IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
Case No. 1D19-1781

LOUIS DEL FAVERO ORCHIDS, INC.,

Appellant,

vs.

PERKINS NURSERY, INC. and STATE OF FLORIDA, DEPARTMENT OF HEALTH,

Appellees.
_____/

ANSWER BRIEF OF APPELLEE, PERKINS NURSERY, INC.

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STATEMENT OF THE CASE AND FACTS

I. Statement of the Case

This is an appeal by a non-party to the proceeding below challenging a final order adopting a Settlement Agreement entered into between Appellee, the Florida Department of Health (the "Department"), and eight other parties, including Appellee Perkins Nursery, Inc. ("Perkins"), which resolved pending litigation and issued medical marijuana treatment center ("MMTC") licenses. Del Favero was not a party to the administrative proceeding that resulted in the Settlement Agreement, and instead had attempted to intervene in the proceeding below. Such intervention was not granted, and a decision on the intervention motion was deferred as the ALJ was unable to determine that Del Favero had a substantial interest in the proceeding.

Del Favero's stated interest in the final order is based on a fundamental misunderstanding as to the effect of the Settlement Agreement on Del Favero. While Del Favero alleges the Settlement Agreement impacted its ability to participate in an application process for an MMTC license and obtain the citrus preference it argues it is entitled to, nothing in the Settlement Agreement impacts Del Favero's ability to do so. Indeed, the Department has already confirmed that the citrus preference Del Favero seeks remains available. Because Del Favero was not a party to the proceeding below, and because its interests are not at issue in this appeal, Del Favero lacks standing and this appeal should be dismissed.

II. Statutory and Regulatory Framework

A. The Dispensing Organization Application Process

In 2014, the Florida Legislature created section 381.986, Florida Statutes, and legalized the cultivation, processing, and dispensing of low-THC cannabis for certain qualified patients. *See* ch. 2014-157, Laws of Fla. The statute directed the Department to license five "dispensing organizations," one in each of five geographic regions of the state, to cultivate, process, and dispense low-THC cannabis. § 381.986(5)(b), Fla. Stat. (2014).

To accomplish the goals of the statute, the Department established a competitive application process for entities to apply to seek the five dispensing organization licenses made available by statute. The application process opened in July 2015 and closed in November 2015. Perkins timely submitted an application for dispensing organization licensure. R. 27. The application process resulted in the issuance of five dispensing organization licenses, one in each of the five regions established by statute. *Id.* That same month, the Department issued a letter denying Perkins application for licensure as a dispensing organization, on the basis that Perkins was not the highest scored applicant in the region for which it applied. *Id.*

B. The 2016 Statutory Revisions

As a result of the passage of a constitutional amendment in 2016 broadening the medical use of marijuana, art. X, § 29, Fla. Const., the Legislature met in special session in 2017 to implement the amendment and amend section 381.986 as

appropriate. *See* ch. 2017-232, Laws of Fla. The 2017 amendments required the Department to convert the licenses of the existing dispensing organizations into MMTC licenses, and established a process for additional MMTC licenses to be issued. The relevant provisions of section 381.986(8)(a) provided:

> 2. The department shall license as medical marijuana treatment centers 10 applicants that meet the requirements of this section, under the following parameters:
>
> a. As soon as practicable, but no later than August 1, 2017, the department shall license any applicant whose application was reviewed, evaluated, and scored by the department and which was denied a dispensing organization license by the department under former s. 381.986, Florida Statutes 2014; which had one or more 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, the department shall license one applicant that is a recognized class member of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), or *In Re Black Farmers Litig*., 856 F. Supp. 2d 1 (D.D.C. 2011). An applicant licensed under this sub-subparagraph is exempt from the requirement of subparagraph (b)2.
>
> c. As soon as practicable, but no later than October 3, 2017, the department shall license applicants that meet the requirements of this section in sufficient numbers to result in 10 total licenses issued under this subparagraph, while accounting for the number of licenses issued under sub-subparagraphs a. and b.
>
> 3. For up to two of the licenses issued under subparagraph 2., the department shall give preference to applicants that demonstrate in their applications that they own one or more facilities that are, or were, used

> for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses and will use or convert the facility or facilities for the processing of marijuana.
>
> 4. Within 6 months after the registration of 100,000 active qualified patients in the medical marijuana use registry, the department shall license four additional medical marijuana treatment centers that meet the requirements of this section. Thereafter, the department shall license four medical marijuana treatment centers within 6 months after the registration of each additional 100,000 active qualified patients in the medical marijuana use registry that meet the requirements of this section.

§ 381.986(8)(a), Fla. Stat. (emphasis added).

Accordingly, the 2017 amendments required the Department to license as an MMTC any entities that: (1) submitted an application during the 2015 dispensing organization licensure process, and whose application was reviewed, evaluated, and scored by the department and which was denied a dispensing organization license by the department; and (2) which had one or more administrative or judicial challenges pending as of January 1, 2017, (3) or had a final ranking within one point of the highest final ranking in its region during the 2015 application process, provided that such entities also met the requirements of section 381.986 and provided 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 an MMTC.

Next, the legislation provided that for "up to two" of the licenses issued under section 381.986(8)(a)2., the Department shall give preference to applicants "that

demonstrate in their applications that they own one or more facilities that are, or were, used for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses and will use or convert the facility or facilities for the processing of marijuana."

