STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LOOP'S NURSERY & GREENHOUSES, INC.,

Petitioner,

Case No. 15-7274

vs.

DEPARTMENT OF HEALTH, OFFICE OF COMPASSIONATE USE,

Respondent.

RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on July 6 through 8, 11, and 13 through 15, 2016, in Tallahassee, Florida, before Administrative Law Judge ("ALJ") R. Bruce McKibben of the Division of Administrative Hearings ("DOAH"). The parties were represented as set forth below.

APPEARANCES

For Petitioner: Jon C. Moyle, Esquire
Karen Ann Putnal, Esquire
Robert A. Weiss, Esquire
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118 North Gadsden Street
Tallahassee, Florida 32301

For Respondent: William Robert Vezina, III, Esquire
Eduardo S. Lombard, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner, Loop's Nursery & Greenhouses, Inc. ("Loop's"), was entitled to be a dispensing organization under section 381.986, Florida Statutes, and applicable rules when its application was reviewed by Respondent, Department of Health, Office of Compassionate Use (the "Department" or "OCU"), in July through November 2015.

Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2015 version, as this case involves a backwards-looking, retrospective assessment of the Loop's application.

PRELIMINARY STATEMENT

Loop's and other applicants seeking to become a dispensing organization ("DO") filed applications with OCU in July 2015. Loop's was notified by letter dated November 23, 2015, that it was not the highest scored applicant in the Northeast Region, as defined in 381.986(5)(b), Florida Statutes. Loop's timely filed a Petition for Formal Administrative Hearing to contest the denial of its application and the approval of a competing application. Subsequently, the Florida Legislature passed amendments to section 381.986 which will be discussed more fully below. Ultimately, the petition filed by Loop's resulted in the hearing described above for the purpose of determining whether

the Loop's application should have been approved by the Department.

At the final hearing, Loop's called the following 11 witnesses: David Loop, accepted as an expert in horticulture; Dr. James Lieberman, accepted as an expert in cannabis processing, extraction, laboratory design, and operation commissioning and process optimization; Richard Rampell, CPA, accepted as an expert in accounting, financial analysis, and valuation; Mark Hand, CPA, accepted as an expert in accounting; Gregg Connor, accepted as an expert in transportation, distribution, dispensing, and security; Dr. Terril Nell, accepted as an expert in horticulture; Holley Moseley; Joel Stanley, CEO of CW Botanicals, accepted as an expert in cannabis breeding, cultivation, processing, extraction, and dispensing; Carla Ard, accepted as an expert in sales and marketing; Henry Stephen Jones, accepted as an expert in facilities and premises security, technological security, and data systems security; and Christian Bax, director of OCU. Loop's Exhibits 1a, 1b, 1c, 2, 7 through 9, 17, 19, 21, 30 through 34, 36 through 38, 40, 41, 49, 58 through 64, and 66 were admitted into evidence.

OCU called the following witness: Daniel Hevia, CPA, accepted as an expert in accounting, auditing, financial forensics, peer review, generally accepted accounting standards

(GAAS), and auditing standards. OCU's Exhibits 13 through 21, 64 through 69, 71, 72, and 75 through 77 were admitted into evidence.

A Transcript of the final hearing was ordered; it was filed at DOAH on August 3, 2016. By rule, parties are allowed 10 days after filing of the transcript at DOAH to submit proposed recommended orders (PROs). Loop's requested additional time (75 days) to prepare its PRO; the Department objected. The ALJ allowed 30 days from the date of filing to submit PROs and extended the page limit to 45 pages. Just prior to the date the PROs were due (which would have been September 2), the Department filed a Motion seeking clarification of the due date. Apparently, Loop's had contacted the Department and expressed its understanding that the PROs were due 45 days after the transcript was filed at DOAH (despite the instructions given by the ALJ at final hearing and set forth in writing in the transcript). An Order of Clarification was entered, reiterating the due date, September 2, 2016. Loop's then filed a request for extension of time until September 12, 2016 to file the PROs; the request was granted. Each party timely submitted a PRO, and each was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. In 2014, the Florida Legislature enacted the Compassionate Medical Cannabis Act, chapter 2014-157, Laws of Florida, codified in part at section 381.986, Florida Statutes (2014). The Department was directed by the new law to authorize the establishment of one DO in each of five enumerated regions within the State.

