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

Case No. 1D19-1814
Lower Tribunal Case Nos.: DOAH 18-4471; DOH 18-0172

LINER SOURCE, INC.,

Appellant,

v.

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

Appellees.

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

On April 16, 2019, the Florida Department of Health ("Department") entered into a Joint Settlement Agreement with eight medical marijuana treatment center ("MMTC") applicants, wherein the Department agreed to award MMTC licenses to each of the eight applicants, including Spring Oaks Greenhouses, Inc. ("Spring Oaks"). On April 19, 2019, the Department entered a separate Final Order for each applicant that "incorporated by reference" the Joint Settlement Agreement. Liner Source, Inc. ("LSI") has appealed six of those Final Orders. They are the subject of this appeal, as well as the appeals in Case Numbers 1D19-1810, 1D19-1811, 1D19-1812, and 1D19-1813, 1D19-1815.

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

STATEMENT OF THE CASE AND FACTS

The Compassionate Medical Cannabis Act

In 2014, the Florida Legislature, through the Compassionate Medical Cannabis Act of 2014 (the "CMCA"), legalized the cultivation, processing, and dispensing of low-THC cannabis for certain qualified patients. The CMCA, which was codified as Section 381.986, Florida Statutes (2014), directed the Department to license five "dispensing organizations," ("DO") each in a different geographic region, for the purposes of supplying "low-THC cannabis" to qualified patients in Florida.

In July 2015, Spring Oaks Greenhouses, Inc. ("Spring Oaks") filed an application for licensure as a DO, in the Northwest Region. (R. 12). In November 2015, the Florida Department of Health ("the Department") denied Spring Oaks's application because it was not the highest scored applicant in the region. (R. 12). Spring Oaks initially filed a petition challenging the Department's denial, but voluntarily dismissed its petition prior to final hearing. (R. 13).

Constitutional Amendment Creates Right to Medical Marijuana

In November 2016, the Florida Medical Marijuana Legalization Initiative, also known as Constitutional Amendment 2, was passed overwhelmingly by Florida voters. It was later codified as Article X, Section 29 of the Florida Constitution (the "Amendment"). The Amendment enshrines in the Constitution

the right of patients to the medical use of marijuana for the treatment of debilitating conditions.

The Amendment enshrines in the Constitution a new category of business entities to engage in the lawful cultivation, production, and/or distribution of medical marijuana to qualifying patients, known as Medical Marijuana Treatment Centers ("MMTCs"). The Amendment requires the Department to promulgate regulations that provide for the Registration of MMTCs to secure "the availability and safe use of medical marijuana by qualifying patients." Article X, Section 29, Fla. Const. These regulations include "[p]rocedures for the issuance, renewal, suspension and revocation of registration, and standards to ensure proper security, record keeping, testing, labeling, inspection, and safety." Article X, Section 29(d)(1)c., Fla. Const. It was the duty of Defendants to promulgate regulations in a timely fashion. Fla. Const. Article X, Section 29(d), Fla. Const. Article X, Section 29 stated in unambiguous language that, the Department shall begin registering MMTCs no later than nine (9) months after the effective date of the Amendment. Article X, Section 29(d)(2), Fla. Const. The Amendment affirms that, if the Department does not commence registration of MMTCs within the time set in this section (9 months after the effective date of the Amendment), any Florida citizen shall have standing to seek judicial review to compel compliance with Defendants' Constitutional duties. Article X, Section 29(d)(3), Fla. Const. On January 3, 2017, the Amendment took effect in the State of Florida.

The Medical Use of Marijuana Act of 2017

During the Special Session convened in June 2017, the Legislature enacted Senate Bill No. 8-A, described as "an act relating to the medical use of marijuana." This act became effective June 23, 2017, as Chapter 2017-232, Laws of Florida, later codified as Section 381.986, Florida Statutes (2017) ("Implementing Statute"). The Implementing Statute was lengthy and detailed, providing extensive instruction to the Department as to how to create and regulate the medical marijuana market in Florida including the direction to the Department to license this class of ten approved applicants **"no later than"** October 3, 2017. (Emphasis added.)

