IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

LOUIS DEL FAVERO ORCHIDS, INC.,

Appellant,

v.

SPRING OAKS GREENHOUSES, INC. and DEPARTMENT OF HEALTH,

Appellees.
_____/

Case No.: 1D19-1772
L.T.: DOAH Case No.: 2018-4471
DOH Case No.: 2018-0172

ANSWER BRIEF OF SPRING OAKS GREENHOUSES, INC.
Appeal from a Final Order of the Department of Health

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STATEMENT OF CASE AND FACTS[1]

The Compassionate Medical Cannabis Act of 2014

In 2014, the Florida Legislature passed the Compassionate Medical Cannabis Act of 2014 (the "CMCA"), which legalized the cultivation, processing, and dispensing of low-THC cannabis for certain qualified patients. *See* Ch. 2014-157, Laws of Fla. The CMCA, which was codified as section 381.986, Florida Statutes (2014), directed the Department[2] to authorize the establishment of five dispensing organizations ("DO") in five geographic regions in the state for the purposes of supplying low-THC cannabis to qualified patients in Florida. § 381.986(5)(b), Fla. Stat. (2014).

The Department was also directed to adopt rules necessary to implement the CMCA, which included rules for the initial application requirements for DOs, and to develop and adopt an application for DO licensure. *See* § 381.986(5)(d), Fla. Stat. (2014). On or about June 17, 2015, pursuant to the Legislative directives under the CMCA, the Department adopted Rule 64-4.002, Fla. Admin. Code, which set forth the initial application requirements and incorporated an application for DO

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[1] Appellee Florida Department of Health is referred to the "Department" and Appellee Spring Oaks Greenhouses, Inc. is referred to as "Spring Oaks." Appellant Louis Del Favero Orchids, Inc. is referred to as "Del Favero."

[2] This brief references the record by page number (*e.g.* [R. 1] references Record page 1).

licensure. Pursuant to Rule 64-4.002(5), entities desiring to become a DO were required to submit the requisite application to the Department no later than 5:00 P.M. on July 8, 2015, along with an initial application fee in the amount of $60,063.00.

Spring Oaks' Application for Licensure

In July 2015, Spring Oaks timely filed an application for licensure as a DO in the "central region" of the state, which the Department denied in November 2015. [R. 11, 24] The Department's denial letter did not specify Spring Oaks' application score and instead merely stated that Spring Oaks' application was denied "because it was not the highest scored applicant in the central region." [R. 24] Spring Oaks did not immediately challenge the Department's denial. [R. 12]

During the next Legislative Session (2016), the Legislature enacted Chapter 2016-123, Laws of Florida, which expanded the scope of the CMCA. In pertinent part, the new law amended section 381.986, Florida Statutes (2015), to allow the newly licensed DOs to cultivate, process, and dispense full strength, high-THC medical marijuana, albeit only for terminally ill patients who obtained, *inter alia*, attestations from two physicians that the patient was expected to die within a year. *See* § 381.986(2), Fla. Stat. (2016).

Amendment 2

In November 2016, Florida voters overwhelmingly approved an amendment to the Florida Constitution to allow for the legal "Use of Marijuana for Debilitating

Medical Conditions" (the "Amendment") (codified as Art. X, § 29, Fla. Const.). [R. 13]. In addition to expanding the population eligible to obtain medical marijuana, the Amendment defined a new category of business entities, Medical Marijuana Treatment Centers ("MMTC"), which are authorized to operate in the medical marijuana industry. [R. 13-14]; *see* Art. X, § 29(b)(5), Fla. Const. On January 3, 2017, the Amendment took effect in the State of Florida. Art X § 29(d), Fla. Const.

Florida Legislature Enacts New Legislative Scheme During Special Legislative Session

During a Special Session convened in June 2017, the Legislature substantially amended section 381.986, Florida Statutes based on the recently passed Amendment. The new amended statute became effective on June 23, 2017 as Chapter 2017-232, Laws of Florida. As to licensing MMTCs, amended section 381.986 (the "Statute") provides, in pertinent part (emphasis added):

> (8) MEDICAL MARIJUANA TREATMENT CENTERS.—
>
> (a) The department shall license medical marijuana treatment centers to ensure reasonable statewide accessibility and availability as necessary for qualified patients. . . .
>
> 1. As soon as practicable . . . the department shall license as a medical marijuana treatment center any entity that holds an active, unrestricted license to cultivate, process, transport, and dispense low-THC cannabis, medical cannabis, and cannabis delivery devices, under former s. 381.986. . . .
>
> ***
>
> **2.** The department shall license as medical marijuana treatment centers 10 applicants that meet the requirements of this section, under the following parameters:

a. As soon as practicable, but no later than August 1, 2017, **the department shall license any applicant whose application** was reviewed, evaluated, and scored by the department and which was denied a dispensing organization license by the department under former s. 381.986, Florida Statutes 2014; which had one or more judicial challenges pending as of January 1, 2017, or **had a final ranking within one point of the highest final ranking in its region under former s. 381.986, Florida Statutes, 2014**; which meets the requirements of this section; and which provides documentation to the department that it has the existing infrastructure and technical and technological ability to begin cultivating marijuana within 30 days after registration as a medical marijuana treatment center.

b. As soon as practicable, the department shall license one applicant that is a recognized class member of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), or *In Re Black Farmers Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011). An applicant licensed under this sub-subparagraph is exempt from the requirement of subparagraph (b)2.

c. As soon as practicable, but no later than October 3, 2017, the department shall license applicants that meet the requirements of this section in sufficient numbers to result in 10 total licenses issued under this subparagraph, while accounting for the number of licenses issued under sub-subparagraphs a. and b.

3. For up to two of the licenses **issued under subparagraph 2.**, the department shall give preference to applicants that demonstrate in their applications that they own one or more facilities that are, or were, used for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses and will use or convert the facility or facilities for the processing of marijuana.

