STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MCCRORY'S SUNNY HILL NURSERY, LLC,

Petitioner,

vs. Case No. 16-1934

DEPARTMENT OF HEALTH,

Respondent.
_____/

RECOMMENDED ORDER OF DISMISSAL

This case is before the undersigned on the motion to dismiss (Motion) by Respondent the Department of Health (Respondent or Department), filed on April 25, 2016. The Motion asserts that as a matter of law, Petitioner McCrory's Sunny Hill Nursery, LLC (Petitioner or McCrory's) is not entitled to the relief it seeks by its Petition for Formal Administrative Proceedings (Petition) that gave rise to this proceeding. McCrory's filed a written response and request for oral argument on May 2, 2016, and a notice of supplemental authority on May 3, 2016. A telephonic hearing was conducted on May 23, 2016, to hear argument on the Motion.

Having carefully considered the parties' filings and the arguments presented at hearing, the undersigned is persuaded that as a matter of law, McCrory's is not entitled to the relief it

seeks. Since the factual allegations in the Petition affirmatively demonstrate the legal insufficiency of Petitioner's claim, no amendment could cure this deficiency. Accordingly, the Motion should be granted with prejudice, and issuance of a Recommended Order of Dismissal is appropriate.

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PRELIMINARY STATEMENT

In 2015, pursuant to section 381.986, Florida Statutes (2014) (the Compassionate Use of Low-THC Cannabis Act), and implementing rules, McCrory's was one of several applicants seeking approval to become the single dispensing organization (DO) of low-THC cannabis in the central Florida region. The Department evaluated the central region applications, which were assigned scores pursuant to the Department's process set forth in its rules. The Department determined that another applicant, Knox Nursery, Inc. (Knox), achieved the highest aggregate score, and therefore, should be approved as the single DO for the

central region. Other central region applicants, including McCrory's, were notified that their applications were not approved because they did not achieve the highest aggregate score in the central region, and therefore, were not determined to be the best for that region. Several initially denied applicants, including McCrory's, timely filed petitions for administrative hearings to contest the Department's initial decisions to approve Knox's application and deny their applications.

The central region cases were assigned to the undersigned and were consolidated. The McCrory's petition (McCrory's I) was assigned DOAH Case No. 15-7275 and remains pending.

Before a final hearing was held in the consolidated central region cases, chapter 2016-123, Laws of Florida, was enacted and took effect immediately on becoming law, on March 25, 2016. The new law amended section 381.986, and also adopted provisions that did not amend the statute, but gave rise to the Petition filed by McCrory's at issue here (McCrory's II).

McCrory's filed its Petition with the Department on April 5, 2016. The Department referred the matter to the Division of Administrative Hearings (DOAH) on April 8, 2016, when it was assigned to the undersigned as a related case to DOAH Case No. 15-7275, and by Order issued on April 18, 2016, was consolidated with the other consolidated central region cases. By virtue of the recommendation made herein on the Motion, it is

appropriate to sever McCrory's II from the other consolidated central region cases that include McCrory's I.

FINDINGS OF FACT BASED ON PETITION

The material facts alleged in the Petition are accepted as true for purposes of ruling on the Motion and are summarized here:

1. The Department was directed by section 381.986 to authorize the establishment of five DOs statewide, one each in five different regions.

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 one of the five regional DOs.

3. The Department conducted its application review process pursuant to rule 64-4.002(5), which provides for three reviewers to independently review and score each application using a scorecard form that is incorporated by reference.

4. Pursuant to rule 64-4.002(5)(b), "[s]corecards from each reviewer will be combined to generate an aggregate score for each application. The Applicant with the highest aggregate score in each dispensing region shall be selected as the region's Dispensing Organization."

5. McCrory's timely submitted an application to become the DO in the central Florida region, as did a number of others, including Knox.

6. According to McCrory's, the scorecards completed by the Department's reviewers for the central region applications reveal "clearly erroneously assigned scores, and scores that were assigned in an arbitrary and capricious manner." (Petition at 4).

7. According to McCrory's, "[c]orrection of the clearly erroneous scoring errors would result in McCrory's being the highest scoring Applicant in the Central Region, and [the Department] would have been required to select McCrory's as the DO for the Central Region." (Petition at 4).

8. McCrory's seeks a formal evidentiary hearing to prove its allegations of scoring errors because by doing so, McCrory's contends it would thereby be entitled to be a central region DO by legislative decree.

9. The Petition is predicated on section 3, subsection (1) of the new law, which provides:

> 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, meets the requirements of and requests cultivation authorization pursuant to rule 64-4.005(2),

> 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. (emphasis added).

