

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

Case No. 1D19-1781  
Lower Tribunal Case Nos.: DOAH 18-4473; DOH 18-0174

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LOUIS DEL FAVERO ORCHIDS, INC.,

Appellant,

v.

FLORIDA DEPARTMENT OF HEALTH, an executive branch agency of the  
State of Florida and PERKINS NURSERY, INC.,

Appellees.

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**APPELLANT'S INITIAL BRIEF**

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## **PRELIMINARY STATEMENT**

On April 16, 2019, the Florida Department of Health ("Department") entered into a Joint Settlement Agreement with eight medical marijuana treatment center ("MMTC") applicants, wherein the Department agreed to award MMTC licenses to each of the eight applicants, including Perkins Nursery, Inc. ("Perkins"). On April 19, 2019, the Department entered a separate Final Order for each applicant that "incorporated by reference" the Joint Settlement Agreement. Louis Del Favero Orchids, Inc. ("Del Favero") has appealed each of those Final Orders. They are the subject of this appeal, as well as the appeals in Case Numbers 1D19-1772; 1D19-1777; 1D19-1778; 1D19-1780; 1D19-1782; 1D19-1783; and 1D19-1784.

On July 10, 2019, this Court consolidated this case with each of the above-referenced cases "for purposes of travel" and stated that the cases "will be assigned to the same panel of judges for consideration of the merits of the appeal." *See* Order, dated July 10, 2019.

The Record on Appeal consists of proceedings before the Division of Administrative Hearings ("DOAH") and the Department. Citations to the record will be as follows: (R. \_\_), with \_\_ indicating the record page number.

## **STATEMENT OF THE CASE AND FACTS**

### **The Compassionate Medical Cannabis Act**

In 2014, the Florida Legislature passed the Compassionate Medical Cannabis Act ("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 in section 381.986, Florida Statutes, directed the Department to license five dispensing organizations ("Dos"), each in a different geographic region, for the purpose of supplying "low-THC cannabis" to qualified patients. § 381.986(5)(b), Fla. Stat. (2014); *see also* ch. 2014-157, § 2, Laws of Fla.

In July of 2015, Perkins Nursery, Inc. ("Perkins") filed an application for licensure as a DO in the Southwest Region. (R. 12). The Florida Department of Health ("the Department") denied Perkins' application because it was not the highest scored applicant in the central region. (R. 12-13).

### **The 2016 Constitutional Amendment**

In November 2016, Florida voters overwhelmingly approved an amendment ("the Amendment") to the State Constitution legalizing the use of medical marijuana for the treatment of debilitating conditions. *See* art. X, § 29, Fla. Const. In addition to legalizing the use of medical marijuana for qualifying patients, the Amendment created a new category of business entities to engage in the lawful

cultivation, production, and/or distribution of medical marijuana to qualifying patients, known as Medical Marijuana Treatment Centers ("MMTCs"). Art. X, § 29(b)(5), Fla. Const. The Amendment required the Department to promulgate regulations that provide for the Registration of MMTCs to secure "the availability and safe use of medical marijuana by qualifying patients." Art. X, § 29, Fla. Const.

Significantly, the Amendment placed an affirmative duty on the Department "to promulgate regulations in a timely fashion." Art. X, § 29(d), Fla. Const. Indeed, article X, section 29 stated in unambiguous language that the Department shall begin registering MMTCs "**no later than** nine (9) months after the effective date of this section." Art. X, § 29(d)(2), Fla. Const. (emphasis added). The Amendment further provided that if the Department failed to begin registering MMTCs within the prescribed time limits, "any Florida citizen shall have standing to seek judicial relief to compel compliance with the Department's constitutional duties." Art. X, § 29(d)(3), Fla. Const.

The Amendment went into effect on January 3, 2017. Pursuant to article X, section 29, the Department was required to begin registering MMTCs no later than September 3, 2017—nearly two years ago.

## The Legislature Amends Section 381.986, Florida Statutes

In 2017, following the passage of the Amendment, the legislature substantially amended section 381.986, Florida Statutes, through Senate Bill No. 8-A, described as "an act relating to the medical use of marijuana." *See* ch. 2017-232, Laws of Fla. This Act went into effect on June 23, 2017. *See id.*

Under the 2017 law, the Department was first required to license as MMTCs those DOs that held an "active, unrestricted license to cultivate, process, transport, and dispense low-THC cannabis, medical cannabis, and cannabis delivery devices" under the former version of the statute, and met the other requirements of the statute. § 381.986(8)(a)1., Fla. Stat. (2017). The newly amended statute then went on to provide that the Department shall license as MMTCs ten additional applicants that met the requirements of the statute under certain parameters. *See* § 381.986(8)(a)2. Those parameters were as follows:

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 administrative or 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, but no later than October 3, 2017, 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) and is a member of the Black Farmers and Agriculturalists Association-Florida Chapter. An applicant licensed under this sub-subparagraph is exempt from the requirements of subparagraphs (b)1. and 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.

§ 381.986(8)(a)2., Fla. Stat. (2017) (emphasis added). Importantly, with respect to the parameter set forth under subsection (8)(a)2.a., the Staff Analysis for Senate Bill No. 8-A included the "Final Scorecard" for the applicants that were scored by the Department under the prior version of the statute. (R. 156, 164). Thus, as the Department explained below, when enacting subsection (8)(a)2.a., or, "the one-point provision," the "legislature knew what the Final Ranks were and knew how many 2015 DO applicants were within one point of the highest-ranking applicant in their regions." (R. 156).

Section 381.986(8)(a)3 then directs the Department to "give preference" to up to two of the applicants under subsection (8)(a)2 who "own[ed] one or more facilities that are, or were, used for the canning, concentrating, or otherwise processing of citrus . . . ." § 381.986(8)(a)3. The statute also included a provision for additional MMTC licenses after the registration of a certain number of active

qualified patients in the medical marijuana registry. *See* § 381.986(8)(a)4. As the Department explained below:

In simple terms, then, the 2017 Law directed the Department to (1) issue MMTC licenses to those entities that already possessed DO licenses under the old (and now repealed) law and that satisfied the new law's requirements; (2) issue an additional 10 licenses—and only 10 licenses—as provided in section 381.986(8)(a)2, Florida Statutes (2017), with one reserved exclusively for *Pigford/BFDL* class applicants, and with a preference for up to two "citrus" applicants; and (3) issue 4 more licenses sometime in the future, if and when the patient registry hits 100,000 active patients (and 4 more for every additional 100,000 active patients). *See* § 381.986(8)(a)1-4, Fla. Stat. (2017).

(R. 204).

### **Perkins Files a Request for Registration with the Department**

In April of 2018, Perkins filed with the Department a request for registration as a MMTC under the "within one point" provision of section 381.986(8)(a)2.a., Fla. Stat. (2017). (R. 14). On July 13, 2018, the Department issued a denial of Perkins' request for registration, explaining that Perkins "was not within one point of the highest ranked applicant in the Southwest Region." (*Id.*).

On August 2, 2018, Perkins filed a Petition for Formal Administrative Hearing to challenge the Department's denial of Perkins' request for registration. (R. 11). The Department referred the matter to the Division of Administrative Hearings ("DOAH").