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

> a) As soon as practicable, but no later than August 1, 2017, the department shall license any applicant whose application was reviewed, evaluated, and scored by the department and which was denied a dispensing organization license by the department under former s. 381.986, Florida Statutes 2014;

which had one or more administrative or judicial challenges pending as of January 1, 2017, **or had a final ranking within one point of the highest final ranking in its region under former s. 381.986, Florida Statutes 2014**; which meets the requirements of this section; and which provides documentation to the department that it has the existing infrastructure and technical and technological ability to begin cultivating marijuana within 30 days after registration as a medical marijuana treatment center.

b) As soon as practicable, but no later than October 3, 2017, the department shall license one applicant that is a recognized class member of *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), or *In Re Black Farmers Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011) and is a member of the Black Farmers and Agriculturalists Association- Florida Chapter. An applicant licensed under this sub-subparagraph is exempt from the requirements of subparagraphs (b)1. and 2.

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

§ 381.986(8)(a)2., Fla. Stat. (2017) (emphasis added). Importantly, with respect to the parameter set forth under subsection (8)(a)2.a., the Staff Analysis for Senate Bill No. 8-A included the "Final Scorecard" for the applicants that were scored by the Department under the prior version of the statute. (R. 153, 154). Thus, as the Department explained below, when enacting subsection (8)(a)2.a., or, "the one-point provision," the "legislature knew what the Final Ranks were and knew how many 2015 DO applicants were within one point of the highest-ranking applicant in their regions." (R. 154).

The Implementing Statute also included a provision for additional MMTC licenses after a certain number of active qualified patients were registered in the medical marijuana registry. *See* § 381.986(8)(a)4. As the Department explained below:

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

(R. 151).

Spring Oaks Files a Request for Registration with the Department

On July 26, 2018, Spring Oaks sent notice to the Department requesting registration as a MMTC under the one point provision of section 381.986(8)(a)2.a., Fla. Stat. (2017). (R. 18). On July 27, 2018, the Department issued a denial of Spring Oaks' request for registration and stated that Spring Oaks was "not within one point of the highest scoring applicant in its Region." (R. 18).

On July 30, 2018, Spring Oaks filed a Petition for Formal Administrative Hearing to challenge the Department's denial. (R. 10). The Department referred the matter to the Division of Administrative Hearings ("DOAH").

On August 27, 2018, the Department issued a notice[1] that the Department had received and denied six requests for MMTC registration pursuant to section 381.986(8)(a)2., and had received a Petition for Administrative Hearing for five[2] of those denials. (R. 47-48, 59). The Department advised that it had already issued seven of the ten licenses available under the statute, and that one of the remaining three was reserved for a recognized member of the *Pigford*[3] class. (R. 59). Accordingly, the Department advised that anyone "with a substantial interest in the remaining **two licenses** should take appropriate legal action." (R. 59) (emphasis added).

Proceedings at DOAH

On August 30, 2018, the Department moved to consolidate the Spring Oaks matter with the four other petitions filed. (R. 35). In that motion, the Department again asserted that only two MMTC licenses from the statutorily limited number of ten remained. (R. 39). Thus, the Department insisted that

[1] The Notice was issued to a similarly situated applicant, Louis Del Favero Orchids, Inc. ("Del Favero"). Del Favero has also appealed the Department's Final Orders to this Court. *See* Case Nos.: 1D19-1772; 1D19-1777; 1D19-1778; 1D19-1780; 1D19-1781; 1D19-1782; 1D19-1783; and 1D19-1784.

[2] The five Petitions were filed by Spring Oaks Nursery, Inc. ("Spring Oaks), Dewar Nurseries, Inc. ("Dewar"), Bill's Nursery, Inc. ("Bill's"), Tree King-Tree Farm, Inc. ("Tree King"), and Perkins Nursery, Inc. ("Perkins"). (R. 418). Bill's, Dewar, Perkins, Tree King, and Spring Oaks are appellees in Case Nos. 1D19-1810; 1D19-1811; 1D19-1812; 1D19- 1813; and 1D19-1814, respectively.

[3] *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999); *In Re Black Farmers Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011).

consolidation was necessary to prevent the risk of five different ALJs issuing five recommended orders "recommending that more than two of the five petitioners receive MMTC licenses…despite the statutory limitation on the number of MMTC licenses." (R. 39-40).