2. The Department promulgated an application form, incorporated by reference in Florida Administrative Code Rule 64-4.002, to be used by applicants seeking approval as a dispensing organization. In July 2015, Loop's filed an application to become the DO in the Northeast Region, consisting of 18 primarily rural counties. The Loop's application was comparatively reviewed with several other applications.

3. In November 2015, the Department notified Loop's that its application had received the third-highest score during the comparative review. San Felasco Nurseries, Inc. ("San Felasco"), received the highest score; Chestnut Hill Tree Farm, LLC ("Chestnut Hill"), received the second highest score. However, the Department notified San Felasco that its application was being denied on the basis of an alleged deficiency, leaving Chestnut Hill as the approved DO in the Northeast Region. Loop's and San Felasco each timely filed a petition for formal administrative hearing to challenge their

denials. Chestnut Hill filed an "approved applicant" petition in support of the Department's decision. The three petitions were consolidated into a single case at DOAH.

4. The Florida Legislature, in the 2016 legislative session, passed House Bill 307 (CS for CS/CS/HB 307) and House Bill 1313, which were signed into law on March 25, 2016, as chapter 2016-123, Laws of Florida (referred to herein as the "2016 Law"). The 2016 Law says, in pertinent part:

> Section 3. (1) Notwithstanding s. 381.986(5)(b), Florida Statutes, a dispensing organization that receives notice from the Department of Health that it is approved as a region's dispensing organization, posts a $5 million performance bond in compliance with rule 64-4.002(5)(e), Florida Administrative Code, and expends at least $100,000 to fulfill its legal obligations as a dispensing organization; or any applicant that received the highest aggregate score through the department's evaluation process, notwithstanding any prior determination by the department that the applicant failed to meet the requirements of s. 381.986, Florida Statutes, must be granted cultivation authorization by the department and is approved to operate as a dispensing organization for the full term of its original approval and all subsequent renewals pursuant to s. 381.986, Florida Statutes. Any applicant that qualifies under this subsection which has not previously been approved as a dispensing organization by the department must be given approval as a dispensing organization by the department within 10 days after the effective date of this act, and within 10 days after receiving such approval must comply with the bond requirement in rule

> 64-4.002(5)(e), Florida Administrative Code, and must comply with all other applicable requirements of chapter 64-4, Florida Administrative Code.
>
> (2) If an organization that does not meet the criteria of subsection (1) receives a final determination from the Division of Administrative Hearings, the Department of Health, or a court of competent jurisdiction that it was entitled to be a dispensing organization under s. 381.986, Florida Statutes, and applicable rules, such organization and an organization that meets the criteria of section (1) shall both be dispensing organizations in the same region. During the operations of any dispensing organization that meets the criteria in this section the Department of Health may enforce rule 64-4.005, Florida Administrative Code, as filed on June 17, 2015.

5. The 2016 Law thus effectively approved the applications of Chestnut Hill and San Felasco by legislative fiat, declaring the Department's preliminary agency action to be final. Those two entities withdrew their petitions for formal administrative hearing and, upon accomplishing certain preliminary requirements, were to be granted licenses as DOs in the Northeast Region.

6. The petition filed by Loop's remained as the only challenge to the Department's decision vis-à-vis the Northeast Region DO applications, resulting in the hearing at issue in this Recommended Order. (Both San Felasco and Chestnut Hill attempted to intervene in this action, but because the result in this case would have absolutely no bearing on the status of

their DO licenses, their petitions to intervene were denied for lack of standing.) Loop's was left to prove that its application should have been approved instead of one or both of the now-approved applicants.

7. It is unclear why the Department takes such an aggressive adversarial stance against Loop's in this proceeding. Should Loop's prove that its application should have been approved rather than one of the other applicants, OCU would issue a DO license to Loop's. If Loop's fails to meet its burden of proof, OCU would not issue a license. That is the extent of OCU's status in this matter. Notwithstanding, OCU fervently opposes approval of Loop's as a DO in the Northeast Region.

The Applicant

8. Loop's was founded in 1949 as a greenhouse and was organized as a corporation under the laws of Florida in 1970. It has operated a certified nursery for well over 30 years and has done so pursuant to a valid Certificate of Registration issued by the Florida Department of Agriculture and Consumer Services ("DACS") pursuant to section 581.131, Florida Statutes.

9. Loop's is a Florida greenhouse pioneer, having led the industry in advanced cultivation practices, such as drip irrigation and the use of blackout shade cloths to maximize yield. Today, Loop's specializes in greenhouse-grown flowering

potted plants. It has cultivated more than 400,000 plants annually since the early 1980s.