On August 27, 2018, Louis Del Favero Orchids, Inc. ("Del Favero") received notice from the Department that the Department had received and denied six requests for registration as a MMTC pursuant to section 381.986(8)(a)2., and had received a Petition for Administrative Hearing for five<sup>1</sup> of those denials. (R. 54). The Department advised that it had already issued seven of the ten licenses available under the statute, and that one of the remaining three was reserved for a recognized member of the *Pigford*<sup>2</sup> class. (R. 54). Accordingly, the Department advised that anyone "with a substantial interest in the remaining **two licenses** should take appropriate legal action." (R. 54) (emphasis added).

### **Proceedings at DOAH**

On August 30, 2018, the Department moved to consolidate the Perkins' matter with the four other petitions filed. (R. 29). In that motion, the Department again asserted that only two MMTC licenses from the statutorily limited number of ten remained. (R. 29). Thus, the Department insisted that consolidation was necessary to prevent the risk of five different ALJs issuing five recommended orders "recommending that more than two of the five petitioners receive MMTC

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<sup>1</sup> The five Petitions were filed by Perkins, Spring Oaks Greenhouses, Inc. ("Spring Oaks"), Dewar Nurseries, Inc. ("Dewar"), Tree King-Tree Farm, Inc. ("Tree King"), and Bill's Nursery, Inc. ("Bills"). (R. 54). Spring Oaks, Dewar, Tree King, and Bill's are appellees in Case Nos. 1D19-1772; 1D19-1777; 1D19-1783; and 1D19-1784, respectively.

<sup>2</sup> *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999); *In Re Black Farmers Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011).



licenses . . . despite the statutory limitation on the number of MMTC licenses." (R. 33-34).

On August 31, 2018, Del Favero, pursuant to the August 27 Notice from the Department, filed a Motion to Intervene,<sup>3</sup> explaining that it had "expended substantial resources" to secure one of the ten MMTC licenses, including purchasing a citrus processing facility to qualify for the citrus preference under section 381.986(8)(a)3. (R. 40, 48). Del Favero explained that although the Department was required to issue all ten licenses under section 381.986(8)(a)2 no later than October 3, 2017, the Department had yet to allow an applicant meeting the citrus preference under section 381.986(8)(a)3 to apply for licensure. (R. 48). Del Favero further explained that it had been prepared to file an application for a MMTC license since before October 2017, and that it was waiting only for the Department to begin accepting applications. (R. 48).

Accordingly, Del Favero argued that its substantial interests were affected by Perkins, as Perkins was attempting to obtain one of the last two MMTC licenses available under section 381.986(8)(a)2. (R. 48-49). Specifically, Del Favero argued that Perkins' application must be comparatively reviewed with Del Favero's under *Bio-Medical Applications of Clearwater, Inc. v. Dep't of Health & Rehab. Servs.*, 370 So. 2d 19 (Fla. 2d DCA 1979). (R. 49-50). Del Favero also argued,

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<sup>3</sup> Several other interested parties filed motions to intervene, as well. (*See, e.g.*, R. 59, 153)

consistent with the Department's position, that Perkins is not entitled to a license under the statute. (R. 40).

On September 7, 2018, after holding a telephonic status conference, the ALJ issued an Order directing Perkins to file a response addressing the Department's contention that only two MMTC licenses remain. (R. 87). The Order explained that "the number of medical marijuana treatment center licenses that are still available would likely have a substantial impact on how the proceedings in DOAH Case Nos. 18-4463, 18-4471, 18-4472, 18-4473, and 18-4474 must be conducted." (*Id.*). The Order further directed the Department to file a reply to Perkins' response. (*Id.*).<sup>4</sup>

Four days later, the ALJ entered an Order Regarding Motions to Intervene. (R. 147). In that Order, the ALJ stated:

Because a ruling on the Motions to Intervene may be significantly influenced by a determination as to whether the Petitioners in DOAH Case Nos. 18-4463, 18-4471, 18-4472, 18-4473, and 18-4474 "are

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<sup>4</sup> On September 24, 2018, Perkins and the other four MMTC applicants filed a Joint Response pursuant to the ALJ's order. That Joint Response was filed only in Dewar's case, and therefore, was not included in this appellate record. However, the Joint Response can be found in the appellate record for Case No. 1D19-1777, at R. 170.

It is proper for the Court to take judicial notice of documents that are part of the records in the consolidated cases before it. *See* § 90.202(6), Fla. Stat. (2018); *see also Kelley v. Kelley*, 75 So. 2d 191, 194 (Fla. 1954) ("The court in which a cause is pending will take judicial notice of all its own record in such cause and of the proceedings related thereto."); *Falls v. Nat'l Env'tl. Prods.*, 665 So. 2d 320, 321 (Fla. 4th DCA 1995) ("[I]t is fitting and proper that a court should take judicial notice of other actions filed which bear a relationship to the case at bar.").

competing for only two available [medical marijuana treatment center] licenses,” the undersigned has elected to defer ruling on the Motions to Intervene until the issue regarding the number of available licenses is resolved.

*(Id.)*.

In its Reply to Perkins' Response, the Department continued to argue that only two MMTC licenses from the statutorily limited number of ten remained, "if any at all." (R. 205). Additionally, the Department reiterated that Perkins did not qualify for a MMTC license under section 381.986(8)(a)2.a. *(Id.)*. In support of its argument that Perkins did not qualify under the one-point provision, the Department referenced the Staff Analysis for Senate Bill 8-A, which amended section 381.986(8)(a)2 after the passage of the constitutional amendment. (R. 199). As the Department explained, included in the Staff Analysis was the "Final Scorecard," which showed the scores of the applicants that applied under the prior version of section 381.986, including the score of Perkins. *(Id.)*. The Department contended that the inclusion of this Final Scorecard in the Staff Analysis makes clear that the "legislature knew what the Final Ranks were and knew how many" prior applicants would be licensed under the one-point provision, and that Perkins was not one of them. (R. 207).

Thereafter, the ALJ issued an Order to Show Cause Why Jurisdiction Should Not Be Relinquished to the Department of Health, explaining that the ALJ was

"uncertain whether there are any material facts in dispute in the instant case." (R. 266). The ALJ wrote:

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 [Perkins] for registration as a medical marijuana treatment center.

(R. 266-67).

In compliance with that Order, both the Department and Perkins filed responses. (R. 310, 358). The Department maintained its position that Perkins did not qualify under the one-point provision of section 381.986. (R. 313). The Department also argued that the "dispositive facts" relating to Perkins' and the other applicants' licensure denials were "not disputed and jurisdiction over that issue should be relinquished" to the Department. (R. 312). In other words, the Department argued that the ALJ should relinquish jurisdiction to the Department if the ALJ agreed, as a finding of fact that could not be disputed, that Perkins was not within one point of the highest scoring applicant in its region under former section 381.986. (*Id.*).

On October 18, 2018, the ALJ issued an Order Closing File and Relinquishing Jurisdiction to the Department of Health Pending Resolution of Issue Regarding the Constitutionality of Section 381.986, Florida Statutes. (R. 398). The Order explained that after the ALJ issued the Order to Show Cause, the Leon County Circuit Court issued an order temporarily enjoining 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." (*Id.*)<sup>5</sup> The Court wrote:

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.

Any pending requests for relief will be addressed if the undersigned reacquires jurisdiction over this matter.