Finally, the legislation created a mechanism for automatic increases in the number of MMTC licenses to be issued, providing:

> Within 6 months after the registration of 100,000 active qualified patients in the medical marijuana use registry, the department shall license four additional medical marijuana treatment centers that meet the requirements of this section. Thereafter, the department shall license four medical marijuana treatment centers within 6 months after the registration of each additional 100,000 active qualified patients in the medical marijuana use registry that meet the requirements of this section.

§ 381.986(8)(a)4., Fla. Stat. Therefore, every time the Medical Marijuana Use Registry adds another 100,000 qualified patients, four new MMTC licenses become available for issuance by the Department.

III. Litigation Regarding the "One Point" Provision

Following the passage of the 2017 amendments to section 381.986, the Department began issuing MMTC licenses pursuant to section 381.986(8)(a)(2). As discussed in detail in Perkins filings in the administrative proceedings below, disputes arose regarding the interpretation of the "one point" provision in section 381.986(8)(a)(2), as well as with respect to emergency rules adopted by the Department to implement the statutory section. *See, e.g. Nature's Way Nursery of*

Miami, Inc. v. Fla. Dep't of Health, Case Nos. 17-5801RE & 18-0720RU (DOAH June 15, 2018) (Final Order);[1] *Nature's Way Nursery of Miami, Inc. v. Fla. Dep't of Health,* Case No. 18-0721 (DOAH June 15, 2018) (Recommended Order). As reflected by the final order entered in *Nature's Way,* the Department and Nature's Way entered into a settlement agreement to resolve the disputes and issue an MMTC license to Nature's Way.

IV. Perkins' Request for Registration as an MMTC and Subsequent Challenge

On April 26, 2018, Perkins filed with the Department its request for licensure pursuant to the "one point" provision of section 381.986(8)(a)2.a., Fla. Stat. (2017). R. 16. Perkins correspondence demonstrated that the Department met each of the statutory criteria to be registered as an MMTC pursuant to section 381.986(8)(a)1 & 2. *Id.* Perkins also filed a petition for administrative hearing challenging the Department's denial of its request, and challenging the Department's scoring methodology. R. 15.

Perkins petition, along with similar petitions filed by five other entities who submitted applications during the 2015 process, were forwarded to the Division of Administrative Hearings ("DOAH") for a formal hearing. R. 26. In an abundance of caution, on August 27, 2018, the Department issued a notice to various parties

[1] The Department appealed the final order to this Court, but subsequently dismissed the appeal.

informing them that it had already issued seven of the ten licenses available under section 381.986(8)(a).2.a, and that one of the remaining three licenses was reserved for a recognized member of the *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), classes. R. 75. Accordingly, it stated that any party "with a substantial interest in the remaining two licenses should take appropriate legal action." R. 75.

V. Del Favero's Interests and Attempted Intervention

Del Favero purchased facilities that were used for the canning, concentrating, and processing of citrus in an attempt to file an application for MMTC licensure and qualify for the "citrus preference" contemplated by section 381.986(8)(a)3.a. (the "Citrus Preference"). R. 46. In an attempt to ensure the citrus preference it desired remained available, Del Favero moved to intervene in all six of the administrative proceedings described above. R. 42.

Del Favero's motion to intervene acknowledges that it did not submit an application for licensure as a dispensing organization during the 2015 application process. R. 49. Del Favero's motion additionally makes clear that Del Favero seeks to file an MMTC application and obtain the benefit of the citrus preference contemplated by section 381.986(8)(a).3 R. 50-51. Accordingly, Del Favero's Motion to Intervene alleged it was "within the zone of interest of section 381.986(8)(a)2.-3., Florida Statutes." *Id.*

In the related Spring Oaks DOAH proceeding, on September 11, 2018, the ALJ assigned to all of the related "one point" cases below entered an "Order Regarding Motions to Intervene," stating:

> The instant case comes before the undersigned based on Motions to Intervene, filed on August 31 and September 6, 2018. 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 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.

A. 044 (*Spring Oaks Greenhouses, Inc. v. Department of Health, Office of Medical Marijuana Use,* DOAH Case No. 18-4471 (September 11, 2018, Order Regarding Motions to Intervene)). Although entered in the Spring Oaks case, the order referenced all related one point cases that were then known to the ALJ.

On September 28, 2018, prior to any evidentiary hearing or the taking of any evidence, the ALJ issued an order to show cause why jurisdiction should not be relinquished to the Department. R. 268. The order began by noting that "[a]s explained below, the undersigned is uncertain whether there are any material facts in dispute in the instant case." Accordingly, the order required Perkins and the other similarly situated petitioners to show cause within five days why jurisdiction should not be relinquished to the Department. R. 269.

Meanwhile, on October 5, 2018, the Leon County Circuit Court entered an order granting a temporary injunction preventing the Department from issuing

licenses pursuant to section 381.986, Florida Statutes. *See Florigrown v. Dep't of Health*, Leon County Case No. 2017-CA-2549 ("*Florigrown*").[2] In response to the issuance of the *Florigrown* injunction order, the ALJ issued an order on October 18, 2018 relinquishing jurisdiction 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." R. 400-01.