10. Loop's is operated by a qualified nurseryman, David Loop. Loop's currently has 650,000 square feet of state-of-the-art greenhouses. The greenhouses are fully automated, with features including automatic temperature and humidity controls. The primary Loop's nursery is operated in a 150,000 square foot greenhouse located in Jacksonville, Florida, and there is another 500,000 square feet of specialized greenhouses located in St. Johns County, Florida. Loop's has plenty of space available in which to cultivate medical marijuana, pending development and approval of a security system for the nursery.

11. Loop's expressed its intention to use a subsidiary corporation or division (Loop's Dispensaries, LLC) to operate the dispensing functions of its proposed project, if approved. This plan was in deference to the federal government's refusal to recognize the legitimacy of medical marijuana and to keep the marijuana cultivation separate and apart from the other Loop's cultivation processes. OCU's contention that use of the LLC constitutes a "material misrepresentation" in the application is unfounded. Loop's was overt and transparent concerning this contingency. Further, no mention was made of this perceived misrepresentation in OCU's denial letter following review of the Loop's application.

The Application Form

12. The application form for applying to be a DO identifies a number of statutory and rule requirements which must be met, including three basic criteria: a) Possess a valid certificate of registration issued by DACS; b) Show that the nursery is operated by a Florida nurseryman as described in section 581.011; and c) Prove continuous operation as a nursery for at least 30 continuous years. Loop's generally satisfies each of those criteria.

13. The application form is divided into four parts: Part I requires the applicant to provide basic information about itself. Part II requires the applicant to document its compliance with requirements which are mandated by statute. Part III requires the applicant to provide OCU with information addressing all items listed in rule 64-4.002. There are five substantive subparts in the application: Cultivation (constituting 30 percent of the weighted score), Processing (30 percent), Dispensing (15 percent), Medical Director (5 percent), and Financials (20 percent). These subparts are further broken down into sub-subparts, and weights or percentages are assigned to each of those. Part IV of the application addresses the application submission process, including payment of the application fee.

14. It is clear Loop's at least minimally meets the requirements set forth in the statute and rule and identified within the application. It has the ability to cultivate, process and dispense medical marijuana (or has set forth a reasonable proposal for doing so in its application). It has a qualified medical director. There is, as set forth below, some concern about the Loop's financial statements, but Loop's is generally stable and meets minimal financial requirements.

15. However, Loop's has the burden in the present case to show that it satisfied the requirements to such an extent that it, rather than Chestnut Hill or San Felasco, should have received the highest point total upon comparative review.[1/]

16. Looking at Part I of the application, Loop's provided the requisite information dictated by the application form, as did--presumably--the other applicants. There appears to be no dispute that all three applicants sufficiently satisfied Part I.

17. As to Part II, Loop's provided its DACS certification and submitted successful level 2 background screens for all of its owners and managers. OCU suggested that some individuals who may be involved with the Loop's operation, if approved, should have undergone level 2 background screening. There is no persuasive evidence, however, that such persons were "owners or managers" as contemplated by statute and rule so as to be subject to the background screening.

18. Loop's raised a legitimate question as to whether competing applicant Chestnut Hill satisfied the requirement to have "operated for 30 continuous years as a registered nursery," as required by section 381.986(5)(b)1. Chestnut Hill was formed as a limited liability company in Florida on August 29, 2005. By law, Chestnut Hill became a corporate "person" at that time. See § 607.01401(19), Fla. Stat. Thus, argues Loop's, Chestnut Hill could not have operated a registered nursery for 30 years because it has not been in existence for 30 years.

19. The Department takes the position that a "nursery" may be certified by DACS and, even if the nursery ownership changes its name or corporate structure, the "nursery" will continue to be certified. "Nursery" is defined in section 581.011(20) as "any grounds or premises" used for growing nursery stock.

20. A DACS letter dated August 4, 2015, addressed to Loop's states: "According to the Department's records, your nursery has operated as a registered nursery since May 1, 1963 and has a current inventory of 951,781 plants." A DACS letter to San Felasco dated July 6, 2015, states: "According to the Department's records, your nursery has operated as a registered nursery since October 23, 1973 and has a current inventory of 561,200 plants." DACS issued a letter dated August 3, 2015, to Chestnut Hill which states: "According to the Department's records, your nursery has operated as a

registered nursery since November 23, 1981 and has a current inventory of 406,337 plants."