On September 21, 2019, LSI filed a Motion to Intervene, explaining that it has expended and continues to expend significant time and financial resources to secure one of the ten MMTC licenses (R. 102). LSI explained that although the Department was required to issue all ten licenses under section 381.986(8)(a)2 no later than October 3, 2017, the Department had yet to allow any applicant apply for licensure. (R. 104, 105). LSI further explained that it had been prepared to file an application for a MMTC license, and that it was waiting only for the Department to begin accepting applications. (R. 106).

Accordingly, LSI argued that its substantial interests were affected by Spring Oaks, as Spring Oaks was attempting to obtain one of the last two MMTC licenses available under section 381.986(8)(a)2. (R.106). Specifically, LSI argued that Spring Oaks's application must be comparatively reviewed with LSI's under *Bio-Medical Applications of Clearwater, Inc. v. Dep't of Health & Rehab. Servs.*, 370 So. 2d 19 (Fla. 2d DCA 1979). (R. 107). LSI also argued, consistent with the Department's position, that Spring Oaks is not entitled to a license under the statute. (R. 102).

On September 7, 2018, after holding a telephonic status conference, the ALJ issued an Order directing Spring Oaks to file a response addressing the Department's contention that only two MMTC licenses remain. (R. 89). The Order explained that "the number of medical marijuana treatment center licenses that are still available would likely have a substantial impact on how the proceedings in DOAH Case Nos. 18-4463, 18-4471, 18-4472, 18-4473, and 18-4474 must be conducted." (R. 89). The Order further directed the Department to file a reply to Spring Oaks's response. (R. 89).

Four days later, the ALJ entered an Order Regarding Motions to Intervene. (R. 94). In that Order, the ALJ stated:

> Because a ruling on the Motions to Intervene may be significantly influenced by a determination as to whether the Petitioners in DOAH Case Nos. 18-4463, 18-4471, 18-4472, 18-4473, and 18-4474 "are competing for only two available [medical marijuana treatment center] licenses," the undersigned has elected to defer ruling on the Motions to Intervene until the issue regarding the number of available licenses is resolved.

(*Id.*).

On September 14, 2018, Spring Oaks filed a Joint Brief[4] in Response to the ALJ's September 7 Order, along with Dewar, Spring Oaks, and Perkins.

In its Reply to that Response, the Department continued to argue that only

[4] This Joint Response was filed pursuant to the ALJ's order but was only filed in the Dewar case and therefore is not included in the record for the subject appeal. The Joint Response can be found in the appellate record for Case No. 1D19-1777, at (R. 170).

two MMTC licenses from the statutorily limited number of ten remained, "if any at all." (R. 154). Additionally, the Department reiterated that Spring Oaks did not qualify for a MMTC license under section 381.986(8)(a)2.a. (R. 142). In support of its argument that Spring Oaks did not qualify under the one-point provision, the Department referenced the Staff Analysis for Senate Bill 8-A, which amended section 381.986(8)(a)2 after the passage of the constitutional amendment. (R. 155-156). As the Department explained, included in the Staff Analysis was the "Final Scorecard," which showed the scores of the applicants that applied under the prior version of the statute, including the score of Spring Oaks. (R. 155-156). The Department contended that the inclusion of this Final Scorecard in the Staff Analysis makes clear that the "legislature knew what the Final Ranks were and knew how many" prior applicants would be licensed under the one-point provision, and that Spring Oaks' was not one of them. (R. 156).

Thereafter, the ALJ issued an Order to Show Cause Why Jurisdiction Should Not Be Relinquished to the Department of Health, explaining that the ALJ was "uncertain whether there are any material facts in dispute in the instant case." (R. 200). The ALJ wrote:

> Pursuant to the statutory "one point condition" in section 381.986(8)(a)2.a., there are no disputed issues of material fact that, if resolved, could qualify Petitioner [Spring Oaks'] for registration as a medical marijuana treatment center.

(R. 201).