Subsequently, in October 2018, Del Favero sent a letter to the Department requesting an MMTC license under a section 381.986(8)(a).3 citrus preference, despite the fact that no application process was open at that time. IB at 12, no.6. In January 2019, the Department responded by letter to Del Favero stating that it would not act on the request because the application period for licenses seeking a citrus preference had not yet opened. *Id.*

In March 2019, Redland Nursery, Inc., and Hart's Plant Nursery, Inc. also filed requests for licenses pursuant to section 381.986(8)(a).2.a's "one point" provision. R. 427-31. The Department denied their requests and both parties filed petitions for administrative hearing challenging the Department's denial of their request. *Id*. The record in those proceedings demonstrates Del Favero did not move

[2] The decision was subsequently stayed pending appeal, and remains pending on motions for rehearing en banc before this Court. *See Fla. Dep't of Health v. Florigrown*, First District Court of Appeal Case No. 1D18-4471.

to intervene in either the Redland or Hart's proceedings. Del Favero contends in the Initial Briefs filed in the Redland and Hart's appeals (First District Court of Appeal case numbers 1D19-1780 and 1D19-1782) that it had no notice of either petition and therefore did not move to intervene, but Del Favero clearly did have notice of such proceedings prior to issuance of the Final Order. Before the Final Order was issued, Del Favero filed an ex parte motion for temporary injunction in the *Florigrown* circuit court case which included as an attachment the Settlement Agreement, and the Settlement Agreement expressly referenced both the Redland and Hart's petitions. *See Florigrown L.L.C. and Voice of Freedom, Inc. v. Florida Dept. of Health*, Leon County Case No. 2017-CA-002549 (Intervenor Louis Del Favero Orchids, Inc.'s Emergency Ex Parte Motion for Temporary Injunction, April 19, 2019)

VI. The Settlement Agreement and Final Order

On April 16, 2019, the Department entered into a Settlement Agreement to resolve the claims of Perkins and the seven other parties with pending administrative challenges pertaining to the one point provision (the "Settlement Agreement").[3] R. 426. The Settlement Agreement acknowledges that each applicant "had a colorable

[3] The parties to the Settlement Agreement, in addition to Perkins, were Spring Oaks Greenhouses, Inc., Redland Nursery, Inc., Dewar Nurseries, Inc., Tree King-Tree Farm, Inc., DeLeon's Bromeliads, Inc., Bill's Nursery, Inc. and Hart's Plant Nursery, Inc.

claim alleging that they qualify as medical marijuana treatment centers under section 381.986(8)(a)." R. 430. By the time the Settlement Agreement was executed, an additional eight licenses were available pursuant to section 381.986(8)(a)4., as the medical marijuana use registry had, by that time, exceeded 200,000 qualified patients.[4] The licenses awarded pursuant to the Settlement Agreement did not impact the Citrus Preference available pursuant to section 381.986(8)(a)3., but were instead made available by operation of section 381.986(8)(a)4. *See Louis Del Favero Orchids, Inc. v. Florida Department of Health*, DOH Case No. 2019-0098-B (Aug. 5, 2019 Final Order Dismissing Petition). Accordingly, the Department in the Settlement Agreement was able to resolve the litigation between the parties and conserve state resources by issuing licenses available under section 381.986(8)(a), and at the same time preserve Del Favero's interest in seeking to obtain a Citrus Preference in a future application process.

Each of the parties to the Settlement Agreement filed notices of voluntary dismissal with prejudice, and on April 19, 2019, the Department issued a Final Order

[4] Per the Department's weekly updates, at the time of the Final Order, there were 207,869 active qualified patients on the Department's patient registry. *See* https://knowthefactsmmj.com/2018/12/21/2019-ommu-updates/. The Court is requested to take judicial notice of the document pursuant to section 90.202(5), Florida Statutes. *See Schriver v. Tucker,* 42 So. 2d 707, 709 (Fla. 1949).

adopting the Settlement Agreement and dismissing Perkins petition with prejudice. R. 423.

Although not a party to any of the proceedings below, Del Favero appealed the Final Order, as well as the seven other final orders pertaining to the other parties to the Settlement Agreement. R. 463. Del Favero did not seek for the Department to stay the effect of the Final Order, and did not ask this Court to stay the effect of the Final Order.

VII. Related Litigation Filed by Del Favero

After the Settlement Agreement was executed, but before the Final Order was entered, Del Favero filed a 312 page (with attachments) "Emergency Ex Parte Motion for Temporary Injunction" in the *Florigrown* proceeding that included the Settlement Agreement as an attachment, and made specific allegations regarding the Settlement Agreement. The circuit court denied the requested injunction.

Additionally, Del Favero filed a separate administrative petition challenging the Settlement Agreement. The Department entered a final order dismissing that petition on August 5, 2019. *Louis Del Favero Orchids, Inc. v. Florida Department of Health,* DOH Case No. 2019-0098-B (Aug. 5, 2019 Final Order Dismissing Petition). The Final Order Dismissing Petition states in part: "[i]n the Petition, Petitioner appears to allege that the citrus preference available under § 381.986(8)(a) Florida Statutes is no longer available. Although irrelevant to this inquiry, the citrus

preference outlined in § 381.986(8)(a) remains available." *Id.* at p. 4, n. 1. Accordingly the Department's Final Order in *Louis Del Favero Orchids, Inc. v. Florida Department of Health,* DOH Case No. 2019-0098-B expressly memorializes exactly what Del Favero seeks to obtain in this case. A. 050.

SUMMARY OF ARGUMENT

Del Favero's appeal should be rejected for numerous reasons. First, as a threshold matter, Del Favero was not a party to the administrative proceeding below, and therefore cannot satisfy the section 120.68(1), Florida Statutes, requirement that it be "a party who is adversely affected" by the Final Order. Even if it was a party below, Del Favero is clearly not adversely affected by the Final Order, as the Department has expressly stated that the Citrus Preference Del Favero seeks remains available, and was not impacted by the Settlement Agreement or Final Order.

