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

CASE NO. 1D19-1783

(Consolidated with Case Nos.1D19-1772, 1D19-1777, 1D19-1778, 1D19-1780, 1D19-1781, 1D19-1782, and 1D19-1784 for purposes of travel)

Lower Tribunal Case Nos.: DOAH Case No. 18-4472; DOH No. 0190

LOUIS DEL FAVERO ORCHIDS, INC.,

Appellant,

vs.

STATE OF FLORIDA, DEPARTMENT OF HEALTH, and TREE KING-TREE FARM, INC.,

Appellees.

Appeal from a Final Administrative Order

ANSWER BRIEF OF APPELLEE TREE KING-TREE FARM, INC.

Gary V. Perko, FBN 855898
gperko@hgslaw.com
D. Kent Safriet, FBN 174939
ksafriet@hgslaw.com
Felicia Kitzmiller, FBN 1010258
fkitzmiller@hgslaw.com
HOPPING GREEN & SAMS, P.A.
119 South Monroe Street, Suite 300
Tallahassee, Florida 32301
Tel.: 850-222-7500
Fax: 850-224-8551

Counsel for Appellee Tree King-Tree Farm, Inc.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Constitutional Provisions

Administrative Rules and Order

Other Authorities

INTRODUCTION

Del Favero – a would-be market competitor who did not perfect party status below – seeks to appeal a final order of the Department of Health which resolved pending administrative litigation by licensing Tree King (and other similarly situated applicants) to operate a Medical Marijuana Treatment Center ("MMTC") and thereby expand access to medical marijuana treatment consistent with the intent of Article X, Section 29, of the Florida Constitution. Because Del Favero lacks appellate standing under section 120.68(1) of the Administrative Procedure Act ("APA"), this Court lacks subject matter jurisdiction and should dismiss this appeal. But even if the Court were to address the merits, the Department's action is fully consistent with the MMTC statute, the APA, and established public policy.

STATEMENT OF THE CASE AND FACTS

The Prior Statutory Regime

In 2014, the Florida Legislature passed the Compassionate Medical Cannabis Act of 2014 which authorized the use of low-THC cannabis for certain medical conditions. Ch. 2014-157, Laws. of Fla. As part of the Act, the Department was required to license five dispensing organizations to cultivate, process and dispense low-THC cannabis in the five geographic regions of Florida. § 381.986(5), Fla. Stat. (2014).

In July 2015, Tree King timely filed an application for licensure as a dispensing organization in the Northwest Region. [R.12].[1] The application was made pursuant to former section 381.986, Florida Statutes. [*Id.*]. By letter dated November 23, 2015, the Department advised Tree King that its application was denied. The letter further stated that Tree King's application "has been substantively reviewed, evaluated and scored by a panel of evaluators according to the requirements of Section 381.986, Florida Statutes, and Chapter 64-4, of the Florida Administrative Code" and that the application was denied because Tree King "was not the highest scored applicant in the Northwest Region[.]" [*Id.*].

It is undisputed that Del Favero never applied for a license under former section 381.986. In fact, Del Favero did not submit an application for a MMTC license until October 2018. [Initial Br. at 12 n.6].

Constitutional and Statutory Amendments

In 2016, Amendment 2 to the Florida Constitution was passed by ballot initiative. Amendment 2 created section 29, article X of the Florida Constitution and authorized the medical use of marijuana for the treatment of debilitating medical conditions. Art. 10, § 29, Fla. Const. In 2017, the Florida Legislature

[1] Where a record has not been made, the allegations in an administrative petition may be taken as true for purposes of appellate review. *See Ybor III, Ltd. v. Fla. Housing Fin. Corp.,* 843 So. 2d 344, 345 (Fla. 2d DCA 2003).

passed implementing legislation that substantially amended section 381.986. Ch. 2017-232, Laws of Fla.

The 2017 amendments required the Department to license the existing dispensing organizations as Medical Marijuana Treatment Centers ("MMTCs") and established a process for licensing new MMTCs. *Id.* The relevant language is as follows:

> (8) MEDICAL MARIJUANA TREATMENT CENTERS.–
>
> (a) The department shall license medical marijuana treatment centers to ensure reasonable statewide accessibility and availability as necessary for qualified patients . . . .
> ***
> 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). . . .

> 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), Fla. Stat. (2018) (emphasis added).

Thus, pursuant to the 2017 amendments, an entity must receive an MMTC license if it: (1) previously submitted an application as a dispensing organization that had been reviewed, evaluated, and scored under former section 381.986; (2) had pending litigation as of January 1, 2017, or had a final ranking within one point of the highest final ranking in its region; (3) meets the requirements of section 381.986; and (4) provides documentation of the ability to cultivate marijuana within 30 days.

The Legislature went on to state 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 specific involvement in the citrus industry. § 381.986(8)(a)3, Fla. Stat. The Senate Staff Analysis of Senate Bill 8-A, the legislation creating section 381.896(8)(a), clarifies that the citrus provision relates to "up to two of the remaining licenses" following the awards to applicants qualifying under section 381.986(8)(a)2.a. and b. [App. to Initial Br. at 5].

The Legislature also enacted a provision whereby more MMTC licenses would become available in the future. Specifically, section 381.986(8)(a)4 now provides:

> Within 6 months after the registration of 100,000 active qualified patients in the medical marijuana uses 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. (2018). Therefore, for every 100,000 qualified registered patients, the Department shall issue four new MMTC licenses.

Department Rulemaking and Related Administrative Proceedings

In response to litigation alleging that the Department was utilizing unadopted of rules in calculating the aggregate scores during the dispensing organization selection process and in determining what constitutes "one point" under section 381.986(8)(a)2.a., on September 28, 2017, the Department adopted emergency rule 64ER17-3. The emergency rule defined being "within one point" of the highest final ranking in a region to mean:

> Within One Point – one integer (i.e., whole, non-rounded number) carried out to four decimal points (i.e. 1.0000) by subtracting an applicant's final ranking from the highest final ranking in the region for which the applicant applied.