In compliance with that Order, both the Department and Spring Oaks filed responses. (R. 232, 280). The Department continued to maintain its position that Spring Oaks did not qualify under the one-point provision of section 381.986. (R. 235). The Department also argued that the "dispositive facts" relating to Spring Oaks and the other applicants' licensure denials were "not disputed and jurisdiction over that issue should be relinquished" to the Department. (R. 234). In other words, the Department argued that the ALJ should relinquish jurisdiction to the Department if the ALJ agreed, as a finding of fact that could not be disputed, that Spring Oaks was not within one point of the highest scoring applicant in its region under the former statute. (R. 234).

On October 18, 2018, the ALJ issued an Order Closing File and Relinquishing Jurisdiction to the Department of Health Pending Resolution of Issue Regarding the Constitutionality of Section 381.986, Florida Statutes. (R. 309). In that Order the ALJ addressed that fact that after he issued the Order to Show Cause, the Leon County Circuit Court issued an order temporarily enjoining the Department "from registering or licensing any [medical marijuana treatment centers] pursuant to the unconstitutional legislative scheme set forth in Section 381.986, Florida Statutes." (R. 309). Specifically, the Court wrote:

> Because Petitioner is seeking licensure pursuant to section 381.986, the undersigned relinquishes jurisdiction back to the Department WITHOUT

> PREJUDICE to either Petitioner or Respondent moving to reopen the case once the injunction is lifted or the constitutionality of section 381.986 is otherwise conclusively resolved.
>
> Any pending requests for relief will be addressed if the undersigned reacquires jurisdiction over this matter.

(R. 309). As a result of the ALJ's order, LSI's motion for intervention was never ruled upon.

The Department Enters a Final Order Granting Spring Oaks' an MMTC License

On April 16, 2019, after repeatedly taking the position that Spring Oaks did not qualify for an MMTC license, and making the argument to the ALJ that no material facts were in dispute because Spring Oaks clearly did not meet the requirements for an MMTC license pursuant to section 381.986(8)(a)2.a, the Department, in a complete reversal, entered into a Joint Settlement Agreement with Spring Oaks and seven other MMTC applicants, wherein the Department agreed to award MMTC licenses to those applicants. (R. 332-340). In a telling admission that neither Spring Oaks nor the other seven applicants qualified for MMTC licenses under the one-point provision of section 381.986(8)(a)2.a., the Settlement Agreement stated only that the applicants "have a colorable claim" that they qualified under the statute. (R. 336). The Department did not provide LSI with any notice of its decision to enter this Joint Settlement Agreement, before adopting it in a Final Order.

On April 19, 2019, the Department entered a Final Order, which "incorporated by reference" the Joint Settlement Agreement. (R. 329). The Final Order provided a "Notice of Right to Judicial Review," advising that any party adversely affected by the Final Order had the right to appeal. (R. 330). Recognizing LSI as a party that would be adversely affected by the Final Order, the Department furnished a copy to LSI's counsel. (R. 330).

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

Shortly thereafter, LSI timely filed its Notice of Appeal.

Summary of Argument

Issue I: Whether the Department's award of a MMTC license to Spring Oaks without comparative review violates A*shbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945), and the plain language of the Implementing Statute

The United States Supreme Court has held that "where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." *Ashbacker v. Radio Corp. v. F.C.C.*, 326 U.S. 327, 333 (1945). Florida courts have applied *Ashbacker* "whenever an applicant is able to show that the granting

of authority to some other applicant will substantially prejudice his application." *Bio- Medical Applications of Clearwater, Inc. v. Dep't of Health & Rehab. Servs.*, 370 So. 2d 19, 23 (Fla. 2d DCA 1979); *see also Bio-Med. Applications of Ocala, Inc. v. Office of Cmty. Med. Facilities, Dep't of Health & Rehab. Servs.*, 374 So. 2d 88, 88-89 (Fla. 1st DCA 1979). Because Spring Oaks and LSI both sought one of a limited number of MMTC licenses, "fairness require[d] that the [Department] conduct a comparative hearing at which the competing applications are considered simultaneously." *Bio-Medical*, 370 So. 2d at 23.

Contrary to Spring Oaks argument below, the Implementing Statute does not give prior applicants, like Spring Oaks, a priority over non-prior applicants, like LSI. Rather, the plain language of the statute makes clear that the Department was required to comparatively review all MMTC applications submitted under section 381.986(8)(a)2 before awarding the ten licenses available under the statute.