Thus, the amended statute directed the Department to first license as MMTCs all current DOs under the prior version of the Statute. § 381.986(8)(a)1., Fla. Stat. In addition, amended section 381.986(a)2.a. directed the Department to issue an

MMTC license to **every** 2015 DO applicant that met the following four criteria: (a) their application was reviewed, evaluated, and scored by the Department; (b) they had a final ranking ***within 1 point*** of the highest final ranking in their region; (c) they meet the requirements of section 381.986; and (d) they can provide documentation of operational capacity within 30 days (hereinafter the "One Point Provision"). In an attempt to implement the One Point Provision, the Department adopted emergency administrative rule 64ER17-3 on September 28, 2017, which it superseded on November 1, 2017 by adopting rule 64ER17-7. [R. 16-17]

In another new provision, amended section 381.986(8)(a)3., the Statute directed the Department to "give preference to applicants that demonstrate in their applications" that, *inter alia*, they own facilities that were used for citrus processing and will use the facility for the processing of marijuana (the "Citrus Preference"). By its terms, the Citrus Preference may **only** be applied: "[f]or up to two of the licenses issued under [§ 381.986(8)(a)**2.**]." § 381.986(8)(a)3., Fla. Stat. (emphasis added).

Finally, the amended Statute directed the Department to issue four additional MMTC licenses within six months of the state medical marijuana use registry reaching 100,000 active qualified patients and then four additional MMTC licenses within six months after the registration of each additional 100,000 active qualified patients in the state registry. *See* § 381.986(a)4., Fla. Stat.

Scoring Methodology For 2015 DO Applications Found Fatally Flawed

In October 2017, Nature's Way Nursery of Miami, Inc. ("Nature's Way"), requested that the Department license it as an MMTC pursuant to the One Point Provision. [R. 16-17]. Nature's Way is one of the entities that, like Spring Oaks, applied for a DO license in 2015 and did not receive a license because it was not the highest ranking applicant in their region. [*Id.*] After the Department denied Nature's Way's 2017 request for licensure, Nature's Way filed an administrative challenge on the ground that the Department's scoring calculation was unreasonable, arbitrary, capricious, erroneous, and based on an unadopted rule. [R. 16][3] At the same time, Nature's Way filed a separate administrative action alleging that certain provisions of emergency rule 64ER17-3 and then rule 64ER17-7, which superseded it, were vague, arbitrary and capricious, exceeded the Department's grant of rulemaking authority, and contravened the law implemented. [R. 15-17]

On June 15, 2018, the administrative law judge (the "ALJ") presiding over the proceedings issued a lengthy Final Order finding that provisions of emergency

[3] *See* Petition for Formal Administrative Hearing and Administrative Determination Regarding Unadopted Rules, *Nature's Way Nursery of Miami, Inc. v. Fla. Dep't of Health*, Case No. 18-0721 (DOAH Jan. 17, 2018) (available at https://www.doah.state.fl.us/DocDoc/2018/000721/18000721PFAH-021318-14250725.PDF.

rule 64ER17-7 constitute an invalid exercise of delegated legislative authority. [R. 18][4]

In addition, pertinent to all of the 2015 DO applicants, including Spring Oaks, the Final Order also found that the scoring methodology used by the application reviewers during the 2015 DO selection process to determine the aggregate scores of the applicants, and which the Department intended to rely upon in determining the qualifying One Point Provision applicants, was fatally flawed and constituted an unadopted rule in violation of section 120.54(1)(a), Florida Statutes. *Id*.[5] In so doing, the ALJ even went as far as saying that:

> [i]f this deception had been intentional (and, to be clear, there is no evidence it was), **we could fairly call it fraud**. Even without bad intent, the decision to code positions in ranked series with 'scores' expressed as 'points' was **a colossal blunder that turned the scoring process into a dumpster fire**.

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[4] *See* Final Order, *Nature's Way Nursery of Miami, Inc. v. Fla. Dep't of Health*, Case No. 17-5801RE (DOAH June 15, 2018) (available at https://www.doah.state.fl.us/ROS/2017/17005801.pdf (hereinafter "*Nature's Way Final Order*").

[5] Also on June 15, 2018, the ALJ issued a recommended order determining that Nature's Way was entitled to a license under the "within one point" qualification, despite Nature's Way having a final ranking of over 1.5 "points" less than the highest final ranking and having a regional rank of 3 less than the highest final ranking. [R. 17]; Recommended Order, *Nature's Way Nursery of Miami, Inc. v. Fla. Dep't of Health*, Case No. 18-0721RU (DOAH June 15, 2018). The Department subsequently rejected the ALJ's recommended order yet entered into a settlement agreement in which Nature's Way was issued an MMTC license. *See* https://www.doah.state.fl.us/DocDoc/2018/000721/18000721MEF-071618-09173217.PDF (July 16, 2018).

Nature's Way Final Order at ¶ 28 (emphasis added).

The Erroneous Scoring Methodology Failed to Capture Critical Data, Tainting the Entire Scoring Process Beyond Repair

The ALJ explained that the governing DO application rule (Fla. Admin. Code R. 64-4.002(5)(a) (2015)) required the 2015 application reviewers "to score the applicants in a way that quantified the differences between them, rather than with superlatives such as 'more qualified' and 'most qualified' (or numbers that merely represented superlative adjectives)." *Nature's Way Final Order* at ¶ 13. Far from *scoring* the DO applications, however, the Department instead adopted a *ranking* policy pursuant to which the application reviewers simply *ranked* the various criteria in the DO Applications using ordinal numbers. *Id.* at ¶¶ 28-30.

The Department's "rank scores" merely symbolized the applicants' positions in sets of ordered applications and failed to capture critical interval data. *Id.* at ¶ 30. As a result, the ALJ explained that "it cannot truthfully be claimed that the interval between, say, Second Best and Third Best is the same as that between Third Best and Fourth Best, as there exists no basis in fact for such a claim." *Nature's Way Final Order* at ¶ 29; *see also id.* at ¶ 68 ("[t]he Department committed a gross conceptual error when it decided to treat ordinal data as interval data").