21. OCU interpreted the statutory requirement in section 381.986(5)(b)1. to mean that if the applicant operated a registered nursery (rather than itself being a registered nursery), that would satisfy the requirement. OCU reputedly relied upon the DACS certification of the nursery premises to deem Chestnut Hill compliant with the 30 year requirement. Again, no one from Chestnut Hill was called as a witness to explain this conundrum.

Comparative Review

22. The five subparts in Part II of the application addressing the statutory criteria were carefully considered by OCU in its comparative review of the applicants. OCU's process for reviewing the applications is set forth below.

23. Applicants were to submit their applications and a $60,000 filing fee to OCU no later than July 8, 2015. At that point the applications were initially reviewed for completeness by OCU Director Bax. If any items or responses were missing from an application, Bax would send the applicant an omissions letter, giving the applicant an opportunity to supplement its application. In the case of Loop's, Bax noted that Loop's had not provided proof of operating a registered nursery for 30 continuous years and the financial statements provided in the

application had not been audited. Loop's timely provided the missing items requested by the Department.

24. Once the applications were deemed complete, three individuals evaluated and scored the applications comparatively. The scorers were: Christian Bax; Patricia Nelson, a member of the Statewide Drug Policy Advisory Council; and Ellyn Hutson, a certified public accountant. Nelson and Hutson were appointed by the State Surgeon General.

25. Instructions for scoring the applications were provided by the Department's general counsel, Nicole Geary. Pursuant to those instructions, the scorers performed their comparative evaluations independently, not communicating with one another during the review process. They were, however, allowed to make inquiries to certain experts in various areas within the applications outside the scorer's knowledge or expertise.

26. The scorers each assigned scores on the various sections of the application and compiled the scores in a spreadsheet. The three spreadsheets were then consolidated into a single spreadsheet and the scores were totaled. San Felasco received the highest aggregate score--3.9750; Chestnut Hill received the second highest score--3.7917; and Loop's received the third highest score--3.5708. Each applicant's score was an aggregate score totaling all sections of the application.

Scoring higher in one section (e.g., cultivation) would not necessarily mean the applicant had the highest aggregate score. The application as a whole had to be scored higher than the others in order to be approved. (See, however, ALJ Van Laningham's September 8, 2016 "Informational Order on the Multi-Criteria Evaluation, etc.," entered in Plants of Ruskin, Inc. v. Dep't. of Health, DOAH Case No. 15-7270, wherein he calls into question the entire process by which OCU "scored" the competing applications, deeming the so-called scores to actually be rankings and thus inconsistent with the statutory mandate.)

27. At final hearing, Loop's called one of the scorers, Bax, to discuss his evaluation and review of the applications, but did not call the other two scorers. The findings and conclusions reached by the other two scorers were not addressed. Nor were principals from the competing applicants called in order to compare or discuss their applications. Thus, Loop's attempted to prove that its application was superior by affirming the appropriateness of its own application, superficially presenting portions of the competing applications, and showing that only one of three scorers deemed its application superior. That is not a legitimate or appropriate comparison.

28. As to the technical and technological ability to cultivate, Loop's provided ample proof that it has that ability.

Loop's will rely in part on assistance from CW Botanicals (i.e., the Stanley brothers), and will utilize some of that entity's policies and procedures.[2/] Although it has no experience cultivating cannabis, Loop's is very skilled in cultivating other flowering plants. With the help of CW Botanicals, Loop's undoubtedly would be able to successfully cultivate cannabis.

29. It is the intention of Loop's to cultivate the specific strain of medical cannabis known as "Charlotte's Web." That strain was developed by the Stanley brothers and has proven effective in treating many conditions, especially severe, intractable epilepsy. There are many strains of medical marijuana, however, as evidenced by the fact that the Stanley brothers themselves grow hundreds of different strains. San Felasco proposes to cultivate a strain known as Anovia Medical; Chestnut Hill plans to grow one known as Green Solutions. Other than its notoriety, there was no competent evidence that Charlotte's Web is superior to any other strain.

30. The Loop's proposal to cultivate Charlotte's Web is based entirely on an oral agreement with Ray of Hope, an entity which holds the rights to Charlotte's Web in Florida. There is no binding written agreement between Loop's and Ray of Hope. Nothing prohibits Ray of Hope from granting other Florida growers the right to use that strain as well.