The Petition asserts that McCrory's would, if allowed to prove its allegations of scoring errors, achieve the status described in the emphasized language following the semi-colon.[1/]

10. The language McCrory's seeks to invoke identifies attributes of an applicant in a two-part description. The first part of the description is "any applicant that received the highest aggregate score through the department's evaluation process." The second part of the description is "[n]otwithstanding any prior determination by the department that

the applicant failed to meet the requirements of s. 381.986, Florida Statutes."

11. McCrory's has not alleged that it was an applicant that received the highest aggregate score through the Department's evaluation process, nor has McCrory's alleged that the Department previously determined that McCrory's failed to meet the requirements of section 381.986, Florida Statutes.

12. Instead, McCrory's admits by its allegations that it was not the applicant that received the highest aggregate score among the central region DO applicants, through the Department's evaluation process. McCrory's instead alleges that its application did not receive the highest aggregate score because of scoring errors characterized as clearly erroneous or arbitrary and capricious. McCrory's can only allege that correction of the scoring errors "would result in McCrory's being the highest scoring Applicant in the central region."[2/]

13. McCrory's also cannot allege that it meets the second part of the two-part description after the semi-colon. McCrory's acknowledges by its allegations that its application was denied because it did not receive the highest aggregate score in the central region, not because it did not satisfy one of the statutory requirements.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015).

15. The Department has moved to dismiss the Petition on the grounds that the factual allegations are legally insufficient for the relief requested.

16. In ruling on the Motion, consideration of factual matters has been limited to the four corners of the Petition, and the allegations are accepted as true. See St. Francis Parkside Lodge v. Dep't of Health & Rehab. Servs., 486 So. 2d 32, 34 (Fla. 1st DCA 1986).

17. As an applicant for DO approval in the central region whose application was initially denied by the Department, McCrory's was entitled to file a petition for an administrative hearing to contest the denial of its application. However, McCrory's already has pending in McCrory's I, DOAH Case No. 15-7275, its petition for an administrative hearing to contest the Department's denial of its DO application.

18. McCrory's II, the second McCrory's petition challenging the denial of the same DO application, seeks to take advantage of a legislative provision for more automatic DO approval than through litigation in which McCrory's will have the opportunity to try to prove that the McCrory's application should have been

approved instead of denied. However, the legislative provision that McCrory's is attempting to invoke does not fit. It requires a two-part status that McCrory's does not have and cannot claim.

19. Taken together, the two-part description of an applicant entitled to the legislatively mandated approval requires (1) an applicant that received the highest aggregate score in the Department's initial review and scoring process, but (2) was determined by the Department to not be entitled to approval, despite the applicant's highest aggregate score, because of a failure to meet one or more of the statutory requirements. The two parts of the description are linked grammatically, by virtue of the use of "any applicant" in the first part and "the applicant" in the second part to refer back to an applicant meeting the description in the first part.

20. The original 2014 law contemplated approval of five DOs by January 1, 2015. Instead, it was not until well after that date before the Department had established the process by which the five DOs would be approved (through rulemaking, challenges, more rulemaking, and more challenges); then the Department had to carry out the application submission and evaluation process; and then, once the Department made its decisions, those decisions had to be conveyed with the requisite "clear points of entry" to allow applicants to challenge the Department's decisions in de novo administrative hearings. Instead of seeds in the ground in

the beginning of 2015, the 2016 Legislature was confronted with the prospect of protracted administrative litigation before the five regional DOs would be finally approved.

21. Considered in this context, the point of section 3, subsection (1), of the new law seems clear: the Legislature wanted to accelerate what had become a long, drawn-out process, by legislatively approving the applicants selected by the Department as the best in each region, and setting them free from protracted litigation to go forth and start growing the product. The language before the semi-colon gives legislative approval to the initially approved applicants that had taken certain steps in reliance on that initial approval--Knox, in the central region. While generally, under the Department's rules, the initially approved applicant would be the applicant that received the highest aggregate score, the language after the semi-colon addresses the circumstance in which an applicant that received the highest aggregate score did not end up being the initially approved applicant, because of a determination by the Department that the highest-scoring applicant did not meet statutory requirements. In that instance, the highest-scoring applicant would have been disqualified, and the initially approved applicant would have been the next-highest scorer.

22. The Department asserts that the circumstance addressed by the language after the semi-colon applies to one region--the

northeast region--and one applicant--San Felasco Nurseries, Inc. (San Felasco). Indeed, the supplemental authority filed by McCrory's bears out the Department's contention. See San Felasco Nurseries Inc., et al., v. Dep't of Health, et al., DOAH Case Nos. 15-7268, 15-7274, and 15-7276, Order Granting Dismissal of Parties and Amendment of Remaining Petition, May 2, 2016 (filed by McCrory's as supplemental authority).[3/] The Order, issued by Administrative Law Judge Bruce McKibben, recites as undisputed background:

> Applications were submitted to the Department and, in November 2015, the Department issued its decision as to which of the applicants in the Northeast region should be approved. Based upon its review of the criteria, the Department assigned the following aggregate scores to those applicants: San Felasco--3.9750 points; Chestnut--3.7917 points; and Loop's--3.5708 points. However, due to the Department's determination that San Felasco's application did not "meet the requirements of s. 381.986 [Florida Statutes]," the Department initially approved the application of Chestnut.