Further, "there is no way to fix this problem retroactively; no formula exists for converting or translating non-metric data such as rankings (which, for the most part, cannot meaningfully be manipulated mathematically) into quantitative data."

Id. at ¶ 68. This improper *ranking* methodology was "used to determine the substantial interests of every nursery that applied for a DO license in 2015[,]" and "[t]he Department cannot, and does not, dispute this." *Id.* ¶ 173. To the contrary the Department has admitted that "[t]he 2015 Scoring Methodology allowed the Department to determine which applicants from a *one-time batch* were entitled to receive the five exclusive DO licenses in 2015." *Id.* (emphasis added). Indeed, "the Department based its determination of *all* the 2015 applicants' substantial interests on the Scoring Methodology." *Id.* (italics in original). The Department appealed the *Nature's Way Final Order* to this Court, but then voluntarily dismissed it.[6]

Spring Oaks Requests Registration As An MMTC and Is Denied

On July 26, 2018, Spring Oaks filed with the Department a request for registration as an MMTC pursuant to the Statute. In so doing, Spring Oaks notified the Department that it meets all statutory criteria to be registered as an MMTC under the One Point Provision qualification. Further, Spring Oaks notified the Department that should the Department determine that Spring Oaks was entitled to be licensed as a DO, then the Department is required to register Spring Oaks as an MMTC without regard to any purported limitations on licenses. [R. 26]

On July 27, 2018, the Department issued a denial of Spring Oaks' request for registration, concluding that Spring Oaks "did not have final score within one point

[6] *See* Case No. 1D18-2929 (Apr. 23, 2019) (Voluntary Dismissal-Rule 9.350(b)).

of the highest scoring applicant in its region." [R. 8] The Department's denial letter did not specify how the Department determined that Spring Oaks is not within one point of the highest scoring applicant in the central region. [*Id.*]

Underlying Administrative Proceedings at DOAH

On July 30, 2018, Spring Oaks filed the instant administrative action to challenge the Department's apparent reliance on provisions of Rule 64ER17-7 and the 2015 DO scoring methodology, both of which were determined invalid, to deny Spring Oaks application for licensure. [R. 10]

On August 31, 2018, Appellant Del Favero filed a Motion to Intervene in the administrative proceedings, stating that it "supports the Department of Health's decision to deny the license sought by Petitioner." [R. 45] In so doing, Del Favero alleged that it had been preparing to file an application for an MMTC license since before October 2017 and was waiting for the Department to begin accepting applications. [R. 53] Further, in an attempt to qualify for the Citrus Preference set forth in section 381.986(8)(a)3., Del Favero alleged that it purchased "facilities that were used for citrus processing and . . . developed plans to convert that facility for the processing of medical marijuana." [R. 50] Del Favero also noted in its motion that it had recently successfully challenged a new administrative rule that the Department proposed to open the MMTC application process and implement the statutory Citrus Preference—and no replacement had yet been proposed by the

Department. [R. 52]. Notwithstanding, Del Favero alleged that it was entitled to have its purported "application," which there is no record evidence in this case of Del Favero ever submitting to the Department, comparatively reviewed against Spring Oaks' DO application which was submitted to the Department in 2015. [R. 55]

On September 11, 2018, the ALJ presiding over the case issued an Order Regarding Motions to Intervene stating that he "has elected to defer ruling on the Motions to Intervene until the issue regarding the number of available licenses is resolved." [R. 94] The order explained that "a ruling on the Motions to Intervene may be significantly influenced by a determination as to whether the Petitioners… 'are competing for only two available [medical marijuana treatment center] licenses.'" [*Id.*]

On September 28, 2018, with Del Favero's motion to intervene still pending, the ALJ issued an Order to Show Cause Why Jurisdiction Should Not Be Relinquished to the Department of Health. [R. 200] In response, Spring Oaks explained that the Department's denial of its registration appeared to be based upon emergency rule 64ER17-7, which was already found to be invalid in *Nature's Way* and to the extent that was the case, it would violate section 120.57(1)(e)1., Florida Statutes. [R. 284] Before that could occur, however, several factual disputes would first have to be resolved to make that determination. [*Id.*]

Spring Oaks also noted that its administrative petition also alleged that the Department relied on an unadopted rule in denying Spring Oaks's request for registration and resolution of that issue would also require the resolution of several factual issues. [*Id.*] Finally, Spring Oaks argued that due process requires that Spring Oaks is entitled to a hearing to introduce evidence to show that it is substantially affected by the Department's proposed action, including the emergency rule and alleged unadopted rule, and to establish that the Department has deviated from its prior practice without explanation. [R. 285]

Shortly before Spring Oaks filed that response, however, in separate litigation, the Leon County Circuit Court issued an order in *Florigrown, LLC v. Department of Health*, Case No. 2017-CA-002549 (Fla. 2d Jud. Cir. Ct. Oct. 15, 2018) (the "*Florigrown* case"), which temporarily enjoined the Department "from registering or licensing any [medical marijuana treatment centers] pursuant to the unconstitutional legislative scheme set forth in Section 381.986, Florida Statutes." [R. 309] As a consequence, on October 18, 2018, before resolving Del Favero's motion to intervene or addressing the parties' responses to the Order to Show Cause, the ALJ issued an order stating:

> Because Petitioner is seeking licensure pursuant to section 381.986, the undersigned relinquishes jurisdiction back to the Department WITHOUT PREJUDICE to either Petitioner or Respondent moving to reopen the case once the injunction is lifted or the constitutionality of section 381.986 is otherwise conclusively resolved.

[*Id.*]

Five days later, on October 23, 2018, Del Favero filed in the *Florigrown* case, a Motion to Intervene and Enforce [Florigrown's] Temporary Injunction Requiring DOH to Register Intervenor as a Medical Marijuana Treatment Center, and the Circuit Court allowed Del Favero to intervene notwithstanding the Department's opposition.[7] On December 18, 2018, this Court entered an order staying the temporary injunction imposed in the *Florigrown* case while the Department sought review of the temporary injunction. *See* Order, Case No. 1D18-4471 (Dec. 18, 2018) (the "*Florigrown* appeal"). On July 9, 2019, a panel of this Court found in the *Florigrown* appeal that the plaintiff has a likelihood of success on the merits and reinstated the relevant provisions of the temporary injunction, which bars the Department from registering or licensing any MMTCs. *See* Opinion, Case No. 1D18-4471 (Jul. 9, 2019) (per curiam), *petition for reh'g en banc pending*.