Fla. Admin. Code R. 64ER17-3(1)(d).

On October 19, 2017, Nature's Way Nursery of Miami, Inc. ("Nature's Way") challenged the validity of rule 64ER17-3 on the grounds that it was vague, arbitrary and capricious, and exceeded the Department's grant of rulemaking authority. [R.4].

On October 30, 2017, the Department adopted emergency rule 64ER17-7 that superseded emergency rule 64ER17-3. Fla. Admin. Code R. 64ER17-7(b). The emergency rule incorporated by reference the 2015 aggregated score card and also provided a new and expanded interpretation of "within one point":

> For the aggregate score under column "Final Rank" one integer (i.e., whole, nonrounded number) carried out to four decimal points (i.e., 1.000) or for the regional rank under column "Regional Rank" one whole number difference, by subtracting an applicant's final ranking from the highest final ranking in the region for which the applicant applied.

Fla. Admin. Code R. 64ER17-7(d).

On November 2, 2017, Nature's Way challenged the validity of rule 64ER17-7 on the grounds that it was vague, arbitrary and capricious, exceeded the Department's grant of rulemaking authority, and contravened the law implemented. [R.15].

On January 17, 2018, Nature's Way filed a petition pursuant to section 120.57, Florida Statutes, to challenge the Department's proposed denial of its request to be registered as a MMTC pursuant to the "within one point" provision in section 381.986(8), Florida Statutes. [*Id.*].

On June 15, 2018, Administrative Law Judge John Van Laningham ("ALJ") issued a final order holding that rule 64ER17-7 constituted an invalid exercise of delegated legislative authority. *See Nature's Way Nursery of Miami, Inc. v. Fla. Dep't of Health,* Nos. 17-5801RE & 18-0720RU (Fla. DOAH June 15, 2018) (Final Order).[2] The Department appealed to this Court, but the appeal was voluntarily dismissed on April 23, 2019.

Also on June 15, 2018, the ALJ issued a recommended order in the separate section 120.57 proceeding, concluding that Nature's Way was entitled to receive a MMTC license because its aggregate score was "within one point" of the regional awardee's final rank, despite the fact that the Department's original ranking for Nature's Way was more than 1.5 "points" higher than the regional awardee. *See Nature's Way Nursery of Miami, Inc. v. Fla. Dep't of Health,* No. 18-0721 (Fla. DOAH June 15, 2018) (Recommended Order).[3] The ALJ found that the Department's use of rankings instead of quantitative scores for the applicants was defective and invalid. *Id.* at 53. The ALJ stated that the Legislature's goal with the "within one point" section could not be effectuated unless the quality of [applicants] "is expressed in interval data, using numbers that hold quantitative

[2] The Final Order is available online at: https://www.doah.state.fl.us/ROS/2017/17005801.pdf

[3] The Recommended Order is available online at: https://www.doah.state.fl.us/ROS/2018/18000721.pdf

content." *Id.* The ALJ added that there was "no way to fix this problem retroactively," but that he had to find a way to adjudicate the question that Nature's Way raised using the "scores" that were issued. *Id.* Based upon expert testimony provided at the hearing, the ALJ utilized a formula that created a range of possible scores for each applicant. *Id.* at 63-66. After utilizing that methodology to calculate the possible score range for Nature's Way, the ALJ found that Nature's Way satisfied the "within one point" condition and therefore, recommended that Nature's Way be granted a license. *Id.* at 66-69, 105.

Following the ALJ's Recommended Order, the Department entered a settlement agreement with Nature's Way. Pursuant to the terms of the settlement, the Department issued a final order rejecting the ALJ's Recommended Order in its entirety, but it also issued a license to Nature's Way. *See Nature's Way Nursery of Miami, Inc. v. Fla. Dep't of Health,* DOAH Case No. 18-0721 (Dep't of Health July 13, 2018) (Final Order).

Tree King's Request for MMTC Registration and Subsequent Challenge

By letter dated July 26, 2018, Tree King submitted a request to the Department for registration as an MMTC pursuant section 381.986(8)(a)2.a., Florida Statutes. [R.18]. The letter informed the Department that Tree King met all statutory criteria to be awarded a license including its 2015 application, ranking within one point of the highest-ranked qualified applicant, readiness to commence

operations, and an assurance that its operations will be in compliance with section 381.986(8)(a)2.a. [*Id.*].

On July 13, 2018, the Department denied Tree King's request for MMTC registration, concluding that Tree King "did not have a final score within one point of the highest scoring applicant in its region." [R.8, 18].

On August 21, 2018, Tree King timely filed a petition for a formal administrative hearing to challenge the Department's proposed denial. [R.11]. Tree King's petition challenged the Department's conclusion that Tree King's final score within one point of the highest scoring applicant in its region, based on the methodology adopted by the ALJ in the prior *Nature's Way* proceeding. Tree King specifically alleged that when the *Nature's Way* methodology was utilized to compare its aggregate score-set to the regional awardee in the Northwest Region, Tree King's score was "within one point" as that term is used in section 381.986(8)(a)2.a of the MMTC statute. [R.17, 21].

The Department forwarded Tree King's petition to DOAH on August 23, 2018, to the Division of Administrative Hearings, along with four other petitions[4]

---

[4] The four other petitioners were Spring Oaks Greenhouses, Inc., Dewar Nurseries, Inc., Perkins Nursery, Inc., and Bill's Nursery, Inc., who are appellees in Case Nos. 1D19-1772, 1D19-1777, 1D19-1781, and 1D19-1784, respectively. By order dated July10, 2019, this Court consolidated (for purposes of travel) this appeal with those four, as well as Case Nos. 1D19-1778 and 1D19-1780, which involve two other parties to the Joint Settlement Agreement discussed *infra*, at 11-12.

from former DO applicants who were seeking MMTC licensure pursuant to the "one point" provision. [R.24].

Del Favero moved to intervene in all five cases on August 31, 2018. [R.42]. In its motion to intervene Del Favero stated that it has been prepared to file a MMTC application "since prior to October 3, 2017." [R.50]. Del Favero also noted that the Department had "awarded two licenses to previously denied [DO] applicants which allegedly had a final ranking within one point of the highest final ranking in its region" pursuant to the MMTC Statute. [R.44].