Del Favero likewise cannot meet the requirements for standing in an administrative proceeding, as it clearly lacks a substantial interest in the proceeding. Indeed, Del Favero cannot demonstrate it will suffer any injury at all, let alone any injury satisfying the applicable *Agrico* standards. Accordingly, any argument that it should have been permitted to intervene below fails.

The comparative review doctrine does not apply here. Del Favero and Perkins did not file simultaneous applications which are mutually exclusive, are not seeking applications from the same fixed pool, and as demonstrated herein nothing in the

Settlement Agreement or Final Order impact Del Favero's ability to seek a license and obtain a Citrus Preference.

The Department's Final Order does not violate the APA, and does not reject any "findings of fact" made by the ALJ. No findings of fact were made below by the ALJ. Likewise, Del Favero was not entitled to receive a "notice of intent to settle," and no support exists for such an argument.

Florida Supreme Court precedent expressly acknowledges the authority of agencies to enter into Settlement Agreements such as that at issue here. The Settlement Agreement does not violate public policy, does not contravene legislative intent, and is not "clearly injurious to the public good."

Even if it prevailed on all of its claims, Del Favero is not entitled to the remedy it seeks, as a decision vacating the Final Order and Settlement Agreement would have far reaching consequences, and Del Favero sat on any rights it may have had. At most, Del Favero could attempt to obtain some form of ancillary relief pursuant to section 120.68(6)(a), such as a pronouncement from this Court that the Citrus Preference made available by section 381.986(8)(a)3. remains available. However, the Department has already made that exact statement.

STANDARD OF REVIEW

A determination as to "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); *see also Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot.*, 948 So. 2d 794, 796 (Fla. 1st DCA 2006). Determinations as to whether comparative review of applications is necessary and whether the Final Order violated the APA are likewise questions of law subject to *de novo* review. *See Abbott Laboratories v. Mylan Pharmaceuticals*, 15 So. 3d 642, 654 (Fla. 1st DCA 2009). Finally, whether a contract is void as a matter of public policy is subject to *de novo* review. *Catastrophe Services, Inc. v. Fouche*, 145 So. 3d 151, 154 (Fla. 5th DCA 2014).

ARGUMENT

I. Del Favero Lacks Standing to Appeal the Final Order

As a fundamental matter, Del Favero lacks standing to appeal the Final Order, and this appeal should be dismissed. First, Del Favero lacks standing to appeal the Final Order pursuant to section 120.68(1), Florida Statutes, because Del Favero was not adversely affected by the Department's Final Order. Only a party to the proceeding below who was adversely affected by the Department's Final Order may maintain an appeal, and Del Favero clearly does not meet this requirement. Second, any claim by Del Favero that it should have been granted intervention below fails, as Del Favero's substantial interests were not affected, and Del Favero cannot satisfy the test for standing in an administrative proceeding.

A. Del Favero does not have standing to maintain this appeal pursuant to section 120.68 because it was not a party below

Section 120.68(1) provides a right to seek appellate judicial review of final agency action to "[a] *party* who is *adversely affected* by final agency action[.]" § 120.68(1), Fla. Stat. (2018) (emphasis added). "It is a fundamental principle of appellate law that appeal jurisdiction is only available to *parties*," and "the Administrative Procedure Act only provides for review of agency action by *parties*." *Orange Cnty, Fla. v. Game & Fresh Water Fish Comm'n*, 397 So. 2d 411, 413 (Fla. 5th DCA 1981) (emphasis added); *Morrell v. Nat'l Health Investors, Inc*., 876 So. 2d 580, 580 (Fla. 1st DCA 2004) ("Appellate review is limited to the parties in the lower tribunal."). Florida courts have long recognized that "standing to appeal under section 120.68(1) is more narrow than the standing required to participate at the administrative level." *Melzer v. Fla. Dep't of Cmty. Affairs*, 881 So. 2d 623, 625 (Fla. 4th DCA 2004).

The Florida Supreme Court succinctly summarized the standard for obtaining appellate standing in administrative actions as follows:

> Section 120.68(1) sets forth the standard for judicial review of administrative action and states that "[a] party who is adversely affected by final agency action is entitled to judicial review." Thus, there are four requirements for standing to seek such review: (1) the action is final; (2) the agency is subject to provisions of the act; (3) the person seeking review was a party to the action; and (4) the party was adversely affected by the action. *See Daniels v. Florida Parole & Probation Comm'n*, 401 So. 2d 1351 (Fla. 1st DCA 1981), *aff'd sub nom.*

Roberson v. Florida Parole & Probation Comm'n, 444 So.2d 917 (Fla. 1983).

