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

Case No. 1D19-1772
Lower Tribunal Case Nos.: DOAH 18-4471; DOH 18-0172

LOUIS DEL FAVERO ORCHIDS, INC.,

Appellant,

v.

FLORIDA DEPARTMENT OF HEALTH, an executive branch agency of the State of Florida and SPRING OAKS GREENHOUSES, INC.,

Appellees.

APPELLANT'S REPLY BRIEF

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Introductory Statement

Louis Del Favero Orchids, Inc. ("Del Favero") does not dispute that applicants who satisfy the criteria in section 381.986(8)(a)2.a, Florida Statutes, are qualified for a medical marijuana treatment center ("MMTC") license. Del Favero disputes that applicants who do **not** satisfy the criteria in section 381.986(8)(a)2.a., like Spring Oaks Greenhouses, Inc. ("Spring Oaks"), are qualified for an MMTC license. As the Department demonstrated below, Spring Oaks does not satisfy that, or any other, statutory criteria and thus does not qualify for a license.

Through the Settlement Agreement with the Department, Spring Oaks was able to avoid comparative, competitive review of its application with other applicants, contrary to the plain language of the statute. Because the Department does not have the authority to settle with unqualified applicants, or without comparatively reviewing applicants, the Final Order should be set aside.

REPLY ARGUMENT

I. Del Favero has Standing and Comparative Review was Required

In an attempt to strip Del Favero of its standing and defend the Department's decision, Appellees construe section 381.986(8)(a), Florida Statutes, in a way that is impossible to reconcile with its plain language. The plain language of 381.986(8)(a) makes clear that the Department must comparatively review applicants before issuing licenses and, because it did not, Del Favero has standing.

The Statute

The Department has limited authority to grant MMTC licenses. It may only issue licenses to those applicants who meet one of the four—and only four—parameters provided in section 381.986(8)(a). *See Fla. Dep't of Law Enforcement v. Hinson*, 429 So. 2d 723 (Fla. 1st DCA 1983) ("An agency may not enlarge its authority beyond that provided in the statutory grant."). Any suggestion by Appellees that the Department has the authority to award MMTC licenses to applicants who do not meet one of the four parameters must be rejected.

Additionally, section 381.986(8)(a) must be construed chronologically as the legislature intended. *See Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006) (explaining that "legislative intent is the 'polestar' that guides this Court's interpretation."). To discern that the legislature intended a chronological construction, this Court need look only at the plain text of the statute itself. *See Bautista v. State*, 863 So. 2d 1180, 1185 (Fla. 2003) ("In attempting to discern legislative intent, we first look to the actual language used in the statute.").

Section 381.986(8)(a) provides four specific chronological deadline dates denoting when the Department was to award MMTC licenses to applicants pursuant to each of the four parameters. The first parameter—(8)(a)1—provides a deadline of July 3, 2017; the second parameter—(8)(a)2.a—provides a deadline of August 1, 2017; the third parameter—(8)(a)2.b—provides a deadline of "as soon as

practicable"; and the fourth parameter—(8)(a)2.c—provides a deadline of October 3, 2017. § 381.986(8)(a)1.-2.[1] In addition to providing specific chronological deadlines for each parameter, subparagraph (8)(a)2. limits the number of licenses available under (8)(a)2. to 10 licenses. *See* § 381.986(8)(a)2.

The first parameter in (8)(a)2.a provides a deadline of August 1, 2017, and refers only to applicants who applied in 2014; thus, the number of entities that qualify under this parameter is fixed. And, unlike (8)(a)1., (8)(a)2.a does **not** allow the Department to permit applicants to submit a variance from the representations made in their original applications. *Compare* § 381.986(8)(a)1. (which includes the ability to grant variances) *with* § 381.986(8)(a)2.a (which does not); *see also Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996) ("Under the principle of statutory construction . . . the mention of one thing implies the exclusion of another."). Spring Oaks sought a license under (8)(a)2.a. (R. 18).

The third parameter in (8)(a)2.c has a deadline of October 3, 2017, and directs the Department to 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-

[1] Subsections (8)(a)1 and (8)(a)2.b are not at issue here.

subparagraphs a. and b." § 381.986(8)(a)2.c.[2] Del Favero seeks a license under this parameter.