On September 7, 2018, ALJ G.W. Chisenhall, who was assigned to Tree King's case and the other "one point" cases, issued an order requiring Tree King and the other petitioners to file a memorandum addressing how many licenses were currently available through the MMTC Statute. [R.85]. Tree King and the other petitioners filed such a joint brief on September 14, 2018.[5] However, the ALJ never ruled on the issue of how many licenses were available. Instead, on September 28, 2018, following the submission of the requested memoranda, the ALJ issued an order to show cause why jurisdiction should not be relinquished to the Department, stating that he was "uncertain whether any material facts" were truly in dispute. [R.266]. Although Tree King and the other petitioners filed

[5] The Joint Brief was filed in Dewar case, which had the lowest case number below (i.e., DOAH Case No. 18-4463), and is the subject of appeal in Case No. 1D18-1777.

responses to the show cause order [R.287], the ALJ never resolved that issue [R.362].

On October 18, 2018, the ALJ Chisenhall relinquished jurisdiction over all of the cases to the Department, but not for the reasons he articulated in his order to show cause. [*Id.*]. Instead, the ALJ noted that portions of the MMTC Statute had been declared invalid in a case pending before the Leon County Circuit Court. [*Id*.]. Based on that action, the ALJ determined that he should relinquish jurisdiction "without prejudice to [any party] moving to reopen the case once the injunction is lifted or the constitutionality of [the MMTC Statute] is otherwise conclusively resolved." [*Id*.].

At no point did Del Favero seek to reopen the cases to have its motions to intervene resolved.

Joint Settlement Agreement and Department's Final Order

On April 16, 2019, the Department entered into a joint settlement agreement with Tree King and the other "one point" petitioners that granted them each a MMTC license. [R.426]. This agreement stated that Tree King and the other petitioners had advanced "a colorable claim alleging that they qualify" for MMTC licensure pursuant to the "within one point" provision. [R.395]. Further, each of the petitioners agreed to implement hiring and security protocols beyond what is required in statute and to locate a percentage of their medical marijuana

dispensaries in "impoverished communities and rural areas." [*Id*.]. Each party also agreed to bear its own attorney's fees and costs. [R.396]. Pursuant to the terms of the Joint Settlement Agreement, Tree King filed a voluntary dismissal of its action the day after the agreement was entered. [R.386]. Accordingly, on April 19, 2019, the Department entered a final order dismissing Tree King's petition ("Final Order"). [R.388].

At the time of the Final Order, there were 207,869 active qualified patients on the Department's patient registry.[6] Therefore, pursuant to section 381.986(8)(a)4., at that time, the Department was authorized to issue eight licenses in addition to the ten licenses mandated by section 381.986(8)(a)2. As of the most recent count, there were 255,256 qualified patients.

SUMMARY OF ARGUMENT

Under the plain language of section 120.68(1), Florida Statutes, standing to appeal is limited to "parties" who have been "adversely affected" by the final agency action at issue. Having never perfected party status below and having no legitimate basis to argue that it is adversely affected by the Department's Final

---

[6] The Department's Office of Medical Marijuana Use issues weekly updates of the number of active qualified patients. Such weekly updates are on file with the Department of Health and may be viewed at: 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).

Order, Del Favero has no standing to appeal under section 120.68(1). As a proposed intervenor, any right Del Favero had to participate in the proceedings below was lost altogether when the parties decide to settle the case. Moreover, the Department's licensing of Tree King does not "adversely affect" Del Favero because it can still obtain an MMTC license under the statute and take advantage of whatever benefit its coveted "citrus preference" may provide. Accordingly, this Court lacks subject matter jurisdiction and should dismiss this appeal.

Contrary to Del Favero's assertions, the MMTC statute, as amended in 2017, did not require the Department to "comparatively review" pending MMTC license applications, much less hypothetical or late-filed applications like Del Favero's. Because the statute expressly calls for issuance of additional MMTC licenses as patient registrations increase over time, the Department was not engaged in a zero-sum game between mutually exclusive applicants when it issued the final order in this case. As such, the "comparative review" contemplated in *Ashbacker* and progeny was not required or even possible.

Del Favero's "APA violation" theories are fabricated out of whole cloth. Because the ALJ relinquished jurisdiction without holding an evidentiary hearing or issuing a recommended order, there were no "findings of fact" that could conceivably give rise to an improper "reversal," as alleged by Del Favero. Further, because Del Favero's substantial interests were not affected by the

Department's action, it was not entitled to a "point of entry" under the APA. There were no APA violations here.

Finally, the Joint Settlement Agreement implemented via the Department's final order does not violate public policy, as Del Favero asserts. To the contrary, it furthers the legislatively-recognized policy of encouraging settlement of administrative litigation and furthering registered patients' access to medical marijuana treatment.

ARGUMENT

I. DEL FAVERO LACKS STANDING TO APPEAL UNDER SECTION 120.681 OF THE ADMINISTRATIVE PROCEDURE ACT.

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). *See also, Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot*., 948 So. 2d 794, 796 (Fla. 1st DCA 2006).

Argument

A. Del Favero lacks appellate standing under section 120.68(1) because it did not perfect party status below and is not adversely affected by the agency's final order.

In arguing that it has standing to appeal, Del Favero discusses general standing requirements under Florida law and the *Agrico* test for administrative-level standing under section 120.57 of the APA. *See* Initial Brief, at 20-21 (citing

Agrico v. Dep't of Envtl. Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981)). Tellingly, however, Del Favero ignores the plain language of section 120.68(1), which expressly limits *appellate* standing under the APA to "[a] *party* who is *adversely affected* by final agency action[.]"[7] § 120.68(1), Fla. Stat. (2018) (emphasis added). Having never perfected party status below and having no legitimate basis to argue that it is adversely affected by the Department's final order, Del Favero cannot establish standing to appeal under section 120.68(1).