Legal Envtl. Assistance Found., Inc. v. Clark, 668 So. 2d 982, 987 (Fla. 1996). The court further recognized that even status as a party to the proceedings below is not sufficient to establish appellate standing. *Id.* Rather, the appellant must also demonstrate that it is adversely affected by the order on review. *Id.* Accordingly, the court in *Legal Environmental Assistance Foundation* determined that even though the appellant had intervened as a party to the proceedings below, it was not adversely affected by the final order it had appealed, and therefore lacked standing to maintain its appeal. *Id.*

This Court applied the same test in dismissing an appeal by an entity which was not a party to the administrative proceeding on appeal. *See Norkunas v. State Bldg. Comm'n*, 982 So. 2d 1227 (Fla. 1st DCA 2008). Because the appellant in *Norkunas* was not a party to the administrative proceedings below, this Court determined the appellant was without standing to institute the appeal, and therefore dismissed the appeal. *Id.; see also O'Connell v. Fla. Dep't of Cmty. Affairs*, 874 So. 2d 673, 675 (Fla. 4th DCA 2004) ("Standing on appeal requires more than standing at the administrative level. ... Appellants must be not only affected, but adversely affected by the final agency action."); *Sierra Club v. Dep't of Envtl. Prot.*, Case No. 1D08-4881 (Fla. 1st DCA Sept. 9, 2009) (Order granting motion to dismiss where appellant "failed to secure party status in the agency action below and therefore lacks

standing"); *White v. Fla. Dep't of Envtl. Prot.*, 1D18-3282 (Fla. 1st DCA Jan 14, 2019) (same); *Martin Cnty. Conserv'n All. v. Martin Cnty*., 73 So. 3d 856, 857 (Fla. 1st DCA 2011) ("We previously dismissed this appeal, holding '[t]he appellants have not demonstrated that their interests … are 'adversely affected' by the challenged order, so as to give them standing to appeal.'"); *Norkunas*, 982 So. 2d at 1228 ("We dismiss the appeal for lack of standing."); *Univ. Psychiatric Ctr., Inc. v. Dep't of Health & Rehab. Serv*s., 597 So. 2d 400, 401 (Fla. 1st DCA 1992) ("[T]he petitioners lack standing to maintain this action, and the action must be dismissed for lack of subject matter jurisdiction.").

The APA defines a "party" as "[s]pecifically named persons whose substantial interests are being determined in the proceeding" or "[a]ny other person who…is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and *who makes an appearance as a party.*" § 120.52(13)(a)-(b), Fla. Stat. (emphasis added). Del Favero indisputably was not a party to the proceeding below, and, therefore, lacks standing to appeal under the plain language of section 120.68(1). That Del Favero's motion to intervene was not expressly ruled upon before the matter was resolved by settlement is irrelevant, because any right Del Favero might have had to participate as an intervenor below was mooted when the parties decided to settle and entered into the Settlement Agreement. *See Envtl. Confed'n of SW Fla., Inc. v. IMC*

Phosphates, Inc., 857 So. 2d 207, 211 (Fla. 1st DCA 2003) ("Any right [the appellants] have to participate as intervenors would be lost altogether if the parties decide to settle the case or voluntarily dismiss it."). It is, of course, well-settled that the rights of an intervenor (even if intervention had been granted), are subordinate to the rights of the parties to the proceeding. *Id.* at 210.

B. Del Favero is not adversely affected by the Final Order

Del Favero's claim that it had a substantial interest in the proceeding below was based on its belief that the licenses issued pursuant to the Settlement Agreement reduced, or eliminated, the citrus preferences contemplated by section 381.986(8)(a)3. However, this is definitively not the case.

As detailed by Del Favero in its Motion to Intervene below, Del Favero wants to apply for an MMTC license in a future application process, and believes it is entitled to the benefit of the so-called "citrus preference" provided for in section 381.986(8)(a)3., because it purchased a facility that it believes complies with the statutory requirement. Del Favero was concerned the Settlement Agreement and Final Order would reduce, or eliminate, the availability of the preference, and it would therefore not be able to obtain the benefit of the preference in a future application process. In sum, Del Favero's alleged harm is that (1) if an application process is opened, and (2) if the Department makes available a citrus preference, and (3) if Del Favero is entitled to claim that citrus preference, and (4) if Del Favero's

application is not disqualified, and (5) if Del Favero's application is awarded a score that entitles it to a license, then (6) it would be entitled to licensure as an MMTC. As an initial matter, even if Del Favero's claims were accurate, such alleged harm is incredibly speculative, and certainly not the type of potential harm that would satisfy the *Agrico* test for standing in administrative proceedings.

More importantly, however, Del Favero's claims are based on a fundamental misconception as to the effect of the Settlement Agreement and Final Order. Del Favero's concern is that the Settlement Agreement and Final Order awarded licenses pursuant to section 381.986(8)(a)2, and therefore impacted or eliminated the Citrus Preference provided by section 381.986(8)(a)3. However, the Settlement Agreement and Final Order do no such thing. Instead, the Settlement Agreement recognizes that licenses are awarded pursuant to section 381.986(8)(a). The Department has made clear that the licenses issued pursuant to the Settlement Agreement were made available by operation of section 381.986(8)(a)4., and did not impact the availability of the Citrus Preference. Accordingly, even if Del Favero's claimed substantial interest was not speculative, the Settlement Agreement and Final Order do not impact any of the interests claimed by Del Favero, and Del Favero is not an adversely affected party.

C. Del Favero lacks standing under Agrico because it does not have a substantial interest in the Final Order

For the same reasons discussed above, Del Favero could likewise not meet the test for standing in administrative proceedings established by *Agrico v. Department of Environmental Regulation,* 406 So. 2d 478, 482 (Fla. 2d DCA 1981), and denial of its Motion to Intervene was appropriate.

To demonstrate a substantial interest below, Del Favero was required to show that it (1) will suffer injury in fact which is of sufficient immediacy to entitle it to a section 120.57 hearing, and (2) that its substantial injury is of a type or nature which the proceeding is designed to protect. *Agrico*, 406 So. 2d at 482. As demonstrated above, Del Favero can show neither.