31. The suggestion that Loop's could comply with the cultivation requirement better than the other two applicants is purely speculative. Loop's pointed out that Chestnut Hill was a tree farm and that San Felasco dealt with outdoor plants. Both are operating registered nurseries within the State, even if they are not currently growing marijuana. However, each of those applicants presumably submitted plans for cultivating medical marijuana in some fashion. No competent evidence was presented to infer that the proposals of Chestnut Hill and/or San Felasco were inferior to Loop's, or, conversely, that the Loop's proposal was superior to those applications.

32. Loop's provided an expert to explain the nature of the Loop's plan for securing its operations and personnel. The plan was well-developed and seemed to address all of the issues Loop's would face once it began cultivation. There were, however, some glitches pointed out in the Loop's plan, e.g., its 24-hour on-site security was to be provided by a single individual who, presumably, would need to sleep sometimes. But again, there is no evidence that the security plans proposed by the other two applicants are in any way inferior.

33. The same is true of the three applicants' ability to maintain accountability of their raw materials and finished products. Loop's had a good plan for doing so, but did not

specifically demonstrate how its plan was superior to the others.

34. As for a reasonably located infrastructure to dispense the product, Loop's reasonably showed that it had a broader (geographic) distribution plan than its competitors. However, there is no requirement that a DO dispense its product statewide, only that each DO must cover its designated region, in this case the Northeast Region. Thus, the fact that the other applicants did not propose as wide a distribution of its product as Loop's is not consequential. In the Loop's application, 12 distinct dispensing sites are proposed. Eight of those sites have been clearly identified, but zoning and other approvals have not yet been obtained. San Felasco proposes six sites for dispensaries; Chestnut Hill proposes only one, with an option for one more. It is clear Loop's intends to distribute its product on a wider scale than San Felasco or Chestnut Hill, but there is no requirement for doing so. (The application form does include references to such things as being centrally located to several populated areas and proximity to patient populations, but those are examples of what an applicant might want to show OCU. There is no statutory mandate for those items). The statutory and rule provisions relating to dispensing of the cannabis product does not say that ability to distribute more product is necessarily better. Further, Loop's

did not explain how its product would successfully compete with the DOs approved in the other regions around the State. So, in total, Loop's did not prove that its distribution plan was superior to the other applicants' plans.

35. As for transportation of the product to its dispensaries and users, Loop's plans to use a high-roofed van with a refrigerated cargo space and a lockbox or safe. The van appears to be a very competent means of transporting the product. San Felasco proposes the use of one armored van and several small Prius-model automobiles. Chestnut Hill plans to use two Prius automobiles to transport its product. Each applicant's proposal seems adequate for their projected distribution of medical marijuana.

36. In the area of financial ability to maintain operations for two years, Loop's cast some reasonable doubt as to the showing Chestnut Hill made to satisfy this requirement. There was no similar failing noted for San Felasco. Loop's own financial ability to operate is somewhat suspect due to the conditional nature of its audited financial statements.

37. Loop's initially submitted a "reviewed" financial statement with its application. A reviewed statement is one prepared internally and then reviewed by a certified public accountant for general correctness. OCU asked Loop's to submit

an audited financial statement instead, and Loop's complied with that request.

38. The audited financial statement was prepared by Steven Hand, a self-employed CPA whose major business was doing business evaluations. The Loop's audit was the only one he had prepared since 1998. Mr. Hand was familiar with Loop's and had some history with the company. He was asked, on extremely short notice, to prepare an audited financial statement for Loop's. The amount of time he had to prepare the statement was probably insufficient, but he did the best he could in that time.

39. Mr. Hand did not do a written audit plan before commencing the audit although that is a requirement for a bona fide audit. Mr. Hand said that he had a "plan" of sorts based on his conversations with Mr. Loop, but such oral discussions are not sufficient under GAAS to constitute a plan. The audited financial statement he issued did not have the requisite headings required by GAAS, but the financial statement was generally acceptable as to content. Again, failure to include the headings is a violation of GAAS, but the violation seems minimal in this context.

40. Mr. Hand could not issue an unqualified (a/k/a unmodified or clean) opinion regarding the Loop's financial situation. That is because he was unable to verify the inventory due to his having been engaged to do the work more

than a year after the audit period. The verification of accounts receivables was done by Loop's, not by the CPA, another violation of auditing guidelines. Thus, Mr. Hand issued a "qualified" opinion, i.e., a much weaker opinion that those submitted by the competing applicants.