Florida courts have long recognized that "standing to appeal under section 120.68(1) is more narrow than the standing to participate at the administrative level." *Melzer v. Fla. Dep't of Cmty. Affairs*, 881 So. 2d 623, 625 (Fla. 4th DCA 2004). "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). Thus, when an "appellant was not a party to the proceedings below, [it] is without standing to institute an appeal." *Norkunas v. State Bldg. Comm'n*, 982 So. 2d 1227, 1228 (Fla. 1st DCA 2008). Furthermore, even a "party" must be adversely

[7] The APA defines the "party" in pertinent part 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).

affected by the final order under review to have standing to appeal under section 120.68(1). "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." *O'Connell v. Fla. Dep't of Cmty. Affairs*, 874 So. 2d 673, 675 (Fla. 4th DCA 2004).

Del Favero indisputably did not perfect party status below and, therefore, lacks standing to appeal under the plain language of section 120.68(1) because it is not a "party." That Del Favero's motion to intervene was not expressly ruled upon before the matter was resolved by settlement is beside the point because any right Del Favero might have had to participate as an intervenor was lost altogether when the parties decided to settle and entered into the Joint 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."). Moreover, Del Favero cannot establish that it was adversely affected by the Department's final order and issuance of an MMTC license to Tree King. Del Favero broadly asserts that it "will suffer an injury in fact" simply because the Department's action "results in one less MMTC license being available." Initial Brief, at 21. But the "citrus preference" under section 381.986(8)(a)3, which Del Favero covets, remains available and additional MMTC licenses have become

available under section 381.986(8)(a)4 with the registration of over 200,000 more qualified medical marijuana patients. *See supra*, at 12. Thus, Del Favero can still obtain a license under subsection (8)(a), but whether or not it ultimately will establish entitlement to a license is entirely speculative. Regardless, Del Favero indisputably has suffered no injury in fact as a result of the Department's action on Tree King's application.

When, as here, the appellant lacks standing, the appellate court lacks subject matter jurisdiction to consider the appeal. *See Rogers & Ford Constr. Corp. v. Carlandia Corp*., 626 So. 2d 1350, 1352 (Fla. 1993) ("The determination of standing to sue concerns a court's exercise of jurisdiction to hear and decide the cause pled by a particular party."). Under such circumstances, this Court has consistently dismissed administrative appeals wrongly brought under section 120.68(1). *See e.g., 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 Court should do the same here.

B. Del Favero could not have established standing under the *Agrico* test for standing in section 120.57 proceedings as a matter of law.

Because Del Favero lacks appellate standing, this Court should go no further, as it lacks subject matter jurisdiction under section 120.68(1). However, even assuming *arguendo* that the *Agrico* test for standing under section 120.57 is somehow relevant to this appeal, Del Favero could not have established standing under *Agrico* as a matter of law. To establish standing under *Agrico*, proposed intervenors must show that they face an injury in fact of sufficient immediacy to entitle them to a hearing and that their injury is of a type or nature that the proceeding was designed to protect. *Agrico*, 406 So. 2d at 482. The first prong of this test means that "[t]he injury or threat must be both real and immediate, not conjectural or hypothetical." *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)). Under the second prong, "the statute pursuant to which the agency acted" must be designed to protect against the injury that a party alleges. *Menorah Manor, Inc. v. Agency for Health*

Care Admin., 908 So.2d 1100 (Fla. 1st DCA 2005). Del Favero can meet neither prong of the *Agrico* test.

First, Del Favero's asserted "injury" is neither real nor immediate; but instead is entirely conjectural or hypothetical. As admitted in its motion to intervene below, Del Favero had not even submitted an application when it moved to intervene. [R.46]. Although Del Favero now asserts that it subsequently filed an application to operate an MMTC with the Department, it admits that any such application still awaits departmental review. *See* Initial Brief, at 12n.6. With no application under review, Del Favero cannot possibly establish that it "has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct." *S. Broward Hosp. Dist*., 141 So. 3d at 681. To conclude otherwise, the Court (and any ALJ below) would have to overlook the fact that Del Favero had not submitted a timely application under the prior statutory regime and therefore, unlike Tree King, was not eligible for a license under section 381.986(8)(a)2.[8] The Court (and any ALJ) also would have to presume that Del Favero's application was submitted for the same region as Tree King's and that it satisfies all the requirements of section 381.986, Florida Statutes.

[8] As discussed in Section II of this Answer Brief, *infra*, at 21-28, this indisputable fact – that Del Favero did not submit a timely application under the prior statutory regime – belies Del Favero's argument that its supposed application, filed over 3 years after the "ranking" referenced in section 381.986(8)(a)2, was entitled to some type of "comparative review" with those filed under the prior statutory regime.

Nothing in section 381.986 or Chapter 120 requires, much less authorizes, a court or ALJ to ignore indisputable facts and then pre-empt and prejudge the Department's application review process in such a manner. Furthermore, contrary to Del Favero's assertion in its motion to intervene below, subparagraph 3 of the statute makes no "promise" to citrus processors. [*See* R.45]. That provision merely allows the Department to give preference to "up to two" citrus applicants. *See* § 381.986(8)(a)3., Fla. Stat. (2018). Whether or not any "citrus preference" would render Del Favero's application more favorable than others so as to entitle it to a license would be pure speculation.

Second, Del Favero fails the second prong of the *Agrico* test because the statute at issue – section 381.986(8)(a)2 – is not designed to protect against Del Favero's alleged injury. A plain reading of this subsection makes clear that it is intended to protect the rights of applicants, such as Tree King, "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."[9] *Id.* § 381.986(8)(a)2.a. Unlike Tree King, Del Favero did not submit a timely application under the prior statutory regime and therefore is not

[9] Subparagraph (8)(a)2.b also required the Department to "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)." *Id*. § 381.986(8)(a)2.b. Del Favero does not contend that it qualifies for a license under this provision.

entitled to any protections afforded under subsection 381.986(8)(a)2.a. Moreover, unlike subparagraph 2.a which provides that the Department "shall license" eligible applicants, the "citrus preference" provision in subparagraph 3, upon which Del Favero relies, does not "promise" any licenses for citrus applicants. Rather, as discussed above, subparagraph 3 merely affords the Department discretion to give preference to "up to two" citrus applicants. *See id*. § 381.986(8)(a)3. It does not afford future citrus applicants any rights to licenses issued to applicants who satisfy the requirements of subparagraph 2.a.