Additionally, the Department agrees that comparative review of applications should occur. In addition to explicitly invoking *Ashbacker* in the proceedings below, the Department notified and advised anyone with a substantial interest in the remaining two licenses to take appropriate legal action. Because the Department awarded a MMTC license to Spring Oaks without comparative review, this Court should set aside the Final Order.

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

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

First, the Department reversed a finding of fact of the ALJ that was supported by competent, substantial evidence, in violation of section 120.57(1)(l), Florida Statutes. After successfully convincing the ALJ that under no circumstances did Spring Oaks qualify for a MMTC license and that jurisdiction should be relinquished to the Department because no material facts were in dispute, the Department reversed its position, and awarded Spring Oaks a MMTC license, providing in the Joint Settlement Agreement that Spring Oaks had a "colorable claim alleging" that it qualifies under the statute. This was error, as the APA does not permit the Department to reopen the record after the ALJ relinquishes jurisdiction to the Department, and the competent, substantial evidence in the record supports the Department's original position that Spring Oaks does not qualify for a MMTC license.

Second, the Department failed to provide an adequate point of entry for LSI to challenge the Department's award of a MMTC license to Spring Oaks. Under the APA, a party whose substantial interests are affected by agency action must be provided with notice of the action and an adequate point of entry to challenge that action. Despite LSI's substantial interests, the Department failed to provide LSI notice of its intent to enter into the Joint Settlement Agreement. The Department then failed to provide LSI with an adequate point of entry to challenge the Final Order, which incorporates by reference the Joint Settlement Agreement.

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

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

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

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

ARGUMENT

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

Standard of Review

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

The *Ashbacker* Doctrine

In *Ashbacker v. Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945), the United States Supreme Court held that "where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." *Id.* at 333. *Ashbacker* involved two mutually exclusive applications for a construction permit under the Federal Communications Act. *Id.* at 327-28. The Federal Communications Commission ("FCC") examined an application filed by Fetzer and granted it without a hearing. *Id.* at 328. That same day, the FCC designated an application filed by Ashbacker for a hearing. *Id.* Ashbacker filed a petition for hearing and other relief. *Id.* The FCC denied the petition, explaining that Ashbacker's application had not been

denied, but was designated for a hearing, at which Ashbacker would have ample opportunity to show that its applications was superior to Fetzer's. *Id.* Ashbacker appealed.

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

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

Id. at 330-31. The Court concluded by stating that "[w]hile the statutory right of [Ashbacker] to a hearing on its application has in form been preserved, it has as a practical matter been substantially nullified by the grant of the Fetzer application." *Id.* at 334. Accordingly, the Court reversed. *Id.*

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

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

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

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

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

Id. (internal citations omitted).

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

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

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

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

> interests will be affected by proposed agency action" on the other's application.
>
> Because Bio-Medical had standing as a potential party to the Shands proceedings, Bio-Medical was entitled to request a hearing in those proceedings by which Shands' substantial interests were to be determined.

Id. at 89 (internal citations omitted).

Applying the cases discussed above to the case at bar, Spring Oaks and LSI both sought one of a limited number of licenses under section 381.986(8)(a)2 and LSI is entitled to have its application comparatively reviewed with Spring Oaks. Fairness requires that the Department conduct a comparative hearing to simultaneously consider the competing applications. *Bio-Medical*, 370 So. 2d at 23. Due to the fact that the Department did not conduct a comparative review hearing before awarding a MMTC license to Spring Oaks under section 381.986(8)(a)2, this Court should set aside the Final Order. *See* § 120.68(7)(c) (explaining that a reviewing court shall set aside agency action when it finds that "fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure").

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

Spring Oaks argued that section 381.986(8)(a)2 gives priority to applicants seeking a MMTC license under the one-point provision over those applicants

seeking a MMTC license under the other provisions of section 381.986(8)(a)2. (R. 83). Essentially, Spring Oaks argued that any applicant, including LSI, who was not a prior applicant under the one-point provision of section 381.986(8)(a)2.a, does not have any substantial interest at stake and is not entitled to comparative review with applicants, such as Spring Oaks, seeking a license under the one-point provision. (R. 83). Spring Oaks reading of section 381.986(8)(a)2 cannot be reconciled with the statute's plain language and improperly adds words that do not appear in the statute and therefore it should be rejected. *See Fla. Dep't of Educ. v. Cooper*, 858 So. 2d 394, 396 (Fla. 1st DCA 2003) ("Where the language [of a statute] is clear and unambiguous, it must be given its plain and ordinary meaning."); *Fla. Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 848 (Fla. 1st DCA 2002) ("Courts are not at liberty to add words to statutes that were not placed there by the legislature.").