Spring Oaks and the Department Reach a Settlement

On April 16, 2019, while the temporary injunction in the *Florigrown* case was stayed pending this Court's review, the Department and all of the remaining 2015 DO applicants whose applications were "scored," but that had thus far not received

[7] *See* docket in *Florigrown v. Florida Dept. of Health*, Case No. 2017-CA-002549 (Fla. 2d Jud. Cir. Oct. 23, 2018).

an MMTC license, including Spring Oaks, entered into a Joint Settlement Agreement (the "Settlement Agreement"). [R. 329, 333]. In pertinent part, the Settlement Agreement states [R. 336 (emphasis added)]:

> [T]he Petitioners intend to provide **enhanced patient access** by locating a percentage of dispensaries within impoverished communities and rural areas that have been adversely affected by extraordinary economic events or natural disasters[.]
>
> [T]he Petitioners intend to impose owner, manager, and employee background screening requirements **more stringent than required** under existing Florida law[.]
>
> [T]he Petitioners will adopt security and anti-diversion policies that are **more stringent than required** under existing Florida law, including applying security standards to each dispensary that are comparable to 12 C.F.R. § 326.3 (2018)[.]
>
> [T]he Parties desire to resolve the disputes between them and therefore intend to enter into this Agreement to approve the Petitioners to serve as medical marijuana treatment centers under applicable laws; agree that the Petitioners have a colorable claim alleging that they qualify as medical marijuana treatment centers under section 381.986(8)(a), Florida Statutes (2018); and agree that the Department shall license each of the Petitioners as medical marijuana treatment centers.

Thus, Spring Oaks agreed to, among other things, locate a certain percentage of its dispensaries within impoverished communities and rural areas that have been adversely affected by extraordinary economic events or natural disasters, which would not otherwise be required under the law, and to undertake other obligations in excess of that which is required under Florida law, while the Department agreed to comprise the dispute and in so doing issue Spring Oaks an MMTC license. There

is no record evidence that Del Favero—at any time between December 18, 2018, when the temporary injunction was stayed by this Court and April 16, 2019, when the Department and Spring Oaks entered into the settlement—made any attempt to reopen the case at the Division of Administrative Hearings or otherwise attempt continue to litigate the matter before the Department.

Pursuant to the Settlement Agreement, on April 17, 2019, Spring Oaks filed a voluntary dismissal with prejudice of the DOAH proceeding. [R. 329] Then, on April 19, 2019, the Department issued a Final Order (the "Order") recognizing the parties' Settlement Agreement and Spring Oaks' DOAH dismissal, and entering a dismissal of Spring Oaks' administrative petition with prejudice. [*Id.*]

SUMMARY OF ARGUMENT

As an initial matter, Del Favero lacks standing to appeal the Order because it was not a party to the administrative action. The ALJ never ruled on Del Favero's motion to intervene in the administrative action, and Del Favero did not and cannot establish that it has substantial interests that will be affected by the Order. Therefore, this Court should dismiss this appeal.

In the alternative, this Court should affirm the Order in its entirety for multiple reasons. **First**, the Order does not violate the *Ashbacker* doctrine or section 381.986(8)(a)2. Neither the Department nor the Division of Administrative Hearings could conduct a comparative review of Del Favero's application with

Spring Oaks' application because there is no record evidence that Del Favero ever filed an application Further, any comparison between *applicants* under the One Point Provision and *applicants* seeking an MMTC license under the other provisions of section 381.986(8)(a) has nothing to do with Del Favero. Del Favero is not on equal footing with Spring Oaks, or other applicants for that matter, due to the lack of record evidence of any application from Del Favero to compare. And comparative review would be unnecessary in any event because nothing to date affirms the number of MMTC licenses available at present.

Second, the Order is entirely consistent with the APA and the parties' Settlement Agreement. The Order simply approved a settlement between the Department and Spring Oaks to resolve a dispute between them concerning the MMTC license application scoring methodology. The Order made no findings of fact. In addition, the Order did not deprive Del Favero—a non-party, non-applicant, with no established affected substantial interest—an adequate point of entry to participate in a proceeding limited to a challenge to the Department's methodology for scoring applications.

Third, the Settlement Agreement incorporated into the Order actually promotes public policy. In addition to resolving the dispute through the give and take of settlement, the Settlement Agreement promotes public policy by requiring

Spring Oaks to enhance public access to dispensaries and adopt more stringent security measures than required under law.

STANDARD OF REVIEW

"The inquiry on appeal [from final administrative agency action under the APA] is generally whether the final order is supported by competent, substantial evidence in the record." *Stasinos v. State, Dep't of Bus. & Prof'l Regulation*, 209 So. 3d 18, 21 (Fla. 4th DCA 2016) (citing § 120.68(7)(b), Fla. Stat. (2015); *Dep't of Banking & Fin., Div. of Sec. & Inv'r Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 933 (Fla. 1996); *Legal Envtl. Assistance Found., Inc. v. Clark*, 668 So. 2d 982, 987 (Fla. 1996)). "If so supported, [the appellate] court must affirm the final order unless there is a demonstration of a material error in procedure, an incorrect interpretation of law, or an abuse of discretion." *Id*. (citing §§ 120.68(7)(c)-(e), (8)).

Spring Oaks agrees this Court reviews the question of standing *de novo*. *See* [Ini. Br. at 20 (citing *Davis v. Hinson*, 67 So. 3d 1107, 1110 (Fla. 1st DCA 2011))]. Spring Oaks also agrees the question of whether a settlement agreement is void as against public policy is a legal question reviewed *de novo*. *See* [Ini. Br. at 43 & 43 n.10 (citing *Catastrophe Servs., Inc. v. Fouche*, 145 So. 3d 151, 154 (Fla. 5th DCA 2014); *Pinnacle Three Corp. v. EVS Invs., Inc.*, 193 So. 3d 973, 976 (Fla. 3d DCA 2016))].