II. DEL FAVERO WAS NOT ENTITLED TO "COMPARATIVE REVIEW" UNDER THE SO-CALLED *ASHBACKER* DOCTRINE BECAUSE THE DEPARTMENT WAS NOT INVOLVED IN A ZERO-SUM GAME BETWEEN MUTUALLY EXCLUSIVE APPLICANTS.

Standard of Review

In appeals of final administrative orders such as this, the applicable standard of review depends on the nature of the issue adjudicated. A decision that rests on a finding of fact must be affirmed on appeal if the finding is supported by competent substantial evidence. *See* § 120.68(7)(b), Fla. Stat. (2018). On matters of law, the Court examines the Department's conclusions de novo to determine whether it "has erroneously interpreted a provision of law and a correct interpretation compels a particular action." *Id*. § 120.68(7)(d). Here, Del Favero's argument that the MMTC statute somehow requires "comparative review" is a matter of statutory

construction subject to de novo review. *See CBS Outdoor v. Fla. Dep't of Transp*., 124 So. 3d 383, 385 (Fla. 1st DCA 2013); *Abbott Labs. v. Mylan Pharm*s, *Inc.,* 15 So. 3d 642, 654 (Fla. 1st DCA 2009); *Dep't of Revenue v. Lockheed Martin Corp*., 905 So. 2d 1017, 1020 (Fla. 1st DCA 2005).

Argument

Del Favero wrongly argues that it was somehow entitled to "comparative review" under the so-called *Ashbacker* doctrine[10] that has been applied in the context of Florida "certificate of need" proceedings in *Bio-Medical Applications of Clearwater, Inc. v. Dept of Health and Rehabilitative Services*, 370 So.2d 19 (Fla. 2nd DCA 1979) and *Gulf Court Nursing Center v. Department of Health and Human Services*, 483 So. 2d 700 (Fla. 1st DCA 1986). *See* Initial Brief, at 22-29. Those "certificate of need" cases stand for the proposition that "[a]n 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[.]" *Gulf Court*, 483 So. 2d at 704 (quoting *Bio-Medical*, 370 So. 2d at 23) (emphasis added). *See also, First Hosp. Corp. v. Dep't of Health & Rehab. Servs*., 566 So. 2d 917, 918 (Fla. 1st DCA 1990) (Appellant was not entitled to "comparative review" where it has not shown that it was competing with appellee "for the same fixed pool of need.").

[10] *See Ashbacker v. Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945).

Here, Del Favero claims that "under a plain reading of the [MMTC] statute, the Department was required to comparatively review all MMTC applications submitted under section 381.986(8)(a)2 before awarding licenses." Initial Brief, at 31. But the only "review" mentioned in MMTC statute is in reference to applicants "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." *See* § 381.986(8)(a)2.a., Fla. Stat. (2018) (emphasis added). Del Favero indisputably did not submit a timely, much less a bona fide, application under the prior statutory regime such that it could be "comparatively reviewed" with Tree King's under section 381.986(8)(a)2. And Del Favero fails to explain how under a "plain reading" of the MMTC statute, its hypothetical application could be "comparatively reviewed" with those of the prior applicants or how long the Department was required to wait for such hypothetical applications to materialize. Del Favero cannot provide such an explanation because, under a plain reading of the statute, the only applicants entitled to licenses were the prior applicants who met the "one point criteria" under subparagraph 8(a)2.a and the so-called *Pigford* applicant under subparagraph 8(a)2.b. *See id.* § 381.986(8)(a)2.

Furthermore, as Del Favero repeatedly acknowledges, *Ashbacker, Bio-Medical* and *Gulf Court* all involved "mutually exclusive" applications. *See* Initial

Brief, at 16, 22, 25-28. This case, however, did not involve such a zero-sum game, as evidenced by the fact that eight additional licenses had opened up by the time the Department issued the final order and the "citrus preferences" remain available. *See supra*, at 12. Thus, Del Favero can still obtain a license under subsection 381.986(8)(a) and take whatever advantage its coveted "citrus preference" may provide. As such, *Ashbacker*, *Bio-Medical* and *Gulf Court* do not support Del Favero's argument that it is entitled to any type of comparative review. If anything, they confirm that Del Favero is not entitled to such relief.

Del Favero's reliance in *Ybor III, Ltd. v. Fla. Housing Fin. Corp.*, 843 So. 2d 344, 345-47 (Fla. 1st DCA 2003), is similarly misplaced. *Ybor III* involved a competitive bidding process, where the agency-appellee's "funding pool" was not sufficient to fund both of the competing applicants. *Ybor III,* 843 So. 2d at 345. As such, the agency's selection of the winning bidder "resulted in the Appellant's exclusion from funding." *Id*. Here, by contrast, the Department's issuance of a license to Tree King does not exclude Del Favero from obtaining a license. Because this case does not involve a zero-sum game between mutually exclusive applicants, *Ybor III* is just as inapposite as *Ashbacker, Bio-Medical* and *Gulf Court*. *See also*, *First Hosp. Corp.,* 566 So. 2d at 918 ("comparative review" not required where certificate of need applicant was not competing with appellee "for the same fixed pool of need.").

Finally, Del Favero points to the following language in subparagraph 8(a)2.c of the MMTC Statute as requiring "comparative review" of its application:

> 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.c., Fla. Stat. (2018) (emphasis added). Specifically, Del Favero argues that the use of the word "while" in this subparagraph somehow shows that the Legislature intended for the Department to comparatively review all MMTC applicants at the same time regardless of when they applied or what subsection they applied under. *See* Initial Brief, at 30-31. This argument is belied by the indisputable facts and the plain language of the statute when read as a whole.