(*Id.*). Del Favero's motion for intervention was never ruled upon.<sup>6</sup>

### **The Department Enters a Final Order Granting Perkins an MMTC License**

On April 16, 2019, after repeatedly taking the position that Perkins did not qualify for an MMTC license, and convincing the ALJ that no material facts were in dispute because Perkins clearly did not meet the requirements for an MMTC license pursuant to section 381.986(8)(a)2.a, the Department, in a complete about-

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<sup>5</sup> This Court has recently issued its opinion affirming "that portion of the injunction that precludes [the Department] from enforcing the unconstitutional provisions but allows the Department a reasonable period of time to exercise its duties under the constitutional amendment." *Fla. Dep't of Health, Office of Med. Marijuana Use, et al. v. Florigrown, LLC*, No. 1D18-4471 (Fla. 1st DCA July 9, 2019).

<sup>6</sup> Del Favero filed an application to operate an MMTC with the Department in October of 2018. In January of 2019, the Department sent a letter to Del Favero, stating that it had not yet opened the application period and therefore would not be acting on Del Favero's application. That is currently being litigated in Leon County Circuit Court. *See Louis Del Favero Orchids, Inc. v. Fla. Dep't of Health, et al.*, Case No. 2019-CA-1047 (2nd Cir. Ct. \_\_\_).

face, entered into a Joint Settlement Agreement with Perkins and seven other MMTC applicants, wherein the Department agreed to grant MMTC licenses to those applicants. (R. 424-32). In a telling admission that neither Perkins nor the other seven applicants qualified for MMTC licenses under the one-point provision of section 381.986(8)(a)2.a., the Settlement Agreement stated only that the applicants "have a colorable claim" that they qualified under the statute. (R. 428). The Department provided Del Favero no notice of its decision to enter this Joint Settlement Agreement, before adopting it in a Final Order.

On April 19, 2019, the Department entered a Final Order, which "incorporated by reference" the Joint Settlement Agreement. (R. 421). The Final Order provided a "Notice of Right to Judicial Review," advising that any party adversely affected by the Final Order had the right to appeal. (R. 422). Recognizing Del Favero as a party that would be adversely affected by the Final Order, the Department furnished a copy to Del Favero's counsel. (*Id.*).

Neither the Settlement Agreement nor the Final Order explain how the Department was able to award eight MMTC licenses, when it had previously represented that only two licenses remained and that none of the applicants were within one point of the highest scoring applicant or otherwise eligible for licensure pursuant to section 381.986(8)(a)2.a.

Shortly thereafter, Del Favero timely filed a Notice of Appeal.

## SUMMARY OF THE ARGUMENT

### **Issue I: Del Favero has standing to appeal the Final Order at issue in this case**

It is well-established that parties filing mutually exclusive applications from a limited pool of licenses are substantially affected and possess standing to seek comparative review when a state agency awards one of those limited licenses to another applicant. *See 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). In this case, Del Favero and Perkins both sought one of a statutorily limited number of MMTC licenses. In the Final Order, the Department awarded one of those licenses to Perkins. Thus, because Del Favero sought a license from the same limited pool of licenses as Perkins, Del Favero's substantial interests are affected by the Department's award of one of those licenses to Perkins, and Del Favero has standing to challenge that award.

While it is true that the ALJ did not rule on Del Favero's motion before relinquishing jurisdiction to the Department, the Department clearly recognized that Del Favero's substantial interests were at stake as the Department notified Del Favero that Perkins had filed a petition challenging the Department's denial of Perkins' request for registration. Additionally, the Department notified Del Favero of its right to appeal the Final Order in this case. Accordingly, Del Favero has standing to appeal the Final Order at issue in this case.

**Issue II: Whether the Department's award of a medical marijuana treatment license to Perkins without comparative review violates *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945), and the plain language of section 381.986, Florida Statutes**

The United States Supreme Court has held 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 v. Radio Corp. v. F.C.C.*, 326 U.S. 327, 333 (1945). Florida courts have applied *Ashbacker* "whenever an applicant is able to show that the granting of authority to some other applicant will substantially prejudice his application." *Bio-Medical Applications of Clearwater, Inc. v. Dep't of Health & Rehab. Servs.*, 370 So. 2d 19, 23 (Fla. 2d DCA 1979); *see also 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). Because Perkins and Del Favero both sought one of a limited number of MMTC licenses, "fairness require[d] that the [Department] conduct a comparative hearing at which the competing applications are considered simultaneously." *Bio-Medical*, 370 So. 2d at 23.

Contrary to the argument raised by some of the applicants in the consolidated cases below, section 381.986(8)(a)2 does not give prior applicants, like Perkins, a priority over non-prior applicants, like Del Favero. Rather, the plain language of the statute makes clear that the Department was required to



comparatively review all MMTC applications submitted under section 381.986(8)(a)2 before awarding the ten licenses available under the statute.

Additionally, the Department agrees that comparative review of applications should occur. In addition to explicitly invoking *Ashbacker* in the proceedings below, the Department notified Del Favero of Perkin' petition, even though the Department knew that Del Favero was not a prior applicant, and advised anyone with a substantial interest in the remaining two licenses to take appropriate legal action. Because the Department awarded an MMTC license to Perkins without comparative review, this Court should set aside the Final Order.

**Issue III: Whether the Department's actions in this case violate the Florida Administrative Procedure Act**

The purpose of the Administrative Procedure Act ("APA") "is to ensure due process and fair treatment of those affected by administrative actions." *Pro Tech Monitoring, Inc. v. State, Dep't of Corrs.*, 72 So. 3d 277, 279 (Fla. 1st DCA 2011). In this case, the Department violated the APA in two distinct, yet equally significant ways, both of which, require this Court to set aside the Final Order.

First, the Department reversed a finding of fact of the ALJ that was supported by competent, substantial evidence, in violation of section 120.57(1)(l), Florida Statutes. Here, after successfully convincing the ALJ that under no circumstances did Perkins qualify for an MMTC license and that jurisdiction should be relinquished to the Department because no material facts were in

dispute, the Department reversed its position, and awarded Perkins an MMTC license, providing in the Joint Settlement Agreement that Perkins had a "colorable claim alleging" that it qualifies under the statute. This was error, as the APA does not permit the Department to reopen the record after the ALJ relinquishes jurisdiction to the Department, and the competent, substantial evidence in the record supports the Department's original position that Perkins does not qualify for an MMTC license.

Second, the Department failed to provide an adequate point of entry for Del Favero to challenge the Department's award of an MMTC license to Perkins. Under the APA, a party whose substantial interests are affected by agency action must be provided with notice of the action and an adequate point of entry to challenge that action. In this case, after acknowledging Del Favero's substantial interests by notifying Del Favero of Perkins' petition, the Department failed to provide Del Favero notice of its intent to enter into the Joint Settlement Agreement. The Department then failed to provide Del Favero with an adequate point of entry to challenge the Final Order, which incorporates by reference the Joint Settlement Agreement.

Both of these violations of the APA constitute a denial of due process and require this Court to set aside the Final Order at issue in this case.