41. There is no evidence of record as to the validity or appropriateness of the audited financial statement submitted by San Felasco in its application. Thus, no comparison of information contained therein can be made.

42. Some concerns were raised by Loop's about Chestnut Hill's finances related to the way that entity valuated its inventory. Further, only the balance sheet on Chestnut Hill's financials was audited; the auditor issued a disclaimer as to the income statement portion of the financial report. But, ultimately, the auditors were able to issue a valid audited financial statement for the entity.

43. San Felasco was alleged to have a suspect financial ratio which could have an effect on its ability to continue operations for two years, as required by statute. But no discreet comparison between the Loop's financials and those of the competing applicants was presented at final hearing.

44. Loop's has retained a qualified physician to act as its medical director and to supervise the DO's activities.

There is no evidence the physician is better than the medical directors proposed by the other parties.

45. The evidence at final hearing was abundantly clear that low THC, high CDB marijuana can have enormously successful results in children with significant medical conditions. The stories of how this drug has helped children overcome debilitating seizure activity were miraculous in nature. It is difficult to conceive how such a beneficial medication could be objected to by some uninformed persons or groups.

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016).

47. Section 120.57(1)(k) states: "All proceedings conducted under this subsection shall be de novo." The de novo standard has not been altered by section 381.986, or any other statute relating to the subject matter in this case. Thus, under section 120.57(1), the final hearing at DOAH was conducted "to formulate final agency action, not to review action taken earlier and preliminarily." J.D. v. Fla. Dep't of Child. & Fams., 114 So. 2d 1127, 1132 (Fla. 1st DCA 2013), (quoting McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977)).[3/]

48. The general rule is that the party asserting the affirmative of an issue has the burden of presenting evidence as to that issue. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933 (Fla. 1996), citing Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981). In this case, Loop's has the burden.

49. According to section 120.57(1)(k), "Findings of fact shall be based upon a preponderance of the evidence . . . except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized."

50. In the instant matter, Loop's was required to prove, by a preponderance of evidence, that the Department should have approved its application to become a DO in the Northeast Region instead of approving San Felasco and/or Chestnut Hill. The 2016 Law specifically says that the applicant must show that "it was entitled to be a dispensing organization." That is, that the application as submitted to OCU was superior to all competing applications in the same region. This proceeding, therefore, is a backward-looking, retrospective assessment of the applications at the time they were filed and reviewed by OCU. (See Judge McArthur's excellent description of this process in her May 13, 2016, Order Regarding Impact of [the

2016 Law], entered in McCrory's Sunny Hill Nursery v. Dep't. of Health, DOAH Case No. 15-7275.)

51. In this case, it must first be determined whether Chestnut Hill should have been comparatively reviewed with the other applicants due to the 30 continuous years of operation issue. Although an agency's interpretation of its own statutes is given deference (See Humana, Inc. v. Dep't of Health & Rehab. Servs., 492 So. 2d 388 (Fla. 4th DCA 1986)), that interpretation cannot be contrary to the plain language of the statute. In the present case, the statute at issue dictates that "the applicant must . . . have been operated as a registered nursery in the state for at least 30 continuous years." § 381.986(5)(b)1, Fla. Stat. "Nursery" is defined as "any grounds or premises on which nursery stock is grown." § 581.011(20), Fla. Stat. A nursery is not a person, corporate or otherwise; it is grounds or premises. Thus, none of the corporate applicants to be a DO in Florida could have literally satisfied the requirement to have been operated as a "nursery." DACS also issues certificates of registration to stock dealers, agents, or plant brokers, each of which is defined as a "person" in section 581.131. But receipt of a certificate of registration by a stock dealer, agent, or plant broker does not make that person a "nursery."