As a matter of indisputable fact, Del Favero had not applied for a license prior to the October 3, 2017 – the date referenced in subparagraph (8)(a)2.c – and, therefore, could not conceivably been within the class of applicants potentially entitled to one of the "10 total licenses" referenced in that subparagraph. How, after all, could the Department "comparatively review" the existing applications submitted under the prior statutory regime with those, like Del Favero's, that did not yet exist? Moreover, Del Favero's reading of subparagraph 2.c as a limitation on the number of licenses available under subparagraph 2.a would render meaningless that provision's mandatory directive that the Department "*shall*

license any applicant whose application was reviewed, evaluated, and scored by the department and which was denied a dispensing organization [and] had a final ranking within one point of the highest final ranking in its region under former s. 381.986, Florida Statutes 2014." § 381.986(8)(a)2.a., Fla. Stat. (2018) (emphasis added).

As Del Favero repeatedly points out, section 381.986(8)(a)3. requires that the Department give preference to citrus applicants "[f]or up to two of the licenses issued under subparagraph 2." *Id.* § 381.986(8)(a)3. However, a plain reading of the statute shows that such preference can only be given to an applicant after the mandates of subparagraphs 2.a. and 2.b. have been complied with. The language of subparagraph 2.a states very clearly that the Department "shall license any applicant" that fits the previous applicant criteria. *Id.* § 381.986(8)(a)2.a. Likewise, the language of subparagraph 2.b. makes very clear that the Department "shall license one applicant" that meets the class action criteria. *Id.* § 381.986.(8)(a)2.b. Thus, the Department must first account for the number of licenses provided through those subparagraphs before issuing additional licenses. As a result, the Department must act on prior applicants such as Tree King's – whose application was reviewed, evaluated, and scored pursuant to former section 381.986 by the Department – before it can consider a non-prior applicant such as Del Favero under the citrus "preference" or for any other reason.

Del Favero's argument that the phrase "while accounting for the number of licenses issued under sub-paragraphs a. and b." in section 381.986(8)(a)2.c. requires a different result is irreconcilable with the clear mandates in subparagraphs 2.a. and 2.b. In fact, to read the statute as suggested by Del Favero would render subparagraphs 2.a. and 2.b. meaningless. Assuming Tree King and each of the other applicants with pending administrative proceedings were able to establish that they were "within one point" of the highest ranking in their region, the only way to give meaning to the mandatory language in subparagraph (8)(a)2.a is to first account for the number of licenses provided to those "one point" applicants and the license available to the *Pigford* class member before issuing additional licenses.

As the Florida Supreme Court stated in *Forsythe v. Longboat KeyErosion Control District*, 604 So. 2d 452, 455 (Fla. 1992):

> It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with another.

Moreover, a statutory provision will not be construed in such a way that it renders meaningless or absurd any other statutory provision. *See e.g., Am. Home Assurance Co. v. Plaza Materials Corp.,* 908 So. 2d 360, 367-68 (Fla. 2005); *Amente v. Newman*, 653 So. 2d 1030 (Fla. 1995). Had the Legislature intended that there be a cap on licenses to be issued to prior eligible "one point" applicants,

it would have said so and provided a procedure for determining which of the applicants meeting the requirements of section 381.986(8)(a)2.a. are entitled to licensure. As it stands, however, the Court is not at liberty to add such words to the statute. *See 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."). Because Del Favero's call for "comparative review" lacks textual support in the MMTC statute and, in fact, contravenes the plain language of subparagraph (8)(a)2.a, it must be rejected. *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."). *Ashbacker* and progeny simply do not apply under this statute or under the undisputed facts of this case.

III. THE DEPARTMENT'S ACTION DID NOT VIOLATE THE APA BECAUSE THE DEPARTMENT DID NOT REJECT ANY FINDINGS OF FACT AND DEL FAVERO WAS NOT ENTITLED TO A HEARING AS A MATTER OF LAW.

Standard of Review

Del Favero incorrectly states that the standard of review for alleged procedural errors applies to its argument that the Department violated the APA by somehow rejecting a "finding of fact" of the ALJ and by allegedly failing to provide Del Favero a point of entry to challenge Tree King's license. *See* Initial Brief, at 34. As to the first issue, contrary to Del Favero's suggestion, the ALJ

made no findings of fact. In reality, Del Favero's argument is premised on the ALJ's "show cause" order that was based on his construction of the MMTC statute, a matter which subject to de novo review. *See CBS Outdoor*, 124 So. 3d at 385; *Abbott Labs*., 15 So. 3d at 654; *Lockheed Martin Corp*., 905 So. 2d at 1020. As to the second issue, Del Favero's argument that it was entitled to a point of entry is simply another way of saying that it had "substantially interest" standing under *Agrico*, a matter also subject to de novo review. *See Davis*, 67 So. 3d at 1110; *Mid-Chattahoochee River Users*, 948 So. 2d at 796.

Argument

Del Favero attempts to fabricate an APA violation out of whole cloth by arguing that the Department rejected a "finding of fact" despite the fact that the ALJ indisputably took no evidence and rendered no "findings of fact." *See* Initial Brief, at 34-36. As used in the APA, "finding of fact" is a term of art made in reference to a "recommended order" issued by an ALJ (or other presiding officer) following an evidentiary hearing held pursuant to section 120.57(1). *See* §120.57(1)(k), Fla. Stat. (2018) (referring to "a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in the final order."). In this case, the ALJ relinquished jurisdiction without holding an evidentiary hearing or issuing any recommended order with "findings of fact" as

contemplated in section 120.57. Because there were no "findings of fact," there is no conceivable basis for Del Favero's first "APA violation" argument.

