rule incorporates the statutory scheme by reference and does not require a CON application for a general hospital to include audited financial statements.

16. The above-cited statutory provisions clearly state that a general hospital CON application need not include an audited financial statement and that financial condition is not relevant to the CON application review process.

17. Any rule that requires a general hospital CON applicant to provide an audited financial statement with the application would be contrary to the requirements of section 408.037. It follows, therefore, that a rule contrary to the requirements of a statute would be invalid as it would exceed AHCA's delegated legislative authority.

18. Requiring a general hospital applicant to comply with the requirements of section 408.037(1) would violate the provision of the statute, which expressly excludes general hospitals from the requirements of subsection (1).

19. Further, requiring a general hospital applicant to submit an audited financial statement with its CON application

directly contradicts the submission requirements set forth in section 408.037(2).

20. AHCA's interpretation of rule 59C-1.008 is that it must be read in conjunction with section 408.037, subsections (1), (2), and (3), and accordingly, AHCA does not require that a general hospital applicant submit an audited financial statement as part of its application.

21. AHCA's interpretation is consistent with the differences in the content of the CON application forms published by AHCA for general hospital applications when compared to non-general hospital applications, for instance, those seeking other beds and services such as comprehensive medical rehabilitation, psychiatric, hospice, and other CON-regulated beds in a hospital. The requirements of each application type correspond to the statutory requirements for each application type.

22. Application forms for projects "except for general hospitals" correspond to the CON application content requirements of section 408.037(1), which requires a statement of financial resources that must include capital projects (Schedule 2 of the CON application); capital expenditures and source of funds (Schedules 1 and 3 of the CON application); and a detailed financial projection, including revenues and expenses for the first two years (Schedules 5 through 8 of the CON

application). The general hospital CON application does not have these requirements.

23. General hospitals are not required to submit proof of financial ability to operate at the time of the submission of the CON application. In accordance with rule 59C-1.010(2)(d), general hospitals are required to comply with the requirements of sections 408.035(2) and 408.037(2). Neither of those statutes requires that a general hospital applicant submit proof of financial ability to operate until 120 days after the issuance of the final CON to the applicant.

24. AHCA's representative, Marisol Fitch, testified that AHCA does not require applicants for general hospitals to submit audited financial statements in the CON application, and that proof of financial ability to operate is required within 120 days after the final approval of the CON application, consistent with the statutory provisions. She testified that the Rule being challenged, when read in conjunction with the AHCA CON application form (incorporated by reference into the Rule) and other AHCA rules, including 59C-1.010 and 59C-1.030, is consistent with the statute, and that no audited financial statements are required.

25. SMH asserts that an audited financial statement for hospitals might contain useful information, such as information on a hospital's current payor mix. However, the unrefuted

testimony is that audited financial statements are not required to include payor mix information, and normally do not since they are typically used to look at an applicant's financial feasibility to operate. Further, regardless of whether such information might be "useful," the specific requirement of section 408.037(2) expressly "excepts" general hospitals from the requirement to include such statements in the CON application.

26. Pursuant to rule 59C-1.010(2)(d), "an application for a general hospital must meet the requirements of Sections 408.035(2) and 408.037(2), F.S.," neither of which require that a general hospital CON applicant provide audited financials or financial feasibility data with the CON application.

27. However, the challenged language in rule 59C-1.008(4) does not contain the "exception" for general hospital applications. Rule 59C-1.008(4) provides, without qualification, that a CON application must contain audited financial statements. Therefore, rules 59C-1.008(4) and 59C-1.010(2)(d) are contradictory.

28. The primary purpose of an audited financial statement in a CON application is to review the short-term and long-term financial feasibility of the proposal. Requiring this financial information is contrary to the clear language of the 2008 changes to section 408.035, which removed the short-term and

long-term financial feasibility of the project as review criteria in order to streamline the general hospital CON application process.