Order at 2. By operation of section 3, subsection (1) of the new law, Judge McKibben determined that Chestnut's application was legislatively approved under the language before the semi-colon, and San Felasco's application was legislatively approved by the language after the semi-colon. Accordingly, Judge McKibben dismissed Chestnut's petition filed to support the Department's initial decision to approve its application, as well as San

Felasco's petition challenging the denial of its application, because those two petitioners had become finally approved DOs.

23. Prior to the 2016 legislative session, Judge McKibben presided over a hearing brought to contest the Department's prior determination that San Felasco's application had to be disqualified because one of the statutory requirements was not met. In particular, the Department had determined that Daniel Banks, identified in San Felasco's application as a prospective manager, had not passed his level 2 background screening. See § 381.986(5)(b)6., Fla. Stat. (2014) (requiring that a DO applicant demonstrate that "all owners and managers have been fingerprinted and have successfully passed a level 2 background screening pursuant to s. 435.04").

24. Prior to the passage of the bills that became the new law, Judge McKibben issued his Recommended Order in Banks v. Department of Health, DOAH Case No. 15-7267 (Fla. DOAH Feb. 26, 2016), in which he concluded that Daniel Banks did not commit a disqualifying event that would cause him to not pass his level 2 background screening. Judge McKibben recommended that the Department enter a final order determining that Mr. Banks did not have a disqualifying event in his level 2 background screening.[4/]

25. A legislature that was aware of the administrative proceedings involving DO applications (as may be presumed when interpreting statutes, and as is confirmed by reference to the

legislative history)[5/] could have been persuaded by the circumstances known at that time that San Felasco's application was wrongly disqualified, as had been determined by Judge McKibben. A legislature aware of Judge McKibben's Recommended Order could well have decided that while crafting law to legislatively approve the applicants initially approved by the Department, it should also legislatively approve San Felasco on the rationale that San Felasco would have been the initially approved applicant but for the erroneous disqualification.

26. San Felasco meets the two-part description after the semi-colon in section 3, subsection (1) of the new law. It is an applicant that received the highest aggregate score through the Department's evaluation process, but instead of being approved, was denied because of a prior determination by the Department that San Felasco did not meet one of the statutory requirements. McCrory's does not dispute that San Felasco meets both parts of the two-part description following the semi-colon.

27. On the face of the Petition, however, McCrory's has demonstrated that it was not (and could not allege that it was) the applicant that received the highest aggregate score through the Department's evaluation process. And McCrory's was not, and cannot allege that it was, the applicant that received the highest aggregate score in the central region, but that was

denied because of a prior Department determination that McCrory's failed to satisfy the statutory requirements.

28. McCrory's argues that it would be unreasonable to interpret "received the highest aggregate score" literally to require that the applicant invoking this provision be one that actually came out of the Department's evaluation process having received the highest aggregate score. McCrory's also argues that it would be unreasonable to interpret the second part of the two-part test as actually requiring a prior determination by the Department that the statutory requirements were not satisfied. But that is what the two-part description says. While McCrory's may wish the legislation had said something different, it is hardly unreasonable to conclude that the law means exactly what it says.

29. McCrory's argues that an applicant can satisfy the first part of the test--that it "received the highest aggregate score through the Department's evaluation process"--if the applicant alleges, and subsequently proves in an administrative hearing, that scoring errors were made by the Department's evaluators, and if those errors are corrected, then the applicant will become the applicant with the highest aggregate score. Such a reading of the statute not only distorts the language used by the Legislature, but it eviscerates any distinction between the clause conferring legislative approval on any applicant meeting

the two-part description that McCrory's seeks to invoke, and the alternative option in subsection (2), which McCrory's calls the "litigation option."

30. While section 3, subsection (1) provides for legislative approval of the initially approved applicants, plus any San-Felasco-like applicants that received the highest aggregate score but were disqualified, section 3, subsection (2) of the new law keeps alive the "litigation option" for denied applicants who have not yet had their hearings. Section 3, subsection (2) affords an avenue for a denied applicant to become an approved DO by proving that the applicant "was entitled" to be a DO under the statute and applicable rules. The whole point of the clause conferring legislative approval is that those qualifying under subsection (1) do not have to go the litigation route to prove that they should have received the highest aggregate score and would have received the highest aggregate score but for scoring errors.