ARGUMENT

I. THIS COURT SHOULD DISMISS THIS APPEAL. DEL FAVERO LACKS STANDING TO APPEAL THE ORDER BECAUSE IT WAS NOT A PARTY TO THE ADMINISTRATIVE ACTION.

Del Favero cannot appeal the Order because Del Favero was not a party to the administrative action that resulted in the Order. Therefore, the Court must dismiss this appeal.

The APA is clear that only a **party** to an administrative action may seek judicial review of that action:

> Section 120.68(1) sets forth the standard for judicial review of administrative action and states that "[a] party who is adversely affected by final agency action is entitled to judicial review." Thus, there are four requirements for standing to seek such review: (1) the action is final; (2) the agency is subject to provisions of the act; (3) **the person seeking review was a party to the action**; and (4) the party was adversely affected by the action.

Legal Env'tl Assistance Found., Inc., 668 So. 2d at 986 (citation omitted) (emphasis added). It is undisputed that Del Favero was never a party to the proceedings before the Department or DOAH. *See, e.g.*, [Ini. Br. at 23 ("It is true that Del Favero's motion for intervention was not ruled on before the ALJ relinquished jurisdiction to the Department.")]. The ALJ never determined whether Del Favero satisfied the definition of "party" under section 120.52(13), Florida Statutes. Thus, Del Favero lacks standing to appeal. *See Norkunas v. State Bldg. Comm'n*, 982 So. 2d 1227, 1228 (Fla. 1st DCA 2008) (dismissing appeal after concluding "[b]ecause appellant

was not a party to the proceedings below, he is without standing to institute an appeal").

The fact that both the Department and Spring Oaks included Del Favero on their certificate of service for their filings at DOAH, [Ini. Br. at 24], does not confer appellate standing on Del Favero, and Del Favero cites no authority that it does. The Department and Spring Oaks included Del Favero on the certificate of service because Del Favero filed a motion to intervene in the proceedings. The Department and Spring Oaks do not have the authority to confer appellate standing under any circumstances—especially, where it does not exist. And the Department did not "notif[y] Del Favero of its right to appeal the Final Order in this case." [Ini. Br. at 24] Instead, the Department included on the Order its standard "Notice of Right to Judicial Review" that it includes on all orders. [R. 330] That notice did not tell Del Favero it had a right to appeal the order. Instead, it stated: "A **PARTY ADVERSELY AFFECTED** BY THIS ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES." [*Id.* (emphasis added)] As explained herein, Del Favero is not a party and has not been adversely affected the order pursuant to section 120.68.

Del Favero ignores this statutory requirement entirely. *See* [Ini. Br. at 20-24]. Instead, Del Favero relies on cases that address standing to participate in administrative proceedings in the first instance. *See, e.g.* [Ini. Br. at 20-23 (citing *S.*

Broward Hosp. Dist. v. State, Agency for Health Care Admin., 141 So. 3d 678, 681 (Fla. 1st DCA 2014); *Agrico Chem. Co. v. Dep't of Envtl. Reg.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981); *Bio-Med. Applications of Ocala, Inc. v. Office of Cmty. Med. Facilities, Dep't of Health & Rehab. Servs.*, 374 So. 2d 88, 88-89 (Fla. 1st DCA 1979); *Ybor III, Ltd. v. Fla. Housing Fin. Corp.*, 843 So. 2d 344, 345-47 (Fla. 1st DCA 2003))]. None of these cases dealt with section 120.68(1) or standing to **appeal** final administrative action. Instead, they discuss whether one can establish a substantial interest in the outcome of the administrative proceedings such that they are entitled to appear as a party in those proceedings under section 120.52(13)(b).[8]

This consideration might apply here if the ALJ had ruled on the Del Favero's intervention motion, but he did not. [R. 94] Therefore, Del Favero cannot (and in fact does not) challenge on appeal anything related to its right to intervene in the administrative proceedings. *See Farina v. State*, 937 So. 2d 612, 629 (Fla. 2006) ("[F]ailure to obtain a ruling on a motion or objection fails to preserve an issue for appeal.") (citing *Armstrong v. State*, 642 So. 2d 730, 740 (Fla. 1994)).

In any event, Del Favero cannot satisfy the inapplicable test for standing under section 120.52(13)(b), which defines "party" in pertinent part as: "Any other person who, as a matter of constitutional right, provision of statute, or provision of agency

[8] The cases discussed prior versions of this section that had different numbering, but were identical in substance to 120.52(13)(b).

regulation, is entitled to participate in whole or in part in the proceeding, **or whose substantial interests will be affected by proposed agency action**, and who makes an appearance as a party." (emphasis added). This Court explained the test for determining whether one has "substantial interests [that] will be affected by proposed agency action":

> [One has standing to intervene under section 120.52(13)(b) if they can] establish that they had a substantial interest in the outcome of the proceedings by showing that: (1) they would suffer injury in fact which is of sufficient immediacy to entitle [them] to a section 120.57 hearing, and (2) that [their] substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

S. Broward Hosp. Dist., 141 So. 3d at 681 (quoting *Agrico*, 406 So. 2d at 482) (internal quotation marks omitted).

"Under the first prong of *Agrico*, the injury-in-fact standard is met by showing that the petitioner sustained actual or immediate threatened injury at the time the petition was filed, and '[t]he injury or threat of injury must be both real and immediate, not conjectural or hypothetical.'" *Id*. (quoting *Village Park Mobile Home Ass'n v. State, Dep't of Bus. Regulation*, 506 So. 2d 426, 433 (Fla. 1st DCA 1987)). "Under the second prong, Appellant must establish that its injury is the type of injury that the proceeding is designed to protect." *Id*. (citing *Agrico*, 406 So. 2d at 482).