**Issue IV: Whether the Joint Settlement Agreement incorporated by reference in the Final Order is void against public policy**

Finally, this Court should find the Joint Settlement Agreement incorporated by reference in the Final Order void as against public policy. While parties are generally free to contract, they may not contravene legislative intent in a way that is "clearly injurious to the public good." *Franks v. Bowers*, 116 So. 3d 1240, 1247 (Fla. 2013). This Court has not hesitated to void a contract between a state agency and a private party where, as here, the state agency entered into a contract with one applicant, after a competing applicant was eliminated from the process. *See State, Department of Lottery v. Gtech Corporation*, 816 So. 2d 648 (Fla. 1st DCA 2001).

In this case, the Joint Settlement Agreement that is incorporated by reference in the Final Order should be voided because it contravenes the legislative intent of both the APA and section 381.986(8)(a)2, as it awards an MMTC license to an unqualified applicant. Fundamental fairness requires this Court to set aside the Joint Settlement Agreement, which provides the basis for the Final Order at issue in this case.

## ARGUMENT

### **Issue I: Del Favero has standing to appeal the Final Order at issue in this case**

#### **Standard of Review**

"Determining whether a party has standing is a pure question of law to be reviewed de novo." *Davis v. Hinson*, 67 So. 3d 1107, 1110 (Fla. 1st DCA 2011).

#### **Del Favero Has Standing to Bring this Appeal<sup>7</sup>**

As the Florida Supreme Court has explained, "[s]tanding is a legal concept that requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly." *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 505 (Fla. 2006). Thus, the fundamental purpose of standing is to ensure that a litigant has a sufficient stake in the outcome of a case. *See Gregory v. Indian River Cty.*, 610 So. 2d 547, 554 (Fla. 1st DCA 1992) (explaining that the purpose of requiring a litigant to have standing "is to ensure that a party has a 'sufficient interest in the outcome of the litigation which warrants the court's entertaining it' and to assure that a party has a personal stake in the outcome so he will adequately represent the interest he asserts"); *see also S. Broward Hosp. Dist. v. State, Agency for Health Care Admin.*, 141 So. 3d

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<sup>7</sup> In its Response to Del Favero's Motion to Consolidate and Expedite, the Department asserted that it "reserve[d] the right to contest Del Favero's standing" in this appeal. *See* Dep't's Amended Response at 4, n.3. Accordingly, Del Favero preemptively addresses the issue of its standing.

678, 681 (Fla. 1st DCA 2014). More specifically, the two-part test for standing in administrative proceedings such as this one has been explained as follows:

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his 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.

*Agrico Chem. Co. v. Dep't of Envtl. Regulation*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

In this case, Del Favero and Perkins both sought one of a statutorily limited number of MMTC licenses.<sup>8</sup> In the Final Order at issue in this case, the Department awarded one of those statutorily limited MMTC licenses to Perkins. Because the Department's action results in one less MMTC license being available, without affording Del Favero an opportunity to have its application comparatively reviewed with Perkins, Del Favero will suffer an injury in fact by the Department's action. Additionally, because section 381.986(8)(a) contemplated an application

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<sup>8</sup> Del Favero is aware of this Court's opinion in *Florida Department of Health, Office of Med. Marijuana Use, et al. v. Florigrown, LLC*, No. 1D18-4471, wherein this Court addressed Florigrown's likelihood of success on the merits that certain provisions of section 381.986(8) are unconstitutional, including the cap on the number of MMTC licenses available. However, in that opinion, this Court declined to address "the Department's authority to establish any caps" on the number of MMTC licenses. Thus, because there has yet to be a final ruling that the caps in section 381.986(8) are unconstitutional, nor has it been made clear whether the Department will attempt to establish caps, Del Favero is substantially affected by the Department's award of an MMTC license to Perkins.

process including comparative review, Del Favero is within the zone of interest created by that law. Del Favero possesses the requisite standing to bring this appeal.

This Court has explained that parties filing mutually exclusive applications from a limited pool of licenses are substantially affected and possess standing to seek comparative review when a state agency awards one of those limited licenses to another applicant. *See 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). In *Bio-Medical Applications of Ocala*, a state agency attempted to award a certificate of need to operate a health care facility. *Id.* at 88. When another applicant seeking to offer the same service in the same city petitioned to challenge that award, the Department denied the disappointed applicant's petition, alleging that the applicant lacked standing because it did not have a substantial interest in the certificate awarded to another applicant. *Id.* This Court reversed, explaining:

[W]hen simultaneous applications are mutually exclusive and are so regarded by the Department, as here evidenced by the order denying Bio-Medical's application in favor of Shands' "less costly and more appropriate alternative," each competitor is potentially a party to the proceedings on the other's application. Each is one "whose substantial interests will be affected by proposed agency action" on the other's application.

*Id.* at 89. This Court went on to hold that, because the Department at issue failed to provide a clear point of entry, a petition for formal administrative hearings challenging the application approval should have been granted. *Id.*

More recently, in the context of a bidding process before Florida Housing Finance Corporation, this Court, citing its decision in *Bio-Medical Applications of Ocala*, held that a bidder who was not awarded funding had standing to request a formal administrative hearing because its substantial interests were affected by the Corporation's award of funding to a different bidder. *See Ybor III, Ltd. V. Fla. Housing Fin. Corp.*, 843 So. 2d 344, 345-47 (Fla. 1st DCA 2003).

The same is true here. Because Del Favero sought a license from the same limited pool of licenses as Perkins, Del Favero's substantial interests are affected by the Department's award of one of those licenses to Perkins. The Department itself even recognized that Del Favero's substantial interests would be affected, as the Department sent a letter to Del Favero in August of 2018, notifying Del Favero that Perkins and four other MMTC applicants had filed petitions to challenge the Department's denial of their requests for registration as MMTCs. (R. 54). Additionally, the Department did not oppose Del Favero's motion to intervene below. (R. 50).

It is true that Del Favero's motion for intervention was not ruled on before the ALJ relinquished jurisdiction to the Department. However, the only reason the

ALJ did not rule on Del Favero's motion before relinquishing jurisdiction to the Department was because the Department so zealously argued that there were no issues of fact in dispute because only two licenses remained and Perkins did not qualify for one. Additionally, even though the ALJ never ruled upon Del Favero's motion to intervene, the Department notified Del Favero of its right to appeal the Final Order in this case (R. 422), and both the Department and Perkins included Del Favero on their certificate of service for their filings at DOAH. (*See, e.g.*, R. 310, 378).

Accordingly, Del Favero has standing to bring this appeal.



**Issue II: Whether the Department's award of a medical marijuana treatment license to Perkins without comparative review violates *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945), and the plain language of section 381.986, Florida Statutes**

### **Standard of Review**

This Court shall set aside agency action if it finds that "fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure." § 120.68(7)(c), Fla. Stat. (2018).

### **The *Ashbacker* Doctrine**

In *Ashbacker v. Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945), the United States Supreme Court held 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." *Id.* at 333. *Ashbacker* involved two mutually exclusive applications for a construction permit under the Federal Communications Act. *Id.* at 327-28. The Federal Communications Commission ("FCC") examined an application filed by Fetzer and granted it without a hearing. *Id.* at 328. That same day, the FCC designated an application filed by Ashbacker for a hearing. *Id.* Ashbacker filed a petition for hearing and other relief. *Id.* The FCC denied the petition, explaining that Ashbacker's application had not been denied, but was designated for a hearing, at which Ashbacker would have ample

opportunity to show that its applications was superior to Fetzer's. *Id.* Ashbacker appealed.

