FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D22-1532

DELASOL,

Appellant,

v.

LENKA VOJTISKOVA,
DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Appellees.

On appeal from the Department of Environmental Protection.
Chadwick R. Stevens, Acting General Counsel.

November 2, 2022

PER CURIAM.

Appellant seeks review of an order rendered by Appellee Department of Environmental Protection ("DEP") that dismisses Appellant's amended complaint without prejudice and with leave to amend ("Order"). The Order contains the following, conditional language: "This order constitutes final agency action of the Department, *unless a timely amended petition is filed in compliance with this order*." (emphasis added).

Appellee Vojtiskova filed a motion to dismiss, arguing that the Order "is neither a final agency action nor a non-final agency

action immediately reviewable pursuant to section 120.68(1), Florida Statutes."

Appellee DEP concedes that the Order is a nonfinal order and that, accordingly, this Court "lacks jurisdiction over the order on appeal." Additionally, Appellee DEP asserts that "the jurisdictional defect could be cured by entry of a final order of dismissal."

Appellant disagrees with Appellees and has repeatedly argued to this Court that the Order is final despite its conditional language. Appellant raises two arguments in the alternative: (1) the order was a nonfinal order that became final; and (2) the order was a final order that never became nonfinal. Under the former, the failure to satisfy a condition turned a nonfinal order into a final order; under the latter, the failure to satisfy a condition prevented a final order from becoming nonfinal.

Appellant also raises a claim of equitable estoppel, arguing that it detrimentally relied on Appellee DEP's representation that the Order was final.

Because the Order contains conditional language, we reject Appellant's arguments that the Order is final. *See Scott ex rel. Scott v. Women's Med. Grp., P.A.*, 837 So. 2d 577, 577 (Fla. 1st DCA 2003) ("[A]n order that purports to become final at a later date is not final."); *see also Wilson v. Wilson*, 906 So. 2d 356, 357 (Fla. 1st DCA 2005) ("[A]n order which purports to become final upon the happening of an event specified in the order is not a final order and the happening of the event does not operate to render the order final.").

This rule applies with equal force to orders issued by administrative agencies. *See United Water Fla., Inc. v. Fla. Pub. Serv. Comm'n*, 728 So. 2d 1250 (Fla. 1st DCA 1999) (holding that an order from the Public Service Commission, which purported to become final on a certain future date in the absence of a petition for a formal hearing, was not a final order). *see also Pagenet, Inc. v. State, Dep't of Revenue*, 843 So. 2d 1027 (Fla. 1st DCA 2003) ("[T]he order did not become a final order by purporting to be a dismissal with prejudice if the appellant failed to comply with any

of the options provided in the order for filing an amended complaint.").

Furthermore, Appellant's estoppel theory does not save this appeal from lacking jurisdiction where conditional language of finality is used. *See FCCI Mut. Ins. Co. v. Cayce's Excavation, Inc.*, 675 So. 2d 1028, 1029 (Fla. 1st DCA 1996), citing *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) ("It is well settled that subject matter jurisdiction cannot be conferred by estoppel."); *cf. Branca*, 634 So. 2d at 607 ("[E]stoppel cannot be applied against a governmental entity to accomplish an illegal result."). And we likewise decline to treat the notice of appeal as invoking this Court's jurisdiction to review *nonfinal* administrative action under Florida Rule of Appellate Procedure 9.130(a)(1). *See also* Fla. R. App. P. 9.040(c) ("If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy.").Appellant's ability to solve the jurisdictional problem precludes the demonstration of irreparable harm which is necessary to obtain review of a non-final order by petition. *See Agency for Health Care Admin. v. S. Broward Hosp. Dist.*, 206 So. 3d 826, 828 (Fla. 1st DCA 2016) ("Because there is no prima facie showing of irreparable harm, AHCA is not entitled to our evaluation of the non-final agency order."); *see also Verizon Bus. Network Servs., Inc. ex rel. MCI Commc'ns, Inc. v. Fla. Dep't of Corr.*, 960 So. 2d 916, 917 (Fla. 1st DCA 2007) ("[T]he [certiorari] 'irreparable harm' analysis is also applicable to a petition for review of non-final administrative action.").

Based on the foregoing, we dismiss the appeal and deny all pending motions as moot.

DISMISSED.

ROBERTS, OSTERHAUS, and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Joseph A. Davidow, Naples, for Appellant.

Jeffrey Brown, Tallahassee, for Appellee Department of Environmental Protection; Zachary W. Lombardo of Woodward, Pires & Lombardo, P.A., Naples, for Appellee Lenka Vojtiskova.