Del Favero bases its entire claim of "substantial interest in the outcome of the proceedings" on a false premise—namely, that Del Favero had actually applied for licensure at the time the underlying administrative proceedings took place. Specifically, Del Favero claims it established the first prong of the *Agrico* test (injury in fact) because "Del Favero and Spring Oaks both sought one of a statutorily limited number of MMTC licenses" and "the Department's action [in granting a license to Spring Oaks] results in one less MMTC license being available, without affording Del Favero an opportunity to have its application comparatively reviewed with Spring Oaks. . . ." [Ini. Br. at 21] Del Favero claims it met the second prong of the *Agrico* test (zone of interest) "because section 381.986(8)(a) contemplated an application process including comparative review." [*Id*. at 21-22]

This is incorrect. Del Favero did not seek "one of a statutorily limited number of MMTC licenses." There is no record evidence that Del Favero ever even filed an application for one. And it's unclear how the Department's action failed to "afford[] Del Favero an opportunity to have its application comparatively reviewed with Spring Oaks" when there is no record evidence of any application to compare. Further, what section 381.986(8)(a) contemplates regarding comparative review in the application process is irrelevant in the absence of an application to compare. Del Favero's reliance on cases concerning "parties filing mutually exclusive

applications" [Ini. Br. at 22] is misplaced where the record clearly reflects that Del Favero is neither a party nor an applicant.

The administrative proceeding at issue here concerned one thing: whether the Department relied on an invalid scoring methodology to deny **Spring Oaks' application** for licensure as a MMTC. A compromise of that dispute resulted in the Settlement Agreement between the Department and Spring Oaks, in which the parties agreed the Department would issue a MMTC license to Spring Oaks because Springs Oaks has "a colorable claim" that they qualify as a MMTC under section 381.986(8)(a). [R. 336] In its motion to intervene, Del Favero claimed it was entitled to have its "application" to become an MMTC comparatively reviewed against Spring Oaks' application, [R. 54-55], however, there is no record evidence that Del Favero ever filed an application so there was nothing for the Department (or anyone else) to compare. In fact, the record actually reflects otherwise. [R. 52-53] And the ALJ never ruled on Del Favero's motion to intervene. [R. 94] Under these circumstances, Del Favero did not, and could not, establish its substantial interest in the outcome of the proceedings sufficient to confer standing on Del Favero as a party to those proceedings.

Indeed, the Department's August 2018 letter to Del Favero was not a recognition by the Department that Del Favero's substantial interests would be affected by the petitions Spring Oaks and other *applicants* filed to challenge the

Department's denial of their requests to register as MMTCs. [Ini. Br. at 23] The letter merely notified entities with citrus facilities that the Department denied MMTC licenses to six *applicants* under section 381.986(8)(a)2.; that it believed that there remained two licenses available potentially subject to the Citrus Preference; and "[a]nyone with a substantial interest in the remaining two licenses should take appropriate legal action." [R. 59] The letter does not state Del Favero has a substantial interest in the proceedings. Instead, it advises "*anyone* with a substantial interest" to take "appropriate legal action." It served as notice only and conferred no legal rights under any interpretation. Regardless, Del Favero has failed to identify any statement or other evidence suggesting that the Department has, after the issuance of the Final Order, taken the position that the two potential Citrus Preference licenses referred to in § 381.986(8)(a)3. are not still available. To be sure, the Order states [R. 336]:

> [T]he Parties desire to resolve the disputes between them and therefore intend to enter into this Agreement to approve the Petitioners to serve as medical marijuana treatment centers under applicable laws; agree that the Petitioners have a colorable claim alleging that they qualify as medical marijuana treatment centers under section 381.986(8)(a), Florida Statutes (2018); and agree that the Department shall license each of the Petitioners as medical marijuana treatment centers.

There is nothing in the Order stating that Spring Oaks' license was awarded under § 381.986(8)(a)2.a. or that the Citrus Preference licenses are no longer available, and Del Favero has identified no evidence indicating otherwise.

II. THE ORDER DOES NOT VIOLATE *ASHBACKER* OR SECTION 381.986(8)(a)2. BECAUSE THERE IS NO RECORD EVIDENCE THAT DEL FAVERO EVER FILED AN APPLICATION SO NO COMPARATIVE REVIEW WITH SPRING OAKS' APPLICATION COULD TAKE PLACE.

Resolving this issue is simple. Neither the Department nor the Division of Administrative Hearings could conduct a comparative review of Del Favero's application with Spring Oaks' application because there is no record evidence that Del Favero ever filed an application. The record reflects otherwise. [R. 52-53] Spring Oaks agrees the Supreme Court held in *Ashbacker* that "where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327, 333 (1945); *see also Bio-Med. Applications of Clearwater, Inc. v. Dep't of Health & Rehab. Servs.*, 370 So. 2d 19 (Fla. 2d DCA 1979) (applying *Ashbacker* doctrine to mutually-exclusive certificate of need applications); *Bio-Med. Applications of Ocala, Inc.*, 374 So. 2d at 88-89 (same); [Ini. Br. at 25-29]. But the doctrine is irrelevant to this case, where no comparative review took place because there is nothing in the record to suggest that Del Favero even filed an application.

It is simply untrue that "Spring Oaks and Del Favero both sought one of a limited number of licenses under section 381.986(8)(a)2.," as Del Favero contends. [Ini. Br. at 29]. And Del Favero cites no authority for the proposition (and there is

none) that the Department impaired the fairness of the proceedings or the correctness of the action by not performing a comparative review hearing to compare an actual application and a hypothetical one. The only entities that could request a comparative review hearing in those circumstances are *applicants* in the same situation as Spring Oaks, which Del Favero unequivocally was not.