On review, the Supreme Court, interpreting a provision of the Federal Communications Act, explained:

We do not think it is enough to say that the power of the Commission to issue a license on a finding of public interest, convenience or necessity supports its grant of one of two mutually exclusive applications without a hearing of the other. For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denials of their applications becomes an empty thing. We think that is the case here.

*Id.* at 330-31. The Court concluded by stating that "[w]hile the statutory right of [Ashbacker] to a hearing on its application has in form been preserved, it has as a practical matter been substantially nullified by the grant of the Fetzer application."

*Id.* at 334. Accordingly, the Court reversed. *Id.*

Approximately thirty years later, the Second District Court of Appeal was asked to apply the *Ashbacker* doctrine to mutually exclusive certificate of need applications. *See Bio-Medical Applications of Clearwater, Inc. v. Dep't of Health & Rehab. Servs.*, 370 So. 2d 19 (Fla. 2d DCA 1979). In *Bio-Medical*, Kidneycare filed an application for a certificate of need to install a ten-station kidney dialysis center in Clearwater. *Id.* at 21. The Department of Health and Rehabilitation Services ("HHS") disapproved Kidneycare's proposal, prompting Kidneycare to request a fair hearing. *Id.* Bio-Medical also filed an application with respect to a

twenty-station kidney dialysis center in Clearwater. *Id.* at 22. HRS also denied this proposal, which led Bio-Medical to request a fair hearing. *Id.* Bio-Medical also moved to intervene in Kidneycare's proceeding, which the hearing officer summarily denied. *Id.* The hearing officer issued a recommended order, recommending that Kidneycare's proposal be approved, which HRS adopted. *Id.* Shortly thereafter, the hearing officer recommended that Bio-Medical be approved, but only for seven kidney dialysis stations, as opposed to the twenty for which it applied. *Id.*

Bio-Medical appealed, arguing that the hearing officer's denial of its motion to consolidate violated *Ashbacker*. *Id.* at 23. Kidneycare did not dispute the applicability of *Ashbacker*, but argued that the requirements of *Ashbacker* were met because Bio-Medical " 'enjoyed full participation' in the Kidneycare hearing and thus was not denied a hearing altogether." *Id.* The Second District rejected that argument, explaining:

In *Ashbacker*, the Supreme Court laid down a general principle that an administrative agency is not to grant one application for a license without some appropriate consideration of another Bona fide and timely filed application to render the same service; the principle, therefore, constitutes a fundamental doctrine of fair play which administrative agencies must diligently respect and courts must be ever alert to enforce.

We agree that *Ashbacker* should apply whenever an applicant is able to show that the granting of authority to some other applicant will substantially prejudice his application. In such a case fairness requires that the agency conduct a comparative hearing at which the

competing applications are considered simultaneously. Only in that way can each party be given a fair opportunity to persuade the agency that its proposal would serve the public interest better than that of its competitor. Such an opportunity is not afforded by merely allowing an applicant to intervene in the proceedings pertaining to a competing application since the merits of the intervenor's proposal are not thereby presented for comparative consideration.

*Id.* (internal citations omitted).

Several months later, this Court addressed a similar situation involving two mutually exclusive certificate of need applications. *See Bio-Medical Applications of Ocala*, 374 So. 2d 88. In that case, Bio-Medical's application was denied, while another applicant, Shands, was approved. *Id.* at 88. The agency offered Bio-Medical a hearing on its own application, but determined that Bio-Medical "lack[ed] standing" to contest Shands' application. *Id.* This Court disagreed:

We find that these applications are mutually exclusive, each proposing to satisfy the same limited need; that Bio-Medical has standing as a "party" to proceedings on Shands' application; and that, absent Department rules giving Bio-Medical an earlier clear point of entry as intervenor, Bio-Medical timely requested a hearing after the Department acted on Shands' application in free-form proceedings.

*Id.* Citing the Second District's opinion in *Bio-Medical*, this Court further explained:

[W]hen simultaneous applications are mutually exclusive and are so regarded by the Department, as here evidenced by the order denying Bio-Medical's application in favor of Shands' "less costly and more appropriate alternative," each competitor is potentially a party to the proceedings on the other's application. Each is one "whose substantial interests will be affected by proposed agency action" on the other's application.

Because Bio-Medical had standing as a potential party to the Shands proceedings, Bio-Medical was entitled to request a hearing in those proceedings by which Shands' substantial interests were to be determined.

*Id.* at 89 (internal citations omitted).

As in *Ashbacker*, the Second District's opinion in *Bio-Medical*, and this Court's decision in *Bio-Medical Applications of Ocala*, Del Favero and Perkins both sought one of a limited number of licenses under section 381.986(8)(a)2. Thus, "fairness require[d] that the [Department] conduct a comparative hearing at which the competing applications are considered simultaneously." *Bio-Medical*, 370 So. 2d at 23. Because the Department did not conduct a comparative review hearing before awarding an MMTC license to Perkins under section 381.986(8)(a)2, this Court should set aside the Final Order. *See* § 120.68(7)(c) (explaining that a reviewing court shall set aside agency action when it finds that "fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure").

### **Section 381.986(8)(a)2 Does Not Give A Priority to Prior Applicants Under the One-Point Provision**

Some of the applicants in the consolidated cases argued below that section 381.986(8)(a)2 gives priority to applicants seeking an MMTC license under the one-point provision over those applicants seeking an MMTC license under the

other provisions of section 381.986(8)(a)2. (Case No. 1D19-1772, R. at 83; DOAH Case No. 18-4471, *Response in Opposition*, filed Sep. 7, 2018). In essence, the argument was that Del Favero's substantial interests were not at stake because Del Favero—who was not a prior applicant under the one-point provision of section 381.986(8)(a)2.a—is not entitled to comparative review with applicants seeking a license under the one-point provision. (*Id.*). Because this reading of section 381.986(8)(a)2 cannot be reconciled with the statute's plain language and improperly adds words that do not appear in the statute, it should be rejected. *See Fla. Dep't of Educ. v. Cooper*, 858 So. 2d 394, 396 (Fla. 1st DCA 2003) ("Where the language [of a statute] is clear and unambiguous, it must be given its plain and ordinary meaning."); *Fla. Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 848 (Fla. 1st DCA 2002) ("Courts are not at liberty to add words to statutes that were not placed there by the legislature.").

Section 381.986(8)(a)2 begins by providing that the Department "shall license as medical marijuana treatment centers 10 applicants that meet the requirements of this section, under the following parameters." Those "following parameters" provide that the Department (a) shall award MMTC licenses to those applicants who applied under the 2014 version of the statute and "had a final ranking within one point of the highest final ranking in its region"; (b) shall license one recognized member of the *Pigford* class; and (c) 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." § 381.986(8)(a)2.a.-c (emphasis added). Use of the word "while" makes clear that the legislature intended for the Department to conduct a comparative review of all MMTC applicants under the parameters set forth in section 381.986(8)(a)2 to arrive at a total of ten licenses.