29. AHCA has stated that their interpretation of rule 59C-1.008(4) is that it must be read in pari materia with rule 59C-1.010(2)(d) and sections 408.037 and 408.035, therefore, general hospital CON applicants are not required to submit audited financials with the CON application. According to AHCA's interpretation, rule 59C-1.008(4) does not require a general hospital CON applicant to submit an audited financial statement with the CON application. However, regardless of AHCA's interpretation, rule 59C-1.008(4) expressly states that a CON application must contain audited financial statements, in contravention of sections 408.035 and 408.037.

CONCLUSIONS OF LAW

30. DOAH has jurisdiction over the parties and the subject matter of this proceeding. § 120.56(1) and (3), Fla. Stat. Any person who is substantially affected by a rule or proposed rule can petition DOAH for a final order that the rule or proposed rule is an invalid exercise of delegated legislative authority. § 120.56(1)(a), Fla. Stat.

31. As the party challenging the validity of rule 59C-1.008(4), VRBH has the burden of proving by a preponderance of the evidence that the Rule is an invalid exercise of delegated

legislative authority as to the objections raised. § 120.56(3)(a), Fla. Stat. Unlike a challenge to a proposed rule, the burden of proof never shifts to AHCA. § 120.56(2) & (3), Fla. Stat.; see Bd. of Clinical Lab. Personnel v. Fla. Ass'n of Blood Banks, 721 So. 2d 317 (Fla. 1st DCA 1998). "An existing rule challenge pursuant to section 120.56 is directed to the facial validity of the challenged rule, and not to its validity as interpreted or applied in specific factual scenarios." Hospice of the Fla. Suncoast, Inc. v. Ag. for Health Care Admin., Case No. 15-3656RX, at FO at 54 (Fla. DOAH Sept. 28, 2016), aff'd 203 So. 3d 159 (Oct. 21, 2016).

32. AHCA argues that the interpretation and application of the Rule is moot because both Petitioner and AHCA agree that the Rule does not require general hospitals to submit audited financial statements.

33. A Rule challenge is rendered moot when evidence shows the rule no longer applies to the party initiating the Rule challenge. See Montgomery v. Dep't of HRS, 468 So. 2d 1014, 1016-17 (Fla. 1st DCA 1985). There is no evidence that the Rule no longer applies to VRBH. To the contrary, a ruling in the CON cases held that the Rule applied to general hospital applicants, like VRBH.

34. Moreover, AHCA's assertion that it and VRBH are in agreement is not borne out by the pleadings. Petitioner contends that the Rule is not valid because it does not differentiate between general hospitals and other CON applicants. Petition at ¶ 14.

35. Finally, not all parties agree that the Rule does not apply to general hospitals; at the very least, Intervenor SMH touts the validity of the Rule and its applicability to general hospital applicants, particularly VRBH.

Standing

36. Standing in rule challenge proceedings is governed by section 120.56(1), which provides that "[a]ny 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." In order to establish standing under the "substantially affected" test in a rule challenge proceeding, the petitioner must show: (1) that the rule or policy will result in a real or immediate injury in fact; and (2) that the alleged interest is within the zone of interest to be protected or regulated. Off. of Ins. Reg. v. Secure Enterprises, LLC, 124 So. 3d 332, 336 (Fla. 1st DCA 2013), (citing Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005)). To satisfy the sufficiently real and immediate

injury in fact element, an injury must not be based on pure speculation or conjecture. Id. (citing Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94, 97 (Fla. 1st DCA 1999)).

37. VRBH filed this Rule challenge to defend its general hospital CON application from attack by SMH, based upon an invalid rule that exceeds AHCA's delegated legislative authority. As such, VRBH's substantial interests are affected.

38. Furthermore, VRBH has demonstrated that it is within the zone of interest being protected or regulated, for the purpose of establishing standing to challenge rule 59C-1.008 relating to CON regulation. The challenged Rule potentially affects VRBH's ability to obtain approval of its CON application.

39. Finally, VRBH has demonstrated that the potential injury to VRBH (i.e., denial of its CON application) is real, and not based on pure speculation or conjecture.