The statute then directs the Department to "give preference" for "up to two" of the 10 licenses issued under the parameters in (8)(a)2. to applicants who demonstrate "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." § 381.986(8)(a)3. By the statute's own terms, the "citrus preference" is **not** a separate category of license, nor is it a parameter under subsection (8)(a)2. Rather, it gives preference to certain applicants applying under subsection (8)(a)2.[3]

After the Department awards 10 licenses under subsection (8)(a)2., the statute directs the Department to issue 4 additional licenses "[w]ithin 6 months after the registration of 100,000 active qualified patients in the medical marijuana use registry" to applicants "that meet the requirements of this section." § 381.986(8)(a)4. Thus, (8)(a)4 creates an additional fixed pool of 4 licenses for every additional 100,000 qualified patients.

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[2] The Department tendentiously fails to acknowledge the existence of subsection (8)(a)2.c. (*See* Dep't's AB at 4-5).

[3] *See, e.g.*, Dep't of Health, Office of Med. Marijuana Use Const. Reg. 2-1.01(5)(c), *available at* https://knowthefactsmmj.com/rules-and-regulations/ (providing that applicants seeking the citrus preference "will receive an additional 35 points to their respective total score" in a batched application process).

Construing the plain language of 381.986(8)(a) *in pari materia* makes clear that the legislature authorized the Department to issue licenses from the fixed pool of 10 licenses to only 3 classes of applicants—(1) any applicant that satisfies the "one point" provision of (8)(a)2.a; (2) one applicant that is a recognized member of the *Pigford*[4] class; and (3) all other applicants that filed applications to seek a license from the fixed pool of 10, including those seeking the citrus preference. Then, after the Department awards licenses from that fixed pool of 10 under (8)(a)2., the legislature granted the Department the authority to issue a fixed pool of 4 licenses to qualified applicants each time the registry increases by 100,000.

Thus, the legislature intended that there would always be a fixed pool of licenses for which applicants would compete. Indeed, the Department advocated for this construction below, arguing that section 381.986(8)(a)2. directed the Department to issue "a batch of 10—and only 10—licenses." (R. 151). As to section 381.986(8)(a)4, the Department asserted that "[t]he legislature once again reiterated that the licensing structure is *limited* when the legislature provided that *if and when* the patient registry reached 100,000 active patients, the Department would be required to issue 4 more licenses." (R. 153) (emphasis in original).

Because the legislature intended that MMTC applicants would always be vying for licenses from a fixed pool—whether it be the initial fixed pool of ten

[4] *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).

under (8)(a)2., or a subsequent fixed pool of four under (8)(a)4.—the Department is required to comparatively review applications before awarding licenses. *See Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945). Because the Department failed to hold a comparative review hearing before licensing Appellees, and failed to provide applicants like Del Favero a point of entry to challenge the award of licenses to Appellees, Del Favero has standing. *See Gulf Court Nursing Ctr. v. Dep't of Health & Rehab. Servs.*, 483 So. 2d 700, 705 (Fla. 1st DCA 1985).

Ashbacker Applies to the Award of MMTC Licenses

The comparative review requirements of *Ashbacker* apply to MMTC licensure under section 381.986(8)(a).[5] As this Court has explained:

> [W]here need is determined in accordance with a quantitative standard; that is, by number of units, **a fixed pool** of needed investments is thereby created. Opposing applicants necessarily become competitors for that fixed pool. Once the determination is made that there is a need for ten kidney dialysis units or stations, that granting of an application for those ten units automatically decreases need by that number and effectively denies another pending application to the extent of those ten units. That clearly is mutual exclusivity within the meaning of *Ashbacker*.

Gulf Court, 483 So. 2d at 705 (emphasis added) (quoting *Bio-Medical Applications of Clearwater, Inc. v. Dep't of Health & Rehab Servs.*, 370 So. 2d 19, 23 (Fla. 2d DCA 1979)).

[5] Spring Oaks agrees. (*See* Spring Oaks' AB at 27).