31. McCrory's contends that its allegations of scoring errors are different, somehow. The undersigned understands the McCrory's argument to highlight how close its aggregate score was to the highest aggregate score achieved by Knox, and that in its view, the scoring errors that would make all the difference are very clearly erroneous and highly arbitrary and capricious. These are distinctions of degree that make no difference to the

viability of the McCrory's II claim. No matter how egregious McCrory's claims the scoring errors were, no matter how minute the correction that McCrory's contends it can prove should be made for it to leapfrog over Knox and become the highest aggregate scorer, the remedy available to McCrory's is the litigation option, not the automatic legislative approval option. The Petition's allegations that the Department's initial decision to deny McCrory's application was erroneous, arbitrary, capricious, and/or unreasonable, for reasons large or small, and that a proper evaluation of McCrory's application will result in a determination that its application was the one that should have been approved, are viable allegations to pursue the litigation option, but they are not viable to invoke automatic DO approval under subsection (1).

32. The so-called litigation option, in section 3, subsection (2) of the new law, provides in pertinent part:

> 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 subsection (1) shall both be dispensing organizations in the same region.

33. McCrory's has availed itself of the litigation option, which is pending as McCrory's I. That proceeding is the one in

which McCrory's has the opportunity to prove that it was entitled to be the central region's DO instead of Knox, because its application was the best for the region, not Knox's as the Department determined through its evaluation process.

34. Finally, McCrory's argues that DOAH should avoid an unconstitutional interpretation of the law. McCrory's argues that if the Department is correct that the portion of subsection (1) invoked by McCrory's applies to one applicant and one applicant only--San Felasco--then it would be an unconstitutional special law.

35. It is unnecessary to determine whether San Felasco is the only applicant that meets both parts of the two-part description following the semi-colon in subsection (1). It is only necessary to conclude that McCrory's does not, and cannot, meet either part of the two-part description it seeks to invoke in an effort to avail itself of automatic DO approval by legislative decree. That San Felasco does meet the two-part test as interpreted in accordance with its clear terms lends credence to the interpretation as a reasonable one. The McCrory's suggestion that the literal interpretation of this provision may prove to mean that the provision would not withstand constitutional scrutiny may be so, or may not be so, but in either event cannot transform the language chosen by the Legislature into different language that would fit McCrory's.

DOAH is neither a court nor the Legislature; just as DOAH lacks the authority to address the constitutional question McCrory's injects, so too DOAH lacks the authority to rewrite legislation.

36. Accepting the factual allegations in the Petition as true, McCrory's is not entitled to the automatic DO approval it seeks in this proceeding, and the Petition should be dismissed.

37. Since it conclusively appears from the face of the Petition that the legal insufficiency of McCrory's claim cannot be cured, the dismissal should be with prejudice. See § 120.569(2)(c), Fla. Stat. ("Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.").

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health enter a final order dismissing the Petition for Formal Administrative Proceedings filed by Petitioner McCrory's Sunny Hill Nurseries, LLC, with prejudice.

DONE AND ENTERED this 3rd day of June, 2016, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of June, 2016.

ENDNOTES

[1/] McCrory's does not contend that it is entitled to legislative approval as a DO approved by the Department, as described in the language preceding the semi-colon in subsection (1). In its response opposing the Motion, McCrory's acknowledges that the language preceding the semi-colon applies to Knox, which is the central region DO applicant that was initially approved by the Department, and now finally approved by legislative decree by virtue of the language before the semi-colon in subsection (1).

[2/] Instead, as McCrory's concedes in its response in opposition to the Motion, "The scoring error resulted in the Department erroneously awarding the highest score to Knox." Thus, the only applicant that received the highest aggregate score through the Department's evaluation process is Knox.

[3/] The Order filed by McCrory's as supplemental authority was subsequently amended, but only to clarify that jurisdiction was being relinquished to the Department on those petitions for which there was no longer a factual dispute for determination. See Amended Order Granting Dismissal of Parties, Relinquishing Jurisdiction, and Amendment of Remaining Petition, May 10, 2016.

[4/] By Final Order rendered May 2, 2016, after the new law was already in effect, the Department "invalidated and voided" its prior determination that Daniel Banks failed his level 2 background screening--the determination that caused San Felasco's application to be disqualified. The Department resolved the issue by different means than in the Recommended Order, by concluding that Mr. Banks was not a manager required to undergo background screening, but the result is the same: the Department's prior determination that San Felasco's application was disqualified no longer stands.

[5/] It is not necessary to rely on legislative history to interpret section 3, subsection (1) of the new law, because the language, at least insofar as relevant to resolving the issue presented in this case, is clear. The point made here is that the plain meaning makes sense when considered in context of the sequence of events since the original law was adopted. Nonetheless, if it were necessary to resort to legislative history, which has been filed in the consolidated cases including McCrory's I, and which has, until now, also included McCrory's II, the legislative history would further buttress the plain meaning of the new law as described herein.

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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.