While Spring Oaks insists that section 381.986(8)(a)2 gives it, and applicants like it, some sort of priority, the statute does no such thing. Section 381.986(8)(a)2 begins by providing that the Department "shall license as medical marijuana treatment centers 10 applicants that meet the requirements of this section, under the following parameters." The "parameters" provide that the Department (a) shall award MMTC licenses to those applicants who applied under the 2014 version of the statute and "had a final ranking within one point of the

highest final ranking in its region"; (b) shall license one recognized member of the *Pigford* class; and (c) shall license "applicants that meet the requirements of this section in sufficient numbers to result in 10 total licenses issued under this subparagraph, **while** accounting for the number of licenses issued under sub-subparagraphs a. and b." § 381.986(8)(a)2.a.-c (emphasis added). Use of the word "while" makes clear that the legislature intended for the Department to conduct a comparative review of all MMTC applicants under the parameters set forth in section 381.986(8)(a)2 to arrive at a total of ten licenses.

If the legislature wanted a different outcome or wanted to use different words, it could have. *See Regency Towers Owners Ass'n v. Pettigrew,* 436 So. 2d 266, 268 (Fla. 1st DCA 1983) (noting that courts are not at liberty to ignore language legislature chose to use). The language of the statute is clear that the Legislature did not intend the reading advanced by Spring Oaks and if it did, it could have easily drafted the statute that way. Therefore, under a plain reading of the statute, the Department was required to comparatively review all MMTC applications submitted under section 381.986(8)(a)2 before awarding licenses. *See Bio-Medical*, 370 So. 2d at 23.

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

The Department agrees that comparative review of MMTC license applications should occur. Indeed, responding to the ALJ's Order below, the

Department argued that section 381.986(8)(a)2 requires that the Department issue 10 licenses through an "application batch." (R. 151-152). Later in that same response, the Department again referenced an application batch, stating that "the Department contends none of the petitioners is qualified and that the remaining 2 licenses are to be awarded through a separate application batch." (R. 154). In that same filing, the Department explicitly discussed *Ashbacker*, arguing that it would not "at this time" insist that an *Ashbacker* hearing was required, but only because the Department steadfastly argued that neither Spring Oaks nor the other applicants qualified for licensure under section 381.986(8)(a)2.a. (R. 142).

Additionally, the Department's actions in this case make it clear that the Department agrees with LSI's interpretation of section 381.986(8)(a)2 and that the Department was required to comparatively review **all** MMTC applications submitted under section 381.986(8)(a)2 before awarding licenses. The letter sent by the Department notifying a similarly situated MMTC applicant of Spring Oaks petition provides further evidence of the Department's position. (R. 59). The Department advised in that letter:

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

(R. 53). Consistent with that invitation, the Department did not take a position on LSI's motion to intervene in this case and did not file any opposition to same. (R. 108).

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

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

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

Standard of Review

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

The Florida Administrative Procedure Act

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

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

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

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

3d 703, 711 (Fla. 2017); *see also McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569 (Fla. 1st DCA 1977). (Superseded on other grounds by statute, § 120.54(1)(a) Fla. Stat. (Supp. 1976), as recognized in Dep't of Highway Safety & Motor Vehicles v. Schluter, 705 So. 2d 81 (Fla. 1st DCA 1977).

In this case, the Department violated the APA by improperly rejecting and modifying a finding of fact and law made by the ALJ. The Department also failed to provide an adequate point of entry for LSI to challenge the Department's action of awarding a MMTC license to Spring Oaks. Either of these violations requires this Court to set aside the Final Order in this case. *See* §120.68(7)(c).