Del Favero wrongly cites to ALJ Chisenhall's "show cause" order of September 28, 2018, in support of its initial "APA violation" theory. *See* Initial Brief, at 37. In that interlocutory order, the ALJ required briefing on whether jurisdiction should have been relinquished to the Department based on his preliminary reading of the MMTC statute and the *Nature's Way* recommended order cited in Tree King's petition. [R.266-67]. Ultimately, however, the ALJ never resolved that legal issue. Instead, by subsequent order, he relinquished jurisdiction back to the Department based on the outcome of an intervening circuit court case dealing with the MMTC statute. [R.362-64]. Having relinquished jurisdiction to the Department, ALJ Chisenhall never held an evidentiary hearing, never issued a recommended order, and never rendered any findings of fact. Accordingly, Del Favero's argument that the Department somehow rejected a "finding of fact" of the ALJ is meritless on its face. Likewise, because there was no evidence to reweigh or record to reopen, Del Favero's citations to *Lawnwood Medical Center, Inc. v. Agency for Health Care Administration*, 678 So. 2d 421, 422 (Fla. 1st DCA 1996), *General Development Utilities, Inc. v. Hawkins*, 357 So. 2d 408, 409 (Fla. 1978), and *Kanter Real Estate, LLC v. Department of*

Environmental Protection, 267 So. 3d 483, 489 (Fla. 1st DCA 2019) and similar cases are wholly misplaced. There was no APA violation here.

Del Favero's second "APA violation" theory – that it was not provided an APA "point of entry" to contest the Department's action – is equally threadbare. It is axiomatic that the APA only requires a "point of entry" to persons whose "substantial interests" are or will be affected by agency action. *See Perry v. Dep't of Children & Families*, 220 So. 3d 546, 549-50 (Fla. 3d DCA 2017); *see also* § 120.569, Fla. Stat. (2018) (referring to "proceedings in which the substantial interests of a party are determined by an agency"); *id*. § 120.57(1)(e), (2)(b) (referring to "agency action that determines the substantial interests of a party"). It is also beyond question that whether a person's "substantial interests" are affected so as to entitle them to a point of entry is determined by the two-pronged *Agrico* test for administrative-level standing under section 120.57. But, as explained at length in Section I.B of this Answer Brief, Del Favero fails *Agrico* as a matter of law because: it has suffered no injury as a result of the Department's action in licensing Tree King; and its speculative interest in obtaining an MMTC license is not within the zone of interests protected under subparagraph (8)(a)2 of the MMTC statute. *See supra*, at 18-21. Thus, Del Favero's second asserted "APA violation" is as naked as the first. There was no APA violation here.

IV. THE JOINT SETTLEMENT AGREEMENT FURTHERS PUBLIC POLICY BY IMPLEMENTING THE VOTERS' INTENT TO INCREASE ACCESS TO MEDICAL MARIJUANA TREATMENT CENTERS IN FLORIDA.

Standard of Review

Whether a contract is void as against public policy presents a legal question that is reviewed de novo. *See Catastrophe Servs., Inc. v. Fouche*, 145 So. 3d 151, 154 (Fla. 5th DCA 2014). However, as the Florida Supreme Court has stated, "where a contract is not prohibited under a constitutional or statutory provision, or prior judicial decision, it should not be struck down on the basis that it violates public policy, unless 'it be clearly injurious to the public good or contravene some established interest of society.'" *Garfinkel v. Mager*, 57 So.3d 221, 224 (Fla. 5th DCA 2010) (quoting *Bituminous Cas. Corp. v. Williams*, 154 Fla. 191, 17 So.2d 98, 101 (1944)).

Argument

Because a settlement agreement is contractual in nature, it is interpreted and governed by contact law. *Pinnacle Three Corp. v. EVS Invs.,* 193 So. 3d 973, 976 (Fla. 3d DCA 2016). A court should not strike down a contract, or a portion of a contract, on the basis of public policy grounds except in "extreme circumstances." *City of Largo v. AHF-Bay Fund, LLC,* 215 So. 3d 10, 15 (Fla. 2017). As the Florida Supreme Court stated in *City of Largo* in the context of a public contract:

> Courts . . . should be guided by the rule of extreme caution when called upon to declare transactions void as contrary to public policy and should refuse to strike down contracts involving private relationships on this ground, unless it be made clearly to appear that there has been some great prejudice to the dominant public interest ....

Id. (internal citations omitted). This Court further explained:

> When determining whether a contract violates public policy, it is necessary to carefully balance the public interest with the right to freely contract ... when a contract is not prohibited under a constitutional or statutory provision, or prior judicial decision, it should not be struck down on the ground that it is contrary to public policy, except it be clearly injurious to the public good or contravene some established interest of society.

Interstate Fire & Cas. Co. v. Abernathy, 93 So. 3d 352, 358 n.9 (Fla. 1st DCA 2012) (internal citations omitted).

Furthermore, it is well-established that the public policy of the state of Florida is to encourage pre-trial settlement. *E.g., Russell v. Shelby Mut. Ins. Co.,* 128 So. 2d 161, 164 (Fla. 3d DCA 1961). As such, public policy highly favors settlement agreements among parties and will seek to enforce them whenever possible. *E.g., Pinnacle,* 193 So. 3d at 976. This policy is reflected in the APA, which specifically authorizes informal disposition of administrative proceeding by stipulation, agreed settlement, or consent order "unless precluded by law." *See* § 120.57(4), Fla. Stat. (2018) Moreover, the Florida Supreme Court has held that a settlement agreement between a state agency and state licensees should be upheld

if the public interest is not jeopardized. *Abramson v. Fla. Psychological Ass'n,* 634 So. 2d 610 (Fla. 1994).