First, as noted above, nothing in the Settlement Agreement or Final Order impacts Del Favero's ability to claim a Citrus Preference in a future application proceeding. Second, the plain language of section 381.986(8)(a)3 does not require the Department to provide a citrus preference as part of an application process, but instead states that the Department shall give the preference "for up to two of the licenses" created under section 381.986(8)(a)2. *See* § 381.986(9)(a).3, Fla. Stat. "Up to two" necessarily includes zero, and there remains a question as to whether the provision of such a preference is entirely dependent upon the discretion of the Department.

Third, even assuming solely for the sake of argument that Del Favero is correct, the Final Order awards the licenses under section 381.986(8)(a).2, and it is harmed by the Final Order, Del Favero would still not have standing in this appeal because its challenge is moot. The challenge is moot because the Settlement Agreement and Final Order awarded licenses to Hart's and Redland, but Del Favero did not even attempt to intervene in either case, and cannot possibly be determined to have standing to maintain an appeal of final orders in cases in which *they never even attempted* to become a party below. Accordingly, dismissal of both appeals is required, and, accepting Del Favero's argument, the licenses issued to Hart's and Redlands alone would eliminate the two final licenses available under section 381.96(8)(a).2, thereby eliminating the Citrus Preference available to Del Favero. Any relief that could be given in this case would therefore be moot.

Accordingly, even accepting Del Favero's argument, the harm it alleges it may suffer is too speculative to have provided Del Favero any substantial interest below. *S. Broward Hosp. Dist. v. State,* 141 So. 3d 678, 681 (Fla. 1st DCA 2014) (citing *Village Park Mobile Home Assoc. v. State Dep't of Bus. Regulation*, 506 So. 2d 426, 433 (Fla. 1st DCA 1987)) ("The injury or threat of injury must be both real and immediate, not conjectural or hypothetical.").

II. The Comparative Review Doctrine Does Not Apply.

Del Favero's assertion that the Final Order violates the United States Supreme Court's decision in *Ashbacker v. Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945), is without merit, and is based on the same fundamental misunderstanding that underlies the entirety of this appeal.

Del Favero argues in its brief that "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." IB at 15-16. Even if Del Favero was correct, the licenses issued pursuant to the Settlement Agreement were made available by section 381.986(8)(a)4., and did not impact Del Favero's ability to file an application in a future application process and seek the benefit of the Citrus Preference.

Del Favero's argument fails for two more reasons. First, this Court in *Bio-Medical Applications of Ocala, Inc., v. Office of Community Medical Facilities, Department of Health & Rehabilitative Services* made clear that agencies must employ comparative review where "simultaneous applications are mutually exclusive and are so regarded by the Department. . . ." 374 So. 2d 88, 89 (Fla. 1st DCA 1979). It defined "mutually exclusive" applications as those "proposing to satisfy the same limited need." *Id* at 88; *see also First Hosp. Corp. of Fla. v. Dep't of Health & Rehab. Servs.*, 566 So. 2d 917, 918 (Fla. 1st DCA 1990) (comparative

review principles are applicable to certificate of need applications which are competing for the same fixed pool of established need.)

Perkins and Del Favero do not, however, have pending applications which seek licenses from the "same fixed pool." 566 So. 2d at 918. Del Favero was barred by statute from seeking a license under the "one point" provision of section 381.986(8)(a)2.a., because it did not submit an application for a dispensing organization license in 2015, and clearly has no entitlement to such a license under that statutory section. Indeed, at the time Perkins initiated the administrative proceeding below Del Favero had not ever filed an application for an MMTC license.[5]

Second, Del Favero's application is not currently pending before the Department. As Del Favero acknowledges in its brief, while it attempted to file an application for MMTC licensure in October 2018, no application period was open at the time and the Department therefore did not accept the application. IB, at 12 n.6. Del Favero thus asks this Court to reverse the Final Order entered below because the Department granted Perkins an MMTC license without comparing its request for

[5] It must also be noted that although the Department previously issued seven licenses which it expressly stated were issued pursuant to section 381.986(8)(a)2.a., Del Favero has never argued that the Department was required to conduct a comparative review to issue any of the previous seven licenses. Del Favero thus seemingly argues that the licenses issued pursuant to the Settlement Agreement should be subjected to different procedures than the licenses issued previously.

licensure under section 381.986(8)(a)2.a. to a materially different application that Del Favero attempted to submit to the Department for the first time several months after Perkins initiated the below administrative proceeding, and which clearly did not meet the requirements of section 381.986(8)(a)2.a. There is no support for such an assertion, and Del Favero's argument is meritless.

Curiously, while it maintains in this appeal that MMTC licenses must be issued via a comparative review process, Del Favero has asserted in a pending circuit court case that it is entitled to an MMTC license without such a comparative review process being conducted. Specifically, Del Favero argued in circuit court that it was entitled to "licensure by default" because the Department did not deny its request for licensure within 90 days of Del Favero submitting an application to the Department – notwithstanding the fact that no application process was open when it submitted its application. *See Florigrown L.L.C. and Voice of Freedom, Inc. v. Florida Dept. of Health*, Leon County Case No. 2017-CA-002549 (Louis Del Favero's Motion for Partial Summary Judgment as to Counts III and IV of Louis Del Favero's First Amended Complaint and Incorporated Memorandum of Law, Feb. 22, 2019, at p. 1-2). Del Favero thus appears to take the position that no comparative review is required when it is seeking a license, but a comparative review is required when other licenses are issued.