Spring Oaks filed this proceeding in the wake of the finding in *Nature's Way*, which exposed that the Department's scoring methodology for 2015 DO applicants was a "dumpster fire," and that dumpster fire tainted the entire application process and impaired potential application of § 381.986(8)(a)2. The parties compromised and settled their dispute with the issuance of an MMTC license to Spring Oaks. The settlement also required Spring Oaks to agree to undertake additional obligations in the operation of its business, such as committing to establish locations in impoverished areas and adopting additional anti-diversion and screening protocols that are more stringent than required under Florida law and not required of existing MMTCs. [R. 336]

Del Favero's attempt to refute Spring Oaks' argument that section 391.986(8)(a)2. gives priority to prior applicants under the One Point Provision is a farce and is simply not at issue in this appeal. Any comparison between *applicants* under the One Point Provision and *applicants* seeking an MMTC license under the other provisions of section 381.986(8)(a) has nothing to do with Del Favero. Del

Favero is not on equal footing with Spring Oaks, or other applicants for that matter, because there is no record evidence of a Del Favero application to compare.

This argument also fails on the merits as a matter of law. Del Favero has no substantial interests at stake in a comparative review not only because there is no record evidence of it filing any application (whether under the One Point Provision or any other provision), but also because nothing to date affirms the number of MMTC licenses available at present (despite Del Favero's suggestion that the licenses max out at 10). To date, there is no official word on how many licenses are available, or will be available, under the statutory provisions at issue. In fact, it is not entirely clear whether all the licenses are available, or not. Thus, it is impossible to determine that Del Favero will "lose out" or be substantially affected—notwithstanding the fact that the Department notified Del Favero in August 2018 that "anyone with a substantial interest . . . should take appropriate legal action." [R. 59]

Spring Oaks also agrees the *Ashbacker* doctrine applies to competitive MMTC licensure. *See* [Ini. Br. at 31]. But the doctrine simply does not apply here. The underlying administrative proceedings had nothing to do with determining the validity of an application. As explained in the facts, that process occurred for Spring Oaks in 2015. [R. 24] The proceedings here concerned Spring Oaks and other applicants' exposure of the improprieties in the Department's comparative review

of the 2015 DO Applications. Specifically, instead of using a numerical scoring methodology, the Department was assigning applicants an ordinal rank. Under this system, there was no way to determine the differences between the applicants, and the ordinal ranking process prevented the Department from awarding licenses to the applicants "within one point" of the highest final ranking in its region. Curiously, Del Favero ignores this key distinction between the type of proceedings at issue in *Ashbacker* and the type at issue here.

III. THE DEPARTMENT'S ACTIONS WERE CONSISTENT WITH THE APA AND THE PARTIES' SETTLEMENT AGREEMENT.

The Order did one thing—it approved a settlement between the Department and Spring Oaks to resolve a dispute between them concerning the license application scoring methodology. [R. 329] The Order made no findings of fact, and certainly did not deprive Del Favero—a non-party, non-applicant, with no established affected substantial interest—an adequate point of entry to participate in a proceeding limited to a challenge to the Department's methodology for scoring applications. [*Id.*]

Spring Oaks does not dispute the black letter administrative law Del Favero cites in its brief. But Del Favero misinterprets in two fundamental ways what happened in the underlying administrative proceedings.

First, the ALJ never made a finding of fact. Del Favero asserts alleged error because "six months after the ALJ relinquished jurisdiction to the Department, the

Department reversed the ALJ's finding that Spring Oaks was not qualified under the 'one-point provision' of section 381.986(8)(a)2.a., and agreed to license Spring Oaks as an MMTC," and no competent, substantial evidence supported this reversal. [Ini. Br. at 37] This is incorrect.

The ALJ never made a finding of fact, and certainly not one the Department somehow reversed. Instead, as Del Favero itself quotes in its Initial Brief, the ALJ stated only that "pursuant to the statutory 'one point condition' in section 381.986(8)(a)2.a., there are no disputed issues of material fact that, if resolved, could qualify [Spring Oaks] for registration as a medical marijuana treatment center." [R. 201] And, even if there was a finding of fact by the ALJ, which there was not, the language of the Settlement Agreement itself makes clear that "[n]either the execution nor performance of the Agreement nor any of its terms or provisions will be deemed a presumption, concession or admission of any fact, liability, fault, or wrongdoing of any kind by any Party relating to the license applications, the License Proceedings, or any other matter." [R. 336] Del Favero's claim that the Settlement Agreement somehow constituted a "reversal" of a factual finding is meritless.

Importantly, the Department never determined that Spring Oaks was "not qualified" as Del Favero would have this Court believe. [Ini. Br. at 37] The Department determined only that Spring Oaks was not the highest scoring applicant in the central region. [R. 7-8] In fact, there was no additional evidence presented in

2018 that Spring Oaks qualified for a license because there was no need to do so. Spring Oaks received a license because the Department exercised its discretion to resolve via a settlement agreement the litigation relating to the scoring methodology involved in the 2015 application process, which Del Favero chose not to participate in. [R. 336; R. 52-53]; *see* § 120.57(4), Fla. Stat. ("Informal disposition.—Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order."); *Abramson v. Fla. Psychological Ass'n*, 634 So. 2d 610, 612 (Fla. 1994) ("At the same time, the power of a public body to settle litigation is incident to and implied from its power to sue and be sued.") (citing *Williams v. Public Util. Protective League*, 178 So. 286 (Fla. 1938)).

Moreover, the Department is not required to explain why it settled with Spring Oaks. It merely compromised a dispute and did not state whether Spring Oaks qualified for the license or not—only that Spring Oaks has a "colorable claim" and that it will be licensed subject to Spring Oaks' compliance with the stated conditions of the Settlement Agreement. [*Id.*] And in doing so, the Department never states that the issuance of a license to Spring Oaks means there are no additional licenses to issue.

For these reasons, Del Favero's reliance on *Lawnwood*, *Hawkins*, and *Kanter Real Estate* is misplaced. [Ini. Br. at 37-39 (citing *Lawnwood Med. Ctr., Inc. v. Agency for Health Care Admin.*, 678 So. 2d 421, 422 (Fla. 1st DCA 1996); *Gen.*

Dev. Utils., Inc. v. Hawkins, 357 So. 2d 408, 409 (Fla. 1978); *Kanter Real Estate, LLC v. Dep't of Envtl. Protection*, 267 So. 2d 483, 489 (Fla. 1st DCA 2019)] Quite simply, those cases are factually distinct from this one. They involved an agency improperly reopening the record after an administrative hearing, reweighing of factual matters, or reliance on facts outside the record. None of that even remotely happened here.