On the issue of mutual exclusivity and comparative review, this Court's opinion in *Gulf Court* is indistinguishable from this appeal. There, the Court found that the factor which determines whether comparative review is required is not *when* the competing applications were filed but rather *whether* the applications seek licenses from the *same* pool. *See id*. Gulf Court appealed a final order of the Department of Health and Rehabilitative Services ("HRS") after it was denied comparative review with mutually exclusive applications. *Id.* at 702. Gulf Court's application was comparatively reviewed with other applications in the 1985 batching cycle, but not with applications filed in an earlier 1983 cycle, Provincial and Beverly. Nevertheless, the Agency awarded the bed need announced for the 1985 cycle to the 1983 applicants, by settling the 1983 applicants' litigation. *Id.* The Department then denied Gulf Court's application "on the sole ground that the projected need for additional beds had been satisfied by the granting of certificates to Provincial and Beverly." *Id.*

On appeal, Gulf Court argued that the projected bed need for 1985 constituted a "fixed pool" as defined in *Bio-Medical*. *Id.* HRS countered that "a CON applicant is entitled to comparative review only with applications which are mutually exclusive, meaning applications filed simultaneously or near-simultaneously in time." *Id.* at 704. Because "Gulf Court filed its application at least nine months after Provincial and Beverly," HRS argued, "it could not be

included in the same batching cycle as Provincial and Beverly for purposes of comparative review." *Id.* This Court rejected HRS's construction:

> [I]t is apparent that the CON applications of Provincial and Beverly, as completed in 1981, were based on the 1983 projected need or fixed pool, while Gulf Court's application was predicated on the 1985 projected need or fixed pool. The completed applications of Provincial and Beverly could not be considered as competing with Gulf Court's application until the former were updated pursuant to rule 10–5.14 so as to allege the essential element of the newly projected 1985 bed need. Only by such update could their applications be considered in relation to the new plan. Any such update and request for reconsideration should be considered as essentially a new request based on different information and a different fixed pool, and should be judged in competition with all other timely filed applications for that new fixed pool. Gulf Court's application was timely filed in relation to the 1982 plan. Since the record does not reveal any attempt by either Provincial or Beverly to update their applications under rule 10–5.14, the decision by HRS to consider, sua sponte, the applications as so updated and to award both Provincial and Beverly the requested CONs without affording comparative review with Gulf Court's timely filed application is not in compliance with the federal and state acts.

Id. at 708. The Court held that HRS erred in awarding CONs to Provincial and Beverly from the 1985 pool without comparatively reviewing their applications with Gulf Court's, who sought a CON from the same 1985 pool. This Court vacated the appealed orders and remanded for further proceedings, instructing that Provincial and Beverly should be permitted to "update or resubmit their applications for comparative review with Gulf Court's application." *Id.* at 710.

Like the applicants in *Gulf Court*, Spring Oaks and Del Favero both sought an MMTC license from the same fixed pool of 10 licenses created by subparagraph

(8)(a)2. Applying *Gulf Court* to this case, Del Favero is entitled to comparative review with Spring Oaks. Because the Department awarded a license to Spring Oaks without comparative review with Del Favero, this Court should vacate the Final Order. *See Gulf Court*, 483 So. 2d at 710.

The Department's New Position on Appeal

The Department argues—for the first time on appeal—that it had the authority to issue MMTC licenses to Spring Oaks because, "at the time the Joint Settlement Agreement was entered, the number of qualified patients" had increased to over 200,000. (*See* Dep't's AB at 10). In making this argument, the Department takes the position that subsection (8)(a) "establish[es] a single bucket of MMTC licenses which automatically increases in number as qualified patients are added to the medical marijuana registry." (Dep't's AB at 4).

This new position cannot be reconciled with the Department's position below or the plain language of the statute. Below, the Department argued:

> Additionally and contrary to Petitioners' contention, section 381.986(8)(a)2.a (the One-Point Provision) does not apply to the additional 4 licenses under the separate and distinct section 381.986(8)(a)4. The One-Point Provision authorizes licenses from the pool of 10 licenses under *section 381.986(8)(a)2 only*. *See* § 381.986(8)(a)2, Fla. Stat. (2017). This, too, is a matter of simple statutory construction. Indeed, when directing the Department to issue licenses under the One-Point Provision by August 2017, the legislature knew that the patient registry had not reached 100,000 active patients, and the legislature could not know when that would occur. In fact, it defies plain logic to argue that the legislature ordered that licenses be issued under the One-Point Provision by August 2017

> but at the same time directed that some of those licenses be drawn from a set of 4 licenses sometime in the future, after August 2017.