52. Inasmuch as no applicant could have literally complied with the requirement to be a registered nursery, the

Department's interpretation of the statute to allow applicants who operate--rather than operate as--a registered nursery for 30 continuous years to be deemed compliant with the statutory requirement is accepted. (See Chiles v. Dep't of State, Div. of Elect., 711 So. 2d 151 (Fla. 1st DCA 1998.) If Chestnut Hill had a letter from DACS that it had operated a nursery for 30 continuous years, then its application should have been comparatively reviewed with the other applicants.[4/]

53. This is the first proceeding under the 2016 Law, which generally establishes the parameters for an applicant such as Loop's to obtain approval of its initially denied application. Chapter 381, Florida Statutes, wherein portions of the 2016 Law are codified, sets forth the criteria each applicant must satisfy. Those criteria, paraphrased, are:

a) Technical and technological ability to cultivate and produce low-THC cannabis;

b) Ability to secure the premises, resources, and personnel necessary to operate as a DO;

c) Ability to maintain accountability of all raw materials, finished products, and any byproducts to prevent diversion or unlawful access to or possession of these substances;

d) An infrastructure reasonably located to dispense low-THC cannabis to registered patients statewide or regionally as determined by the Department;

e) Financial ability to maintain operations for the duration of the 2-year approval cycle;

f) Fingerprinting and level 2 background screening for all owners and managers; and

g) Employment of a medical director who is a physician licensed under chapter 458 or chapter 459, Florida Statutes, to supervise the DO's activities.

54. Those criteria are incorporated into the application form. Under the present stature of this case, Loop's is then required to prove, by a preponderance of evidence, that its application met or exceeded those criteria in ways that were, in the aggregate, superior to the competing applicants.

55. As set forth in the Findings of Fact above, Loop's did not provide comparative proof that its application satisfied those criteria better than Chestnut Hill or San Felasco such that its application should have been approved. While Loop's did prove definitively that it was approvable and had a very good proposal, that fact alone did not establish that it was better than the other two applicants at issue. Loop's stated correctly in its Proposed Recommended Order that, "other than uncorroborated hearsay, there is no evidence in the record that either San Felasco or Chestnut Hill [satisfied the various criteria for approval]." By the same token, there was no competent evidence to prove that those two applicants did not

satisfy the criteria, or that their proposals were qualitatively inferior to the Loop's application. It was Loop's duty to show how its application was superior to the other applicants. It was Loop's duty to present whatever evidence about San Felasco and Chestnut Hill was necessary to make that comparison. Loop's failed to do so.

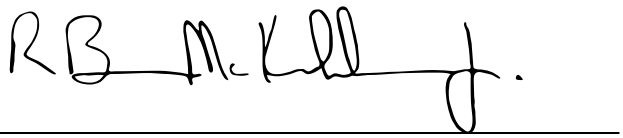
56. The 2016 Law refers to a "final determination from the Division of Administrative Hearings, the Department of Health, or a court of competent jurisdiction." Inasmuch as DOAH does not have final order authority in this matter, the recommendation below is not dispositive of the Loop's application until a final order is entered by the Department.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by Respondent, Department of Health, Office of Compassionate Use, finding that Petitioner, Loop's Nursery & Greenhouses, Inc., failed to prove by a preponderance of evidence that its application to become a distributing organization in the Northeast Region should have been approved, and therefore, denying Loop's application to become a dispensing organization in the Northeast Region.

DONE AND ENTERED this 7th day of October, 2016 in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 7th day of October, 2016.

ENDNOTES

[1/] This matter is unique in its stature at DOAH. Loop's is charged with proving, by comparative review, that its application was--at the time OCU made its decision--superior to the applications of Chestnut Hill and San Felasco. This case is akin to the comparative review done by an ALJ in certificate of need cases, but the facts here are limited to those existing at the time the applications were reviewed by OCU. However, neither of the competing applicants was involved in the final hearing (after being denied intervenor status) and all evidence concerning their applications was essentially uncorroborated hearsay. This fact significantly impaired Loop's ability to meet its burden of proof. Loop's might have remedied this problem by calling witnesses from the competing applicants, but that will never be known.

[2/] The Stanley brothers developed the low THC, high CDB strain of medical marijuana known as "Charlotte's Web." They have gained notoriety in the industry as pioneers and recognized experts in the cultivation of medical marijuana strains.

[3/] Note, however, Judge Van Landingham's well-reasoned conclusion to the contrary in Plants of Ruskin, Inc. v. Dep't. of Health, DOAH Case No. 15-7270, Order Granting Ruskin's Motion

in Limine, September 12, 2016. Judge Van Laningham concludes that an applicant that has not been in existence for over 30 years cannot satisfy the requirement, regardless of whether it holds a certificate from DACS.

[4/] The Department continues to suggest that an "abuse of discretion" standard should be applied to the instant case. That argument is again rejected. Besides, no evidence was presented at final hearing directed to whether OCU abused its discretion; the evidence addressed whether the Loop's application was superior to the competing applicants.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.