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

An agency "may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2018). Indeed, an ALJ's findings of fact that are supported by competent, substantial evidence are "binding" on an agency. *Fla. Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987). An agency commits reversible error when it rejects or modifies findings of fact that are supported by competent and substantial evidence. *Gross v. Dep't of Health*, 819 So. 2d 997, 1005 (Fla. 5th DCA 2002); *Belleau v. State, Dep't of Envtl. Protection*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997).

In this case, the Department argued zealously and repeatedly that Spring Oaks did not qualify for a MMTC license under the one-point provision of section 381.986(8)(a)2.a. The Department was so persuasive with its argument that the ALJ issued an Order to Show Cause Why Jurisdiction Should Not be Relinquished to the Department, explaining that, "pursuant to the statutory 'one point condition' in section 381.986(8)(a)2.a., there are no disputed issues of material fact that, if resolved, could qualify [Spring Oaks] for registration as a medical marijuana treatment center." (R. 200-201).

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

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

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

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

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

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

substantial evidence in the record supports the conclusion that Spring Oaks does **not** qualify. As the Department argued, the Final Scorecard that was included in the Staff Analysis for the Senate Bill summary worksheet, showed each 2015 applicants' scores. (R. 148). It is clear from the record and undisputed that Spring Oaks was not within one point of the highest final ranking in its region. (R. 148). As the Department put it, this is "basic math." (R. 235).

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

The Department Failed to Provide LSI an Adequate Point of Entry

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

> Any substantially affected person **must be provided with a clear point of entry**, within a specified time period after some recognizable event in the investigatory or other free form proceedings, to formal or informal proceedings under section 120.57. Simply providing a point

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

Fla. League of Cities, Inc. v. Admin. Comm'n, 586 So. 2d 397, 413 (Fla. 1st DCA 1991) (internal citations omitted) (emphasis added). Additionally, the point of entry provided by the agency "must not be so remote from the agency action as to be ineffectual as a vehicle for affording a party whose substantial interests are or will be affected by agency action a prompt opportunity to challenge disputed issues of material fact in a Section 120.57 hearing." *Gulf Coast Home Servs. of Fla., Inc. v. Dep't of Health & Rehab. Servs.*, 515 So. 2d 1009, 1011 (Fla. 1st DCA 1987). In this case, the Department recognized that LSI had a substantial interest in Spring Oaks request for registration as a MMTC and LSI exercised its rights as a party whose substantial interests would be affected by filing a motion to intervene. (R. 101).

Then, after zealously and unyieldingly advocating before the ALJ that Spring Oaks did not, under any circumstances, qualify for a MMTC license under the one-point provision of section 381.986(8)(a)2.a, the Department did a complete

position reversal by entering into the Joint Settlement Agreement, in which the Department agreed to license Spring Oaks as a MMTC. The Department failed to provide LSI any notice of the Settlement Agreement prior to entry of the Final Order.

Three days after entering into that Settlement Agreement, the Department entered a Final Order, incorporating the Settlement Agreement by reference. Only then did the Department provide notice to LSI. (R. 330). However, that notice failed to provide an adequate point of entry, as it notified LSI only of LSI's right to appeal the Final Order and did not allow LSI to request an administrative hearing under sections 120.569 and 120.57. In other words, the point of entry provided to LSI was "so remote from the agency action as to be ineffectual as a vehicle for affording a party whose substantial interests are or will be affected by agency action a prompt opportunity to challenge disputed issues of material fact in a section 120.57 hearing." *Gulf Coast Home*, 515 So. 2d at 1011.

The Department's Violations of the APA Warrant Reversal

The APA is predicated on fundamental principles of due process. *See Survivors Charter Schs.*, 3 So. 3d at 1231. The Department's actions in this case including advocating for a finding of fact before an ALJ and then arbitrarily and capriciously reversing that position, which was supported by competent and substantial evidence, and failing to provide a party whose substantial interests are

at stake with an adequate point of entry are fundamentally contrary to those principles.

In its response to the ALJ's Order to Show Cause Why Jurisdiction Should Not be Relinquished to the Department, Spring Oaks argued that "due process requires that Spring Oaks is entitled to a hearing to introduce evidence to show that it is substantially affected by the Department's proposed action." (R. 285). LSI is entitled to the same due process that was sought by Spring Oaks, and respectfully requests this Court set aside the Final Order. *See* § 120.68(7)(c).