40. VRBH has demonstrated that it has standing to challenge the validity of rule 59C-1.008.

41. Additionally, in the context of this consolidated CON application and Rule challenge proceeding, the undersigned previously addressed the issue of VRBH's standing and the mootness argument raised by AHCA:

Standing

Substantially Affected

It is sufficient under case law that a petitioner "could be substantially affected or could reasonably be substantially affected by a[n] [adopted] rule." Interblock v. DBPR, Case No. 11-1075RX (Fla. DOAH Apr. 7, 2011). Venice Regional satisfies this requirement because Venice Regional could be substantially affected by rule 59C-1.008(4)(c) to the extent that the Rule is interpreted and relied upon by the undersigned to require a general hospital CON application to include an audited financial statement.

Case law further provides that in order for a petitioner to show that it is "substantially affected" by a rule, "the petitioner must [also] establish:

(1) a real and sufficiently immediate injury in fact; and

(2) 'that the alleged interest is arguably within the zone of interest to be protected or regulated.'"

Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94, 96 (Fla. 1st DCA 1999) (referring to Ward v. Bd. of Trs. of the Int. Imp. Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995), which is quoting All Risk Corp. of Fla. v. State, Dep't of Labor & Emp. Sec., 413 So. 2d 1200, 1202 (Fla. 1st DCA 1982)); see Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg., 688 So. 2d 404, 407 (Fla. 1st DCA 1997).

Injury

A real and sufficiently immediate injury in fact requires that the "the person challenging the validity of an adopted rule must show a direct injury in fact of

'sufficient immediacy and reality'" to the petitioner; the injury may not be "purely speculative and conjectural." Fla. Bd. of Optometry v. Fla. Soc. of Ophthalmology, 538 So. 2d 878, 881 (Fla. 1st DCA 1988) (referring to Fla. Dep't of Offender Rehab. v. Jerry, 353 So. 2d 1230 (Fla. 1st DCA 1978)). However, "injury" "does not require that a challenger to a rule wait until the injury occurs to institute a rule-challenge." Juan Cuellar v. Dep't of Bus. & Prof'l Reg., Case No. 07-5767RX (Fla. DOAH Feb. 26, 2008). Instead, potential injury is sufficient. Id.

Here, it is reasonable to conclude that Venice Regional faces a sufficient potential injury since there are multiple challenges filed to the preliminary approval of Venice Regional's application, and the determination of the filing requirements for a CON, and the outcomes of these petitions may negatively affect Venice Regional in current and future CON proceedings. Stated succinctly, if the undersigned concludes that the Rule's application content requirements for a general hospital include "an audited financial statement of the applicant or the applicant's parent corporation if the applicant's audited financial statements do not exist," it may well be established at hearing that Venice's application fails to satisfy that requirement, potentially resulting in denial of the application. Such an outcome would clearly affect Venice's substantial interests.

* * *

Mootness

The interpretation of the challenged Rule urged by both the Agency and Venice Regional is contradictory to the above-referenced Order denying Venice Regional's motion in limine, where the undersigned found that by

> the express terms, the requirements of rule 59C-1.008(4)(c) are applicable to Venice Regional's general hospital CON application, and, that the extent to which Venice Regional's application complied with the requirements is a relevant inquiry in Case No. 17-0556CON. However, an interpretation of the Rule has not been adjudicated by the undersigned in the instant Rule challenge proceeding; and, since there remains varying interpretations of the Rule in this proceeding, the matter is not moot.
>
> Conclusion
>
> Venice Regional filed the petition for the instant Rule challenge proceeding, which is guided by section 120.56. Venice Regional complied with the requirements of this statute by stating facts sufficient to show that it is substantially affected by the Agency's adopted Rule, rule 59C-1.008(4)(c). Thus, Venice Regional has standing in this proceeding. The question brought by Venice Regional's petition, which pertains to the correct interpretation of the challenged Rule, is not moot because the interpretation of this Rule has not been formally adjudicated by the undersigned in this proceeding.

(Order Denying Motion to Dismiss, Granting Motion to Consolidate, and Granting Motion to Amend Answer, June 21, 2017).