(R. 154-55) (emphasis in original). While the Department contends it can change its mind, (*see* Dep't's AB at 9, n.6), the Department cannot change the law. Unilaterally awarding licenses to unqualified applicants without comparative review with Del Favero, who seeks a license from the same fixed pool, violates *Gulf Court. See* 483 So. 2d at 708.

The Department's decision to invoke (8)(a)4. now is also curious given its position below that there were "only 2 licenses, if any at all, available for [Appellees]." (R. 154). The filing in which the Department made this assertion is dated September 24, 2018. *Id.* However, as of September 21, 2018, there were more than 100,000 qualified patients in the registry.[6] One wonders why the Department waited until now to invoke this provision, because subsection (8)(a)4.—like the rest of subsection (8)(a)—contains a temporal deadline. *See* § 381.986(8)(a)4.[7]

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[6] *See* OMMU Update dated September 21, 2018, reflecting 128,899 qualified patients: http://s27415.pcdn.co/wp-content/uploads/ommu_updates/2018/092118-OMMU-Update.pdf. In fact, as early as July 13, 2018, there were more than 100,000 qualified patients on the registry. *See* OMMU Update dated July 13, 2018, reflecting 101,590 qualified patients: http://s27415.pcdn.co/wp-content/uploads/ommu_updates/2018/180713-ommu-update.pdf. The Court may take judicial notice of these numbers. *See* § 90.202(12), Fla. Stat. (2019).

[7] Further, while the Department now contends that additional licenses became available under (8)(a)4., Del Favero again notes that in January of this year the

Spring Oaks Does Not Qualify Under the Statute

Spring Oaks makes much of the fact that Del Favero did not apply in 2015, arguing this puts Del Favero on unequal footing with Spring Oaks. (Spring Oaks' AB at 16). This argument fails to acknowledge that after Spring Oaks' application was denied in 2015 because it was not the highest scoring applicant in its region, Spring Oaks was competing for a license from the same fixed pool under (8)(a)2. as Del Favero. Indeed, although Spring Oaks insists that nothing in the Settlement Agreement indicates that Spring Oaks was licensed under (8)(a)2.a, that was in fact the provision under which it sought licensure. (R. 8). And, as the Department demonstrated below, Spring Oaks does not qualify for a license under (8)(a)2.a because Spring Oaks did not score within one point of the highest scoring applicant in its region. (R. 148).[8] This is exactly what Del Favero would have demonstrated in a comparative review hearing, had the Department complied with the legislature's clear directives.

The only other statutory parameter though which Spring Oaks could seek a license is section 381.986(8)(a)2.c—the same parameter through which Del Favero seeks a license. However, that provision requires applicants to "meet the requirements of this section," one of which, is to "apply to the department on a

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Department rejected Del Favero's application, asserting that it was not yet accepting applications. (*See* Del Favero's IB at 12-13, n.6).

[8] Spring Oaks was one of the lowest scoring applicants in its region. (*Id.*).

form prescribed by the department and adopted in rule." § 381.986(8)(b). Because Spring Oaks did not apply to the Department on a form prescribed by the Department and adopted in rule, it also does not qualify under (8)(a)2.c.[9]

The Citrus Preference

Spring Oaks and the Department improperly describe the citrus preference as a separate category of license. There is no such thing as a "Citrus Preference license." By section 381.986(8)(a)3.'s plain terms, the citrus preference gives applicants in a comparative review proceeding a leg up against other applicants seeking one of the ten licenses under (8)(a)2. *See* § 381.986(8)(a)3. Indeed, the word "preference" is defined as "the act, fact, or principle of giving advantages to some over others." *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/preference; *see also Black's Law Dictionary* (11th ed. 2019) (defining "preference" as "[t]he favoring of one person or thing over another"; the "quality, state, or condition of treating some persons or things more advantageously than others").