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

Standard of Review

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

Argument

Since a settlement agreement is contractual in nature, it is interpreted and governed by contract law. *Pinnacle Three Corp. v. EVS Invs., Inc.*, 193 So. 3d 973, 976 (Fla 3d DCA 2016) (internal citations omitted). The Florida Supreme Court has stated that parties are "free to contract around a state law so long as there is nothing void as to public policy or statutory law." *Franks v. Bowers*, 116 So. 3d 1240, 1247 (Fla. 2013). "However, a contractual provision that contravenes legislative intent in a way that is clearly injurious to the public good violates public policy and is thus unenforceable." *Id.*; *see also T.C.B. v. Fla. Dep't of Children & Families*, 816 So. 2d 194, 196 (Fla. 1st DCA 2002) (explaining that a contract "is void as against public policy when it is 'injurious to the interest of the public, or contravenes some established interest of society' ") (quoting *Hall v. O'Neil Turpentine Co.*, 47 So. 609, 612 (Fla. 1908)).

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

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

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

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

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

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

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

In addition to violating the intent of the APA, the Settlement Agreement in

this case violates the legislative intent in section 381.986(8)(a)2.a. The legislature was very clear about how the Department shall issue the ten licenses made available in section 381.986(8)(a)2. Specifically, the legislature provided that only those prior applicants under the former version of the statute that "had one or more administrative or judicial challenges pending as of January 1, 2017, or had a final ranking within one point of the highest final ranking in its region," qualified for licensure under that provision. § 381.986(8)(a)2.a. As is clear by the record, Spring Oaks did not have a final ranking within one point of the highest final ranking in its region. Spring Oaks also did not have an administrative or judicial challenge pending as of January 1, 2017. Thus, Spring Oaks does not qualify for a MMTC license under the § 381.986(8)(a)2.a.

The Settlement Agreement merely states that Spring Oaks has "a colorable claim alleging that they qualify" as a MMTC under the statute. (R. 336). In further support that Spring Oaks did not and does not qualify for a MMTC license, Spring Oaks was required to "submit a variance to its filed application in accordance with section 381.986(8)(e), Florida Statutes (2018)" because the entity described in its originally filed application does not meet the regulatory requirements set forth by the legislature in the 2017 amendment to section 381.986, Florida Statutes. (R. 338).

The Settlement Agreement at issue in this case is not an agreement entered

into by two private parties. Rather, one of the parties to the Agreement is a state agency which thereby limits the actions that it can take when a party's substantial interests are at stake. These limitations support the guiding principle of the APA. *See Survivors Charter Schs., Inc.*, 3 So. 3d at 1231 (explaining that the APA "was intended to…provide the public with a more certain administrative procedure, thereby insuring that the public would receive due process and significantly improved fairness of treatment") (quoting *Machules*, 523 So. 2d at 1136-37).

By awarding one of a statutorily limited number of MMTC licenses to an applicant that the Department acknowledged does not qualify, the Department has contravened "legislative intent in a way that is clearly injurious to the public good" and "violates public policy." *Franks*, 116 So. 3d at 1247. Accordingly, this Court should find the Settlement Agreement that provides for the basis of the Final Order is void as against public policy.

CONCLUSION

The Department's decision to award a MMTC license to Spring Oaks, an unqualified applicant, without comparative review violates *Ashbacker* and the plain language of section 381.986(8)(a). Further, the actions taken by the Department over the course of the proceedings below are contrary to fundamental principles of due process and violate the APA. Lastly, the Settlement Agreement which forms the basis for the Final Order is void as against public policy as it

contravenes the legislative intent set forth in the APA and the legislature's intent in section 381.986(8)(a). Any one of these provides an ample basis for this Court to set aside the Final Order and the underlying Joint Settlement Agreement. Accordingly, LSI respectfully requests this Court set aside the Final Order and underlying Joint Settlement Agreement.

Respectfully submitted this 23rd day of August, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 2019, a true and correct copy of the above and foregoing was electronically filed through the Florida Courts E-Filing Portal which will send a notice of electronic filing to all parties listed on the attached Service List.

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CERTIFICATE OF COMPLIANCE

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

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