In *Abramson,* two practicing psychologists, following a change in state law, no longer met the statutory requirements for Florida licensure. They filed a federal lawsuit against the Florida Department of Business and Professional Regulation claiming that the statute was unconstitutional. *Id.* at 611. The Department entered into a settlement with them, pursuant to which, the two psychologists were allowed to continue to maintain licensure under certain conditions. *Id.* The trial court enjoined the licensure as being violative of the statute. *Id.* at 611-12. The decision was initially affirmed on appeal, but was ultimately quashed by the Florida Supreme Court. *Id.* On review, the Supreme Court emphasized that administrative agencies have the power to settle litigation. *Id.* at 612. The Court also pointed out that a ruling adverse to the psychologists could make it extremely difficult for agencies to accomplish settlements that are clearly in the best interest of the people of the state. *Id.* The Court also found that the settlement had been entered into in good faith and there was no suggestion of any collusion. *Id.* Additionally, the settlement did not jeopardize the health or welfare of the citizens of Florida. *Id.* The Court stated:

> 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. Accordingly, the court quashed the decision below and remanded with directions that the settlement be honored. *Id.*

Subsequently, this Court extracted from the *Abramson* decision the following factors to be considered by the judiciary in determining whether settlement agreements entered into by agencies should be upheld: (1) whether the agency acted in good faith; (2) whether there is any evidence of collusion; (3) whether it appears that the settlement will jeopardize the health or welfare of the citizens of Florida; and (4) whether under the circumstances the settlement is in the best interest of the people of the state. *Kruer v. Bd. of Trs. of the Internal Improvement Tr. Fund,* 647 So. 2d 129, 133 (Fla. 1st DCA 1994).

Here, Tree King filed its petition below requesting formal administrative proceedings on the basis that it is entitled to an MMTC license under the "within one point" qualification of section 381.986(8)(a). [R: 6-19]. The Petition challenged the Department's original scoring based upon the same methodology adopted in the Recommended Order issued in *Nature's Way Nursery of Miami, Inc. v. Fla. Dep't of Health*, DOAH Case No. 18-0721 (Div. of Admin. Hearings June 15, 2018). *Id.* As it did in *Nature's Way*, the Department ultimately settled

the matter in exchange for Tree King's agreement to dismiss its Petition and other promises. By means of a Joint Settlement Agreement, Tree King and other similarly situated applicants received licenses, just as Nature's Way did in the prior case. [R.391]. There is absolutely nothing about this agreement to suggest collusion, or that the Department did not act in good faith. Although Del Favero argues that the Department "all but admits that Tree King does not qualify" for a MMTC license because the Joint Settlement Agreement states that Tree King has a 'colorable claim'" to such license (Initial Brief., at 46), Del Favero evidently misinterprets the meaning of "colorable." A "colorable" claim is one that appears to be "true, valid or right." *Colorable,* Black's Law Dictionary (9th ed. 2009). The use of the word "colorable" in the Joint Settlement Agreement in no way indicates that the settlement was not made by the Department in good faith. To the contrary, it shows that the Department had reason to settle and thereby avoid the costs and uncertainties of litigation.

Moreover, the Joint Settlement Agreement is not injurious to the public good, nor does it jeopardize the health or welfare of the citizens of Florida so as to necessitate being declared void under Florida law. To the contrary, the Joint Settlement Agreement furthers the public good and declared interest of the state. Section 381.986(8)(a) clarifies that it is designed to "ensure reasonable statewide accessibility and availability as necessary for qualified patients registered in the

medical marijuana use registry and who are issued a physician certification under this section." § 381.986(8)(a), Fla. Stat. (2018). The issuance of a MMTC license pursuant to the Joint Settlement Agreement promotes the accomplishment of this stated intent and purpose. Furthermore, the Department obtained several concessions in the settlement in the best interest of the state. The Joint Settlement Agreement requires Tree King and the other licensees to locate a percentage of medical marijuana dispensaries in "impoverished communities and rural areas." [R.395]. It also requires increased security protocols. [*Id.*]. As such, the Department and Tree King's pre-trial settlement is in furtherance of the public's interest and completely in accord with the public policy of the state of Florida. *See Abramson,* 634 So. 2d at 612; *Kruer,* 647 So. 2d at 133; *Russell,* 128 So. 2d at 163; *Pinnacle Three Corp.,* 193 So. 3d at 976; *City of Largo,* 215 So. 3d at 15; *Interstate Fire,* 93 So. 3d at 358 n.9.

Del Favero's reliance upon *State v. Gtech Corp.,* 816 So. 2d 648 (Fla. 1st DCA 2001) in support of its "public policy" argument is misplaced. In *Gtech*, two bidders were competing for the same contract – a factual scenario that is not analogous to this case. As fully discussed above, Tree King applied for a regional dispensing organization license under former section 381.986 and later sought a license under section 381.986(8)(a) as an applicant whose application had been reviewed, evaluated, scored, and denied by the Department under former section

381.986. Del Favero never applied under former section 381.986, never competed against Tree King or any other former applicant for a dispensing organization license and, as a result, did not qualify for one of the mandatory licenses provided for in section 381.986(8)(a)2. The fundamental fairness issues at play in *Gtech* simply do not exist here.

In summary, the Joint Settlement Agreement is in alignment with the public policy of Florida. In accordance with Florida law as set forth above, the Joint Settlement should be upheld.

CONCLUSION

Because Del Favero cannot establish appellate standing under APA section 120.68(1), this appeal should be dismissed for lack of subject matter jurisdiction. Alternatively, this Court should affirm the Department's final order because it is fully consistent with the APA, the MMTC statute, and established public policy.

Respectfully submitted this 22nd day of August, 2019, by:

/s/Gary V. Perko
Gary V. Perko
D. Kent Safriet
Felicia Kitzmuller
HOPPING GREEN & SAMS, P.A.
119 South Monroe Street, Suite 300
Tallahassee, FL 32301
(850) 222-7500 / (850) 224-8551 (fax)

Counsel for Appellee, Tree King-Tree Farm, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent to the following counsel of record by electronic mail on this 22nd day of August, 2019:

Seann M. Frazier
sfrazier@phrd.com
Marc Ito
mito@phrd.com
Kristen Bond
Kbond@phrd.com
Parker, Hudson, Rainer & Dobbs LLP
215 South Monroe Street, Suite 750
Tallahassee Florida 32301
Counsel for Appellant Louis Del FaveroOrchids, Inc.

Eduardo S. Lombard
Elombard@radeylaw.com
Radey Law Firm
301 S. Bronough Street, Suite 200
Tallahassee, Florida 32301
Counsel for Department of Health

/s/Gary V. Perko
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is presented in 14-point Times New Roman and complies with the font requirements of rule 9.210, Rules of Appellate Procedure.

/s/Gary V. Perko
Attorney