Second, the Department did not deprive Del Favero of an adequate point of entry to participate in the proceedings. The entire "adequate point of entry" analysis is premised on one's status as a "substantially affected" person or entity. *See Fla. League of Cities, Inc. v. Admin. Comm'n*, 586 So. 2d 397, 413 (Fla. 1st DCA 1991) ("Any *substantially affected* person must be provided with a clear point of entry…") (emphasis added). As explained above, Del Favero does not qualify as a substantially affected entity under any analysis.

And the undisputed facts show that the Department did in fact notify Del Favero of the proceedings—despite no requirement to do so. [R. 59] At that point, Del Favero filed a motion to intervene. [R. 45] Thereafter, the ALJ issued its order to show cause concerning relinquishment to the Department. [R. 200] Spring Oaks filed a response to the show cause order, [R. 280], but before Del Favero filed any response, the judge presiding over the *Florigrown* case in the Leon County Circuit

Court case entered a temporary injunction restricting the Department from proceeding with any further MMTC licensing. [R. 309]

As a result, the ALJ never addressed the order to show cause submissions and instead relinquished jurisdiction on October 18, 2018 to the Department in light of the temporary injunction. [R. 309] Thus, the ALJ never addressed any of the substantive arguments on Spring Oaks' challenge to the scoring methodology—leaving them open and unresolved. Five days after relinquishment, Del Favero filed a motion to intervene in *Florigrown*.[9] While this Court considered the *Florigrown* injunction, it re-imposed the automatic stay on the temporary injunction[10] and, in April 2019, Spring Oaks and the Department decided to enter into the settlement, [R. 332]. It is unclear what other "adequate entry" Del Favero hoped to have under these procedural circumstances. Indeed, the record reflects that Del Favero did not make any attempt to enter the Department proceeding, restart the proceeding before the ALJ, or otherwise take any action between the time that the stay was re-imposed by this Court and the time that the Department and Spring Oaks reached their settlement.

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[9] *See* docket in *Florigrown v. Florida Dept. of Health*, Case No. 2017-CA-002549 (Fla. 2d Jud. Cir. Oct. 23, 2018).

[10] *See* Order, Case No. 1D18-4471 (Fla. 1st DCA Dec. 18, 2018).

Regardless, this, again, is just not a circumstance where comparative review would apply. Spring Oaks did not maintain in the underlying proceedings that it is more qualified than any other applicant (which, in any event, Del Favero is not). It simply alleged, like the other DO applicants that were "scored" in 2015 but did not receive a license, that the Department employed a defective scoring mechanism that tainted the process. The Department decided to compromise with Spring Oaks and others so it did not have to engage in litigation. Nothing prevents the Department from doing so. *See* § 120.57(4), Fla. Stat. ("Informal disposition.—Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order.").

IV. THE SETTLEMENT AGREEMENT INCORPORATED INTO THE ORDER ACTUALLY PROMOTES PUBLIC POLICY.

The Order's incorporation of parties' Settlement Agreement promotes public policy in favor of using settlements to compromise disputes, which the Department undoubtedly has the discretion to do. *See, e.g.*, *Scott v. Nelson*, 697 So. 2d 1300, 1301 (Fla. 1st DCA 1997) ("recognize[in] and respect[ing] strong public policy favoring settlement of disputed claims"). In addition to resolving the dispute through the give and take of settlement, the Settlement Agreement promotes public policy by enhancing access through requiring Spring Oaks to locate dispensaries in impoverished communities and rural areas that have been adversely affected by extraordinary economic events or natural disasters. [R. 336] This undertaking is not

required of existing MMTCs. Further, public policy is promoted by requiring Spring Oaks to adopt market-leading security, anti-diversion, and background screening policies that are more stringent than required under the law. [*Id.*]

Del Favero erroneously claims the Settlement Agreement was void against public policy because it somehow unfairly "eliminated [Del Favero] from the process" and deprived Del Favero of "an adequate point of entry to challenge that Agreement"—after the Department allegedly advised *Del Favero* to "take appropriate legal action" in Spring Oaks' administrative challenge to the Department's scoring methodology. [Ini. Br. at 45] As repeatedly explained above, Del Favero misconstrues and ignores what actually occurred below, and nothing in *Gtech* applies here. *See* [Ini. Br. at 43-45 (citing *State, Dep't of Lottery v. Gtech Corp.*, 816 So. 2d 648 (Fla. 1st DCA 2011)]. There is no record evidence that Del Favero ever filed an application or submitted a proposed application, so there was nothing to compare with what Spring Oaks filed. In essence, Del Favero is asking this Court to find fault in a hypothetical circumstance. That is not this Court's role.

Finally, Del Favero claims the Order "violates the legislative intent in section 381.986(8)(a)2.a." because "under no circumstances does Spring Oaks qualify for an MMTC license under the statute." [Ini. Br. at 46] This is meritless. Nothing in the Settlement Agreement reflects that Spring Oaks was issued an MMTC license under 381.986(8)(a)2.a.—that subsection is never even cited in the document. [R.

332] In addition, it cannot be overstated that the underlying administrative proceedings and settlement did not concern any *qualitative* decision on Spring Oaks' application. Instead, the proceedings and Settlement Agreement resulted from Spring Oaks' challenge to the Department's *quantitative* decision based on an invalid scoring methodology. This is what drove the case in light of the *Nature's Way* decision applicable to all of the 2015 applicants.

CONCLUSION

In light of the foregoing, Spring Oaks respectfully requests that this Court dismiss this appeal for lack of standing. In the alternative, Spring Oaks asks this Court to affirm the Order in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of August 2019 a true and correct copy of the foregoing has been electronically uploaded to the First District Court of Appeals ePortal and a copy was furnished by E-Mail to all parties listed below.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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