Invalidity of Rule 59C-1.008(4)

42. Section 120.52 defines an "invalid exercise of delegated legislative authority" as:

> (8) "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:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (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; or
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

43. As noted above, the challenged language of rule 59C-1.008(4) is directly contrary to section 408.037(2), which clearly and unequivocally "excepts" general hospital CON applications from the audited financial statement requirement. However, if the challenged Rule language is stricken, specifically section 1.008(4)(c), it does no harm to AHCA's interpretation, established practice, and application of the

requirement that CON applications for projects "except for a general hospital" must include an audited financial statement. The Rule without the challenged provision would simply state that the statutory content requirements must be followed. The challenged language set forth at section 1.008(4)(c) is, therefore, stricken as an invalid exercise of delegated legislative authority.

44. Section 120.52(8) also contains what is referred to as a "flush-left" provision that restricts the scope of agency rulemaking authority. This flush-left paragraph states:

> 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.

45. In Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696, 700 (Fla. 1st DCA 2001), the Court observed:

> [A]gencies 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 and 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.

46. Each rule must include a citation "to the grant of rulemaking authority pursuant to which the rule is adopted," as well as a citation "to the section or subsection of the Florida Statutes or the Laws of Florida being implemented or interpreted." §§ 120.54(3)(a)1. and 120.52(8)(b), (8)(c), Fla. Stat. "After adoption of a rule, the [agency] may not rely on statutory provisions not cited in the proposed rule as statutory authority." Dep't of Child. & Fam. Servs. v. I.B., 891 So. 2d 1168, 1172 (Fla. 1st DCA 2005) (quoting Fla. League of Cities v. Dep't of Ins., 540 So. 2d 850, 865 (Fla. 1st DCA 1989)).

47. In this case, rule 59C-1.008(4) is outside the rulemaking authority granted to AHCA by the Legislature. Although section 408.034(8) states that AHCA may "adopt rules necessary to implement" the CON law, this general grant of rulemaking authority "is not sufficient to allow [AHCA] to adopt" rule 59C-1.008(4) as fully applicable to all CON applications rather than differentiating between the sections that are applicable to general hospital CON applications and

other non-general hospital CON applications, as set forth in both section 408.035(2) and section 408.037(2).

48. The flush-left paragraph in section 120.52(8) requires, "a close examination of the statutes cited by the agency as authority for the rule at issue to determine whether those statutes explicitly grant the agency authority to adopt the rule." United Faculty of Fla. v. Fla. State Bd. of Educ., 157 So. 3d 514, 517 (Fla. 1st DCA 2015). Therefore, to be valid, rule 59C-1.008(4) must "implement or interpret the specific powers and duties granted by the enabling statute." Id.; see § 120.52(9), Fla. Stat.

49. The "law implemented" section at the end of rule 59C-1.008 identifies multiple statutes as the "law implemented" by that rule, including sections 408.033, 408.034, 308.036, 408.037, 408.039 and 408.042. See § 120.52(9) (defining the "law implemented" as "the language of the enabling statute being carried out or interpreted by an agency through rulemaking").

50. However, a review of the implemented statutes, specifically section 408.037, confirms that none of the specific powers and duties conveyed to AHCA by this statute are implemented by rule 59C-1.008(4)(c) that, as written, require general hospital CON applicants to provide audited financial statements.

51. Section 408.037 does not give AHCA an express power or duty to require general hospital applicants to provide audited financial statements in the CON application.

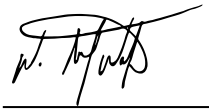
52. Rule 59C-1.008(4)(c) violates the requirements of section 120.52(8)(c), as it clearly "enlarges, modifies, or contravenes the specific provisions of law implemented." As such, rule 59C-1.008(4)(c) is an invalid exercise of AHCA's delegated legislative authority.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Florida Administrative Code Rule 59C-1.008(4)(c) is invalid.

DONE AND ORDERED this 8th day of May, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 8th day of May, 2018.

ENDNOTES

[1/] Statutory references herein are to the 2017 version of the Florida Statutes.

[2/] In 2012, the Legislature revised it to allow the submission of an audited financial statement of the applicant's parent corporation if audited financial statements of the applicant do not exist. Ch. 2012-160, § 42, Laws of Fla.

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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 one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.