Additionally, the assertion that a citrus preference remains available is a red herring. (*See* Spring Oaks AB at 24; Dep't's AB at 10-11).[10] The citrus preference

[9] Section 381.986(8)(a)4. also requires applicants to "meet the requirements of this section," including applying to the Department on a form prescribed by the Department and adopted in rule. Because Spring Oaks did not do this, Spring Oaks does not qualify for a license under this subsection either.

only has value to an applicant when compared to other applicants, such as Spring Oaks, who lack the preference. If, as the Department asserts, it will open an application batch at some point in the future for applicants seeking the preference, such a batch would eliminate all value of the preference because all applicants would have the same preference and therefore would not gain an advantage over other applicants. A comparative application process specifically for applicants seeking the preference would violate the legislature's clear directive to give preference to those applicants over non-preferenced applicants, like Spring Oaks.[11]

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[10] The Department insists that it will move forward with a comparative application process involving the citrus preference "when the plethora of litigation regarding the statute is resolved." (Dep't's AB at 11). However, the Department fails to explain how pending litigation regarding section 381.986 prohibits the Department from "moving forward with a comparative application process" involving the citrus preference, but permits the Department to issue eight licenses to unqualified applicants without comparative review in a Settlement Agreement.

[11] In a seeming attempt to blame Del Favero for why the Department has not yet awarded an MMTC license to an applicant who qualifies for the citrus preference, the Department asserts that it "previously attempted to implement the citrus preference, but it was precluded from doing so because Del Favero challenged the validity of the Department's proposed rule." (Dep't's AB at 12). It must be noted that Del Favero prevailed in that rule challenge—which was resolved more than one year ago—as the ALJ found that the Department's rule was "impossible to reconcile" with the statutory language. *See Louis Del Favero Orchids, Inc. v. Fla. Dep't of Health*, Case No. 18-2838RP, at ¶ 34 (Fla. Div. Adm. Hrgs., Aug. 6, 2018). Additionally, the legislature has explicitly directed that "[n]o statutory provision shall be delayed in its implementation pending an agency's adoption of implementing rules." § 120.54(1)(c), Fla. Stat. (2019).

II. The ALJ Made a Finding of Fact that the Department Reversed

Spring Oaks contends that "[t]he ALJ never made a finding of fact, and certainly not one the Department somehow reversed." (Spring Oaks' AB at 29).[12] However, the ALJ explicitly found:

> 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).[13] Although the ALJ's finding was not made in a Recommended Order, it is a finding of fact supported by competent substantial evidence, and the Appellees cannot point to any evidence in the record to demonstrate that they qualify under any of the parameters in (8)(a)2.[14] The Final Order should be set aside. *See Lawnwood Med. Ctr., Inc. v. Agency for Health Care Admin.*, 678 So. 2d 421, 422 (Fla. 1st DCA 1996).

III. The Settlement Agreement is Void Against Public Policy

Finally, Spring Oaks contends that *Department of Lottery v. Gtech Corporation*, 816 So. 2d 648 (Fla. 1st DCA 2001), is not applicable here. At the

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[12] The Department does not even attempt to address this issue.

[13] Even in the Settlement Agreement, the Department stops short of asserting that Spring Oaks qualifies for an MMTC license. (R. 381) (concluding only that "[p]etitioners have a colorable claim alleging that they qualify").

[14] Spring Oaks evades the issue entirely, asserting that the Settlement Agreement does not specify that they were licensed under (8)(a)2.a. (*See* Spring Oaks' AB at 34).

same time, Spring Oaks boasts that the Settlement Agreement requires it to "locate dispensaries in impoverished communities and rural areas that have been adversely affected by extraordinary economic events or natural disasters," which is not required of existing MMTCs. (Spring Oaks' AB at 33-34). This is exactly what this Court found fundamentally unfair in *G-Tech*—a state agency negotiating more favorable terms with one applicant after it rejected another applicant.

Additionally, Spring Oaks' reliance on *Abramson v. Fla. Psychological Association*, 634 So. 2d 610, 610-12 (Fla. 1994), should be rejected because neither *Abramson* nor its progeny involved competing applications for a license from a fixed pool. Had Abramson been awarded a license from a limited number of licenses at the expense of another qualified applicant, the court would have reached a different result. *See Ashbacker,* 326 U.S. 327; *Gulf Court*, 483 So. 2d 700.

CONCLUSION

Del Favero respectfully requests this Court set aside the Final Order and underlying Joint Settlement Agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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