If the legislature intended the reading advanced by applicants in the consolidated cases, it could have easily drafted the statute that way. Instead of stating "**while** accounting for the number of licenses issued under sub-paragraphs a. and b.," the legislature could have stated "**after** accounting for the number of licenses issued under sub-paragraphs a. and b." § 381.986(8)(a)2.c. The legislature did not do that. Thus, under a plain reading of the statute, the Department was required to comparatively review all MMTC applications submitted under section 381.986(8)(a)2 before awarding licenses. *See Bio-Medical*, 370 So. 2d at 23.

### **The Department Agrees that *Ashbacker* Should Apply To MMTC Licensure**

The Department agrees that comparative review of MMTC license applications should occur. Indeed, responding to the ALJ's Order below, the Department argued that section 381.986(8)(a)2 requires the Department issue ten

licenses through an "application batch." (R. 203). Later in that same response, the Department again referenced an application batch, stating that "the Department contends none of the petitioners is qualified and that the remaining 2 licenses are to be awarded through a separate application batch." (R. 205). In that same filing, the Department explicitly invoked *Ashbacher*, arguing that it would not "at this time" insist that an *Ashbacher* hearing was required, but only because the Department steadfastly argued that neither Perkins nor the other applicants qualified for licensure under section 381.986(8)(a)2.a. (R. 193).

Additionally, the Department's actions in this case make clear that the Department agrees with Del Favero's interpretation of section 381.986(8)(a)2, that the Department was required to comparatively review **all** MMTC applications submitted under section 381.986(8)(a)2 before awarding licenses. Indeed, this Court need look no further than the letter sent to Del Favero by the Department, notifying Del Favero of Perkins' petition. (R. 54). The Department knew that Del Favero was not a prior applicant, and therefore would not be seeking an MMTC license under that parameter. Nevertheless, the Department advised:

The citrus preference identified in section 381.986(8)(a)3., Florida Statutes is only applicable to these same remaining licenses to be issued pursuant to section 381.986(8)(a)2., Florida Statutes, and which are at issue in the pending legal challenges listed below. Anyone with a substantial interest in the remaining two licenses should take appropriate legal action.



(R. 54). Consistent with that invitation, the Department did not oppose Del Favero's motion to intervene in this case. (R. 50).

**The Department Erred in Issuing MMTC Licenses Under Section  
381.986(8)(a)2 Without Comparative Review**

After arguing in **this** proceeding that MMTC licenses under section 381.986(8)(a)2 are to be awarded through a comparative review process, the Department issued an MMTC license to Perkins without comparative review. Such action violates *Ashbacker* and this Court's precedent in *Bio-Medical Applications of Ocala*, and is patently unfair to Del Favero. Accordingly, Del Favero respectfully requests this Court set aside the Final Order issued by the Department in this case. *See* § 120.68(7)(c) (providing that the reviewing court shall "set aside agency action" where it finds that "[t]he fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure").

**Issue III: Whether the Department's actions in this case violate the Florida Administrative Procedure Act**

**Standard of Review**

This Court shall set aside agency action if it finds that "fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure." § 120.68(7)(c), Fla. Stat. (2018).

**The Florida Administrative Procedure Act**

As the Florida Supreme Court has explained, the Florida Administrative Procedure Act ("APA")—codified in chapter 120, Florida Statutes—"was intended to simplify the administrative process and provide the public with a more certain administrative procedure, thereby insuring that the public would receive due process and significantly improved fairness of treatment." *Sch. Bd. of Palm Bch. Cty. v. Survivors Charter Schs., Inc.*, 3 So. 3d 1220, 1231 (Fla. 2009) (quoting *Machules v. Dep't of Admin.*, 523 So. 2d 1132, 1136-37 (Fla. 1988)). This Court has similarly observed that the purpose of the APA "is to ensure due process and fair treatment of those affected by administrative actions." *Pro Tech Monitoring, Inc. v. State, Dep't of Corrs.*, 72 So. 3d 277, 279 (Fla. 1st DCA 2011).

Accordingly, under the APA, "when actions undertaken by a Florida administrative agency affect ones 'substantial interests,' the affected person is entitled to an administrative hearing." *Perry v. Dep't of Children & Families*, 220

So. 3d 546, 549-50 (Fla. 3d DCA 2017); *see also* § 120.569, Fla. Stat. (2018); § 120.57, Fla. Stat. (2018). The agency must provide notice and allow substantially affected parties twenty-one days to challenge agency action by requesting an administrative hearing. *See* Fla. Admin. Code R. 28-106.111; *Fla. League of Cities, Inc. v. Admin. Comm'n*, 586 So. 2d 397, 414 (Fla. 1st DCA 1991). Sections 120.569 and 120.57, Florida Statutes, set forth in detail how these administrative hearings are to be conducted, and limit agencies' ability to alter factual findings made by an administrative law judge presiding over the hearing. *See, e.g.*, § 120.57(1)(l) ("The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.").

Section 120.68, Florida Statutes (2018), then provides for judicial review of agency action, and sets forth specific circumstances under which a reviewing court may remand a case to the agency for further proceedings or set agency action aside. *See* § 120.68(7), Fla. Stat. (2018). As the Florida Supreme Court has explained, "[t]hese provisions ensure that agency action is the product of due process rather than arbitrary and uneven in its application, as well as in reviewable form for courts to enforce that due process." *Citizens of State v. Graham*, 213 So.

3d 703, 711 (Fla. 2017); *see also McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569 (Fla. 1st DCA 1977).<sup>9</sup>

In this case, the Department violated the APA in two discrete and equally significant ways. First, the Department improperly rejected and modified a finding of fact made by the ALJ. Second, the Department failed to provide an adequate point of entry for Del Favero to challenge the Department's action awarding an MMTC license to Perkins. Both of these violations require this Court to set aside the Final Order in this case. *See* §120.68(7)(c).

### **The Department Improperly Reversed a Finding of Fact That Was Supported by Competent, Substantial Evidence**

An agency "may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2018). Indeed, an ALJ's findings of fact that are supported by competent, substantial evidence are "binding" on an agency. *Fla. Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987). An agency commits reversible error when it rejects or modifies findings of fact that are supported by competent, substantial evidence. *Gross v. Dep't of Health*, 819 So.

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<sup>9</sup> *Superseded on other grounds by statute*, § 120.54(1)(a) Fla. Stat. (Supp. 1976), *as recognized in Dep't of Highway Safety & Motor Vehicles v. Schluter*, 705 So. 2d 81 (Fla. 1st DCA 1977).

2d 997, 1005 (Fla. 5th DCA 2002); *Belleau v. State, Dep't of Env'tl. Protection*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997).

In this case, the Department argued zealously that Perkins did not qualify for an MMTC license under the one-point provision of section 381.986(8)(a)2.a. The Department was so persuasive that the ALJ issued an Order to Show Cause Why Jurisdiction Should Not be Relinquished to the Department, explaining 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 [Perkins] for registration as a medical marijuana treatment center." (R. 266-67).

Then, six months after the ALJ relinquished jurisdiction to the Department, the Department reversed the ALJ's finding that Perkins was not qualified under the one-point provision of section 381.986(8)(a)2.a, and agreed to license Perkins as an MMTC, stating that Perkins has "a colorable claim" that it qualifies as an MMTC under section 381.986(8)(a). This reversal is unsupported by any competent, substantial evidence in the record below, and was error.