III. The Final Order Did Not Violate the Administrative Procedure Act.

The Final Order does not violate the APA, and Del Favero's argument that the ALJ made "findings of fact" in an order to show cause fundamentally misconstrues the record. Likewise, Del Favero's assertion that the Department was required to provide it with a "notice of intent to enter into settlement agreement" lacks any support in law.

Del Favero's claim that the Final Order improperly rejected findings of fact is based on a fundamental misreading of an order to show cause entered by the ALJ. Specifically, Del Favero alleges that the ALJ received evidence and made a factual finding, supported by competent substantial evidence, that Perkins was not entitled to receive an MMTC license. The record does not support these allegations. Rather, no evidence was actually taken in the administrative proceeding below, and no evidentiary hearing was ever conducted, as it remained at an early stage when jurisdiction was relinquished to the Department based on the injunction entered in the *Florigrown* case.

Del Favero's citation for the purported "findings of fact" made by the ALJ are to an "Order to Show Cause Why Jurisdiction Should Not Be Relinquished to the Department of Health," which began by stating "[a]s explained below, the undersigned is uncertain whether there are any material facts in dispute in the instant case." R. 268. Del Favero alleges that a portion of the order to show cause which

states "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," constitutes a finding of fact. IB at 36; R. 269. However, the ALJ's statement must be read in the context of the first paragraph of the order to show cause, which questions whether any such material facts remain in dispute. Certainly the statements by the ALJ do not constitute "findings of fact" pursuant to the APA.

The flaw in Del Favero's argument is perhaps best exemplified by the cases it cites in support of its argument. Del Favero first cites *Lawnwood Medical Center, Inc. v. Agency for Health Care Administration*, 678 So. 2d 421 (Fla. 1st DCA 1996), for the proposition that the Agency for Health Care Administration "improperly opened the record **after the administrative hearing**" and "**reweighed factual matters reserved for the hearing officer.**" *Id.* at 422 (emphasis added). Here, no administrative hearing was ever held, and no record evidence was taken. Accordingly, no factual findings were made by the ALJ. Likewise, while the court in *Lawnwood* recognized AHCA "reopen[ed] the record to take selective official recognition and make additional findings of fact," *Id*. at 425, no such thing happened here. Indeed no "additional findings of fact" are made in the Settlement Agreement or Final Order. The same principles hold true in the remaining cases cited as support by Del Favero. Each concerned instances where a final hearing had been held,

record evidence had been taken, and an ALJ had made findings of fact. Here, on the other hand, no final hearing was held, no record evidence was taken, and an ALJ made no findings of fact. Accordingly, Del Favero's claim on this point is meritless.

Likewise, Del Favero's assertion that the Department was required to provide it "notice of its intent to enter into a settlement agreement" lacks any basis in law. Indeed parties to administrative proceedings routinely resolve disputes by entering into settlement agreements, and such a notice requirement is clearly not applicable. Del Favero cites no support for its allegation that notice of entry into a settlement agreement was required.[6]

IV. The Settlement Agreement Did Not Violate Public Policy.

Del Favero's assertions that the Settlement Agreement violates public policy are likewise meritless. First, the Settlement Agreement does not contravene legislative intent. Second, the Settlement Agreement certain is not "clearly injurious to the public good."

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[6] Del Favero asserts in its brief that "[t]hree 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." IB at 40. However, prior to entry of the Final Order, Del Favero filed a 312 page (with attachments) "Emergency Ex Parte Motion for Temporary Injunction" in the *Florigrown* proceeding that included the Settlement Agreement as an attachment, and made specific allegations regarding the Settlement Agreement. Accordingly, Del Favero clearly had notice of the Settlement Agreement in advance of the issuance of the Final Order, and clearly in sufficient time to prepare a substantial legal filing referencing the Settlement Agreement.

The Florida Supreme Court long ago recognized the power of parties to contract, and recognized that "[b]ecause of the public concern that freedom of contract not be lightly interfered with, courts should exercise extreme caution when called upon to declare transactions void as contrary to public policy." *Bituminous Cas. Corp. v. Williams*, 17 So. 2d 98, 101 (Fla. 1944). Against this backdrop, the court has established a high bar for parties seeking to invalidate contractual provisions as violating public policy, and stated that "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." *Franks v. Bowers*, 116 So. 3d 1240, 1247 (Fla. 2013). The Settlement Agreement here is neither contrary to legislative intent, nor clearly injurious to the public good, and Del Favero makes no legitimate claim to the contrary.

Additionally, state agencies possess the authority to settle litigation against the state "incident to and implied from its power to sue and be sued." *Abramson v. Fl. Psychological Ass'n*, 634 So. 2d 610, 612 (Fla. 1994) (citing *Williams v. Public Util. Protective League*, 178 So. 286 (Fla. 1938)). The Court in *Abramson* upheld a settlement agreement executed between an agency and private parties in the face of a challenge alleging that the settlement agreement contradicted Florida statutes. *Id.* The settlement agreement at issue permitted the licensure of two psychologists who allegedly did not meet statutory licensing criteria. *Id.* A third-party sought to enjoin

the agency from issuing licenses to the psychologists on the basis that the settlement agreement violated Florida law and would permit the licensure of unqualified applicants. After the trial court and First District granted and affirmed the injunction, the Florida Supreme Court reversed, noting that:

> Administrative agencies have the authority to interpret the laws which they administer, but such interpretation cannot be contrary to clear legislative intent. *Florida Dairy Farmers Fed'n v. Borden Co*., 155 So. 2d 699 (Fla. 1st DCA 1963). At the same time, the power of a public body to settle litigation is incident to and implied from its power to sue and be sued. *Williams v. Public Util. Protective League*, 178 So. 286 (1938). Moreover, a ruling adverse to Abramson and Seidman in this case could make it extremely difficult for agencies to accomplish settlements which are clearly in the best interest of the people of the state.
>
> There is no doubt that the Department and the Board entered into the settlement in good faith in an effort to protect the constitutionality of chapter 490 which was being seriously challenged. There is no suggestion of any collusion. Moreover, the settlement did not jeopardize the health or welfare of the citizens of Florida. Abramson and Seidman held doctoral degrees from a college licensed in Florida though not accredited. They were required to take the requisite examination and passed it. Any such deviation from legislative intent which may have resulted from the settlement was minimal. To refuse to uphold the settlement under these circumstances would have the effect of discouraging third parties from ever trying to settle their controversies with the governmental agencies of Florida. We cannot see how the public interest was jeopardized by this settlement, and under principles of fundamental fairness, we believe that it should be upheld.

Id. at 612. The same factors apply here. It is clear that the Settlement Agreement does not harm public policy or the public interest, and as with all MMTC licenses,

Perkins and the other similarly situated entities will remain subject to the same regulatory requirements of section 381.986.

V. Del Favero is Not Entitled to the Remedy it Seeks.

Even if Del Favero is determined to have standing, and even if Del Favero prevailed on its claims, Del Favero would not be entitled to the remedy it seeks – a decision vacating the Final Order and Settlement Agreement, and remanding for further proceedings. Del Favero seeks to have this Court invalidate MMTC licenses that were issued months ago to eight different entities, despite the fact that such entities have been required by the Department and applicable law to expand significant sums of money to retain such licenses, and despite the fact that Del Favero sat on any rights it may have in this proceeding.

Del Favero did not move the Department to stay the effect of the Final Order, waited 26 days before it filed its notice of appeal, and likewise did not move this Court to stay the effect of the Final Order.[7] Accordingly, the MMTC licenses issued

[7] As noted previously, Del Favero filed in Leon County Circuit Court an "Emergency Ex Parte Motion for Temporary Injunction" in the *Florigrown* proceeding that included the Settlement Agreement as an attachment, and made specific allegations regarding the Settlement Agreement. While Del Favero argues that the Settlement Agreement and Final Order should be vacated in this appeal, Del Favero argued in its motion for temporary injunction that the award of MMTC licenses would cause irreparable harm. In other words, once such licenses were awarded the awards were final, and could not later be vacated. Del Favero now takes a contrary position in this appeal.

to Perkins and the other seven similarly situated parties have remained in full force and effect since April 19, 2019. Perkins and the other seven similarly situated parties were required by the Department, and applicable law, to expend substantial sums of money to seek cultivation authorization as required by Florida Administrative Code Rules, and to build out their facilities to serve Florida patients. Likewise, applicable rules require each MMTC licensee to "to begin dispensing Derivative Product within 210 days of being granted Cultivation Authorization," therefore requiring MMTC licensees to immediately begin expending significant sums to build out appropriate processing facilities. Any attempt to vacate the final order at this point would result in significant damages to Perkins and the other seven similarly situated parties, and would not be constitutionally permissible.

Given the requirements that Perkins and the other seven similarly situated parties expend funds and make decisions based on their status as MMTC license holders, the principals applicable in appeals of Florida bid protest proceedings are likewise applicable here. It is well-settled that in such cases once a contract is awarded, even if a disappointed bidder prevails on appeal the contract award cannot be disturbed. *See Overstreet Paving Co. v. State, Dept. of Transp.*, 608 So. 2d 851, 854 (Fla. 2d DCA 1992) (holding that absent a stay (which was not entered) the court could not undo the award of a contract and the appellant "no longer has a meaningful remedy by administrative hearing to receive award of this bid."); *see also Miami-*

Dade Cty Sch. B.d v. J. Ruiz Sch. Bus Serv., 874 So. 2d 59 (Fla. 3d DCA 2004); *Hubbard Constr. Co. v. Dept. of Transp.*, 642 So. 2d 1192 (Fla. 1st DCA 1994).

Accordingly, it is well-settled that a successful protester who cannot receive a contract because it has been performed during the litigation is limited to recovering only its bid or proposal preparation costs. *See* The Florida Bar Continuing Legal Education Florida Administrative Practice § 11.6 (2019). The reasoning behind such a principle is obvious – once a party has begun performing on a contract (for example, constructing a road), it would be absurd for the appellate court to order the road be destroyed, or return fees paid under the contract, so a different party could build the road. The constructing party is entitled to rely on the promises made by the agency. Here, by the same token, it would be absurd for entities which, pursuant to applicable law and the Department's direction, have expended significant sums of money and entered into contracts, to be subjected to serious harm. While ancillary relief could theoretically be awarded pursuant to section 120.68(6)(a), such ancillary relief cannot impact Perkins MMTC license. Such ancillary relief could certainly include a pronouncement that the Citrus Preference made available by section 381.986(8)(a)3. remains available, to the extent any possible dispute could even still exist on that fact.

CONCLUSION

For the foregoing reasons, Perkins respectfully requests this Court dismiss Del Favero's petition and affirm the Department's Final Order.

Respectfully submitted this 22nd day of August, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served upon the following this 22nd day of August, 2019:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the type size and style used in this brief is double-spaced 14-point Times New Roman, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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