This Court has reversed a final order of the Agency for Health Care Administration ("AHCA") where AHCA "improperly opened the record after the administrative hearing" and "reweighed factual matters reserved for the hearing officer" under the APA. *Lawnwood Med. Ctr., Inc. v. Agency for Health Care Admin.*, 678 So. 2d 421, 422 (Fla. 1st DCA 1996). Specifically, in *Lawnwood*,

after the hearing officer recommended that AHCA enter a final order issuing the certificate of need at issue to Lawnwood, AHCA "reopen[ed] the record to take selective official recognition and make additional findings of fact." *Id.* at 425. In reversing, this Court observed that the APA does not authorize an agency "to reopen the record, receive additional evidence and make additional findings." *Id.*

The Florida Supreme Court has also not hesitated to reverse a final order of the Public Service Commission, where the Commission relied on a fact from outside of the record. *See Gen. Dev. Utils., Inc. v. Hawkins*, 357 So. 2d 408, 409 (Fla. 1978). The Court explained that reliance on such a fact "plainly violates the notions of agency due process which are embodied in the administrative procedure act." *Id.*

More recently, relying on both *Lawnwood* and *Hawkins*, this Court reversed and remanded a final order of the Department of Environmental Protection ("DEP") where DEP "rel[ie]d on facts from outside the record." *Kanter Real Estate, LLC v. Dep't of Env'tl. Protection*, 267 So. 3d 483, 489 (Fla. 1st DCA 2019). This Court explained that, "[i]n so doing, [DEP] improperly recast factual findings to reach a desired outcome, contrary to law." *Id.* at 490. The same is true here.

There is simply no evidence in the record that Perkins qualified for an MMTC license under section 381.986(8)(a). To the contrary, the competent,

substantial evidence supports the conclusion that Perkins does **not** qualify. Indeed, as the Department explained below, included in the Staff Analysis for the Senate Bill that led to the applicable version of section 381.986, was the Final Scorecard's summary worksheet, which showed each 2015 applicants' scores. (R. 199). It is undisputed that Perkins was not within one point of the highest final ranking in its region. (*Id.*). As the Department put it, this is "basic math." (R. 313).

This kind of agency action, where the agency advances one factual position before the ALJ, and then completely changes its factual position in a Final Order without any notice to those who are substantially affected by the agency's action, violates the fundamental principles of due process embodied in the APA. The Final Order should be set aside.

### **The Department Failed to Provide Del Favero an Adequate Point of Entry**

A fundamental tenet of the APA is that "when actions undertaken by a Florida administrative agency affect ones 'substantial interests,' the affected person is entitled to an administrative hearing." *Perry*, 220 So. 3d at 549-50; *see also* § 120.569(1); § 120.57. In order to pursue that right to an administrative hearing, the affected person must be provided with notice of the agency action and an adequate point of entry to challenge that action.

As this Court has explained:

Any substantially affected person **must be provided with a clear point of entry**, within a specified time period after some

recognizable event in the investigatory or other free form proceedings, to formal or informal proceedings under section 120.57. Simply providing a point of entry, however, is not enough if the point of entry is so remote from the agency action as to be ineffectual as a vehicle for affording a party whose substantial interests are or will be affected by agency action a prompt opportunity to challenge disputed issues of material fact in a 120.57 hearing. Notice of agency action which does not inform the affected party of its right to request a hearing and the time limits for doing so is inadequate to trigger the commencement of the administrative process. Until proceedings are had satisfying section 120.57, or an opportunity for them is clearly offered and waived, **there can be no agency action affecting the substantial interests of a person.**

*Fla. League of Cities, Inc. v. Admin. Comm'n*, 586 So. 2d 397, 413 (Fla. 1st DCA 1991) (internal citations omitted) (emphasis added). Additionally, the point of entry provided by the agency "must not be so remote from the agency action as to be ineffectual as a vehicle for affording a party whose substantial interests are or will be affected by agency action a prompt opportunity to challenge disputed issues of material fact in a Section 120.57 hearing." *Gulf Coast Home Servs. of Fla., Inc. v. Dep't of Health & Rehab. Servs.*, 515 So. 2d 1009, 1011 (Fla. 1st DCA 1987).

In this case, the Department recognized that Del Favero had a substantial interest in Perkins' request for registration as an MMTC, as the Department provided Del Favero notice that Perkins had filed a petition challenging the Department's denial of Perkins' request for registration. (R. 54). And, pursuant to that notice, Del Favero exercised its rights as a party whose substantial interests would be affected by filing a motion to intervene. (R. 40).



Then, after zealously and unyieldingly advocating before the ALJ that Perkins did not—under any circumstances—qualify for a MMTC license under the one-point provision of section 381.986(8)(a)2.a, the Department did a complete about-face by entering into the Joint Settlement Agreement, in which the Department agreed to license Perkins as a MMTC. The Department provided Del Favero—who the Department just months before recognized had a substantial interest in Perkins' request for registration—with no notice of this Settlement Agreement prior to entry of the Final Order.

Three days after entering into that Settlement Agreement, the Department entered a Final Order, incorporating the Settlement Agreement by reference. Only then did the Department provide notice to Del Favero. (R. 422). However, that notice failed to provide an adequate point of entry, as it notified Del Favero only of Del Favero's right to appeal the Final Order—not to request an administrative hearing under sections 120.569 and 120.57. In other words, the point of entry provided to Del Favero was "so remote from the agency action as to be ineffectual as a vehicle for affording a party whose substantial interests are or will be affected by agency action a prompt opportunity to challenge disputed issues of material fact in a section 120.57 hearing." *Gulf Coast Home*, 515 So. 2d at 1011.

## **The Department's Violations of the APA Warrant Reversal**

The APA is predicated on fundamental principles of due process. *See Survivors Charter Schs.*, 3 So. 3d at 1231. The Department's actions in this case—advocating for a finding of fact before an ALJ and then reversing that finding, which was supported by competent, substantial evidence, and failing to provide a party whose substantial interests are at stake with an adequate point of entry—can only be described as fundamentally contrary to those principles.

In its response to the ALJ's Order to Show Cause Why Jurisdiction Should Not be Relinquished to the Department, Perkins argued that to relinquish jurisdiction to the Department would "violate the fundamental principles of the APA, as well as fundamental principles of due process, and result in a reversal and remand of this case by the First District Court of Appeal." (R. 377). Del Favero is entitled to the same due process sought by Perkins below, and respectfully requests this Court set aside the Final Order. *See* § 120.68(7)(c).

**Issue IV: Whether the Joint Settlement Agreement incorporated by reference in the Final Order is void against public policy**

**Standard of Review**

Whether a contract is void as against public policy presents a legal question that is reviewed de novo. *Catastrophe Servs., Inc. v. Fouche*, 145 So. 3d 151, 154 (Fla. 5th DCA 2014).

**Argument**

The Florida Supreme Court has stated that parties are "free to contract around a state law so long as there is nothing void as to public policy or statutory law." *Franks v. Bowers*, 116 So. 3d 1240, 1247 (Fla. 2013). "However, a contractual provision that contravenes legislative intent in a way that is clearly injurious to the public good violates public policy and is thus unenforceable." *Id.*; *see also T.C.B. v. Fla. Dep't of Children & Families*, 816 So. 2d 194, 196 (Fla. 1st DCA 2002) (explaining that a contract "is void as against public policy when it is 'injurious to the interest of the public, or contravenes some established interest of society' ") (quoting *Hall v. O'Neil Turpentine Co.*, 47 So. 609, 612 (Fla. 1908)).<sup>10</sup>

In *State, Department of Lottery v. Gtech Corporation*, 816 So. 2d 648 (Fla. 1st DCA 2001), this Court addressed a dispute regarding a contract for

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<sup>10</sup> "Because a settlement agreement is contractual in nature, it is interpreted and governed by contract law." *Pinnacle Three Corp. v. EVS Invs., Inc.*, 193 So. 3d 973, 976 (Fla. 3d DCA 2016) (quoting *Munoz Hnos, S.A. v. Editorial Telvisa Int'l, S.A.*, 121 So. 3d 100, 103 (Fla. 3d DCA 2013)).

administrative services awarded by the Florida Department of Lottery ("Lottery") pursuant to a Request for Proposals (RFP). *Id.* at 649. The Lottery awarded the contract to AWI after review of proposals submitted by AWI and Gtech. *Id.* After the Lottery and AWI negotiated a contract, Gtech filed an action for declaratory and injunctive relief, arguing that the agreement was "illegal, null, and void because it omitted or altered certain material provisions required by the RFP and added other provisions never contemplated by the RFP." *Id.* at 650. As this Court explained, "[a]ccording to Gtech, AWI purposely 'low balled' its proposal in order to attain superior ranking over Gtech and then negotiated a contract on much more favorable terms than it initially proposed to the Lottery." *Id.*

The circuit court granted Gtech's motion for summary judgment "and declared the negotiated contract between the Lottery and AWI null and void and permanently enjoined its performance." *Id.* This Court quoted the following from the circuit court's order:

The Lottery and AWI contend that they were no longer bound by the competitive bidding statutes but were free to negotiate without limitation after Gtech was eliminated from the process. The court finds this position contrary to Florida law and untenable under the concept of fair competition among bidders. Long ago the Florida Supreme Court made it clear that public bidding laws were designed to prevent "opportunities for favoritism, whether any favoritism is actually practiced or not ... [.]” *Wester v. Belote*, 103 Fla. 976, 138 So. 721, 724 (1931). This basic tenant [sic] remains the law of Florida and the facts are uncontested that the Lottery treated its preferred vendor, AWI, more favorably in the negotiated contract which was not even the subject of the competitive bidding process.

*Id.* at n.1. The Lottery and AWI appealed. *Id.* at 651.

On appeal, Gtech argued that it was "aggrieved by agency action taken after the completion of the bid protest hearing and appeal." *Id.* This Court agreed, explaining that the "pivotal issue . . . is whether the Lottery can treat the RFP process as little more than a ranking tool to determine a preferred provider and then negotiate a contract with that provider with little or no concern for the original proposal of that preferred provider." *Id.* at 653. Ultimately, this Court held that "fundamental fairness" required it to affirm the trial court. *Id.*

Like in *Gtech*, the Department and Perkins entered into their own agreement after the Department successfully convinced the ALJ that there were no disputed facts at issue and Del Favero "was eliminated from the process." *Id.* at 650, n.1. Stated another way, after the Department advised Del Favero to "take appropriate legal action" with respect to Perkins' petition challenging the Department's denial its request for registration, which Del Favero did, and after jurisdiction was relinquished to the Department and Del Favero eliminated from the process, the Department entered into a Settlement Agreement with Perkins without providing Del Favero an adequate point of entry to challenge that Agreement, as required by the APA. Thus, like in *Gtech*, fundamental fairness requires this Court to find the Settlement Agreement null and void.

In addition to violating the intent of the APA, the Settlement Agreement violates the legislative intent in section 381.986(8)(a)2.a. The legislature was very clear about how the Department shall issue the ten licenses made available in section 381.986(8)(a)2. The legislature specifically provided that only those prior applicants under the former version of the statute that "had one or more administrative or judicial challenges pending as of January 1, 2017, or had a final ranking within one point of the highest final ranking in its region," qualified for licensure under that provision. § 381.986(8)(a)2.a. As the Department made painstakingly clear below, Perkins did not have a final ranking within one point of the highest final ranking in its region. Perkins also did not have an administrative or judicial challenge pending as of January 1, 2017. Thus, under no circumstances does Perkins qualify for an MMTC license under the statute.

The Settlement Agreement all but admits that Perkins does not qualify as it states only that Perkins has "a colorable claim alleging that they qualify" as an MMTC under the statute. (R. 428). Further, as part of the Agreement, Perkins is required to "submit a variance to its filed application in accordance with section 381.986(8)(e), Florida Statutes (2018)"<sup>11</sup> because the entity described in its filed application does not meet the regulatory requirements set forth by the legislature in

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<sup>11</sup> Under section 381.986(8)(e), the Department "may grant a medical marijuana treatment center a variance from the representations made in the initial application."

the 2017 amendment to section 381.986, Florida Statutes. (R. 430). This further makes clear that the application submitted by Perkins did not qualify for MMTC licensure.<sup>12</sup>

The Settlement Agreement at issue in this case is not an agreement entered into by two private parties. Rather, one of the parties to the Agreement is a state agency. And, as a state agency, the Department is limited in the actions that it can take when a party's substantial interests are at stake. Indeed, that is the guiding principle of the APA. *See Survivors Charter Schs., Inc.*, 3 So. 3d at 1231 (explaining that the APA "was intended to . . . provide the public with a more certain administrative procedure, thereby insuring that the public would receive due process and significantly improved fairness of treatment") (quoting *Machules*, 523 So. 2d at 1136-37).

By awarding one of a statutorily limited number of MMTC licenses to an applicant that the Department acknowledges does not qualify, the Department has contravened "legislative intent in a way that is clearly injurious to the public good"

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<sup>12</sup> In anticipation that the Department may attempt to argue that Perkins somehow does qualify under the statute, Del Favero notes that agencies are no longer entitled to deference in their interpretation of statutes. *See* art. V, § 21, Fla. Const. ("In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo."); *see also Citizens of State through Fla. Office of Public Counsel v. Fla. Public Serv. Comm'n*, 44 Fla. L. Weekly D703 \*3 (Fla. 1st DCA Mar. 13, 2019) (stating that it is this Court's "responsibility to say what the applicable law is.").

and "violates public policy." *Franks*, 116 So. 3d at 1247. Accordingly, this Court should find the Settlement Agreement that provides the basis for the Final Order in this case void as against public policy.



## CONCLUSION

The Department's decision to award an MMTTC license to Perkins—an unqualified applicant—without comparative review violates *Ashbacker* and the plain language of section 381.986(8)(a). Further, the actions taken by the Department over the course of the proceedings below are contrary to fundamental principles of due process and violate the APA. Lastly, the Settlement Agreement which forms the basis for the Final Order is void as against public policy as it contravenes the legislative intent set forth in the APA and the legislature's intent in section 381.986(8)(a). Any one of these provides an ample basis for this Court to set aside the Final Order and the underlying Joint Settlement Agreement. Accordingly, 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**

I HEREBY CERTIFY that on July 23, 2019, a copy of the foregoing was filed with the Florida Courts E-Portal which will furnish copies to its registered users, including the following:

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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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