STATE OF FLORIDA
DEPARTMENT OF HEALTH

LOOP'S NURSERY AND GREENHOUSES, INC.,

Petitioner,

vs.

DOH Case Nos. 2016-0107, 2016-0108
DOAH Case No. 16-2614

CHESTNUT HILL TREE FARM, LLC; SAN FELASCO NURSERIES, INC., d/b/a GRANDIFLORA; AND DEPARTMENT OF HEALTH, OFFICE OF COMPASSIONATE USE,

Respondents.
_____/

FINAL ORDER

THIS MATTER is before the Department of Health ("Department") for the consideration of a Recommended Order and entry of a Final Order. On June 23, 2016, Administrative Law Judge ("ALJ") R. Bruce McKibben issued a Recommended Order in this matter, attached as Exhibit A. Loop's Nursery and Greenhouses, Inc. ("Loop's") timely filed exceptions. Chestnut Hill Tree Farm, LLC ("Chestnut Hill"), San Felasco Nurseries, Inc., d/b/a Grandiflora ("San Felasco") and the Department filed responses. Upon review of the entire record, the Department makes the following findings and conclusions.

RULING ON EXCEPTIONS

Section 120.57(1)(k), Florida Statutes, directs that a final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or

paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

An agency may not reject or modify findings of fact in a recommended order 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. *See* section 120.57(1)(l), Florida Statutes.

An agency may reject or modify the conclusions of law over which the agency has substantive jurisdiction and interpretation of administrative rules over which the agency has substantive jurisdiction. *See* section 120.57(1)(l), Florida Statutes. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons and must make a finding that its substituted conclusion or interpretation is as or more reasonable than that which was rejected or modified. *See id.*

Ruling on Exception No. 1

Loop's takes exception to the statement in the second paragraph on page 4 of the Recommended Order, which states that "[t]he effect of the new law was to deem Chestnut's and San Felasco's applications to be a [dispensing organization] in the Northeast region approved without further opportunity to be challenged." Loop's asserts that this is an incorrect interpretation of chapter 2016-123, section 3, Laws of Florida, ("the new law"). Loop's argues that the Department must make factual determinations that an applicant meets the requirements set forth in the new law prior to granting an applicant approval to operate as a dispensing organization ("DO"), that approval pursuant to the new law is preliminary agency action that can be challenged in

an administrative hearing, and that Loop's substantial interests are affected because the approval of San Felasco's application may adversely affect Loop's ability to fairly compete for approval.

The sentence to which Loop's has taken exception is found in the ALJ's "Preliminary Statement," but is an interpretation of the new law and as such it is a conclusion of law. *See Nassau County. v. Willis,* 41 So. 3d 270, 278 (Fla. 1st DCA 2010) (noting that construction of statutes is a question of law). The label given a finding in a recommended order is not determinative. Rather, the true nature of the ALJ's finding controls. *See Pillsbury v. Dep't of Health and Rehabilitative Services*, 744 So. 2d 1040, 1041 (Fla. 2d DCA 1999). The Department has substantive jurisdiction over the new law, being the agency tasked with the approval and regulation of low-THC cannabis and medical cannabis DOs.

The new law sets out three ways an applicant can receive approval to operate as a DO. Two are in subsection (1), and one is in subsection (2). First, according to subsection (1), an applicant "*must* be granted cultivation authorization" and "*is* approved" to operate as a DO if it receives notice from the Department that it is approved as a region's dispensing organization, posts a $5 million performance bond, meets the requirements of and requests cultivation authorization, and expends at least $100,000 to fulfill its legal obligations. Under this provision, Chestnut Hill's approval to operate as a DO in the Northeast region became final.

Second, according to subsection (1) of the new law, an applicant who 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 section 381.986, Florida Statutes, must be granted cultivation

authorization and is approved to operate as a DO. San Felasco fell within this category and was granted approval to operate as a DO in the Northeast region.

The plain language in subsection (1) indicates that an organization "must" be granted cultivation authorization and "is approved to operate" as a DO if it falls into one of the two categories articulated therein. The ALJ's interpretation that the new law deemed Chestnut Hill and San Felasco's applications approved, with no further opportunity to be challenged, is reasonable and consistent with the Department's interpretation.

Loop's argues that the Department must make factual findings before an organization can be approved as a DO under subsection (1), specifically whether the applicant received notice from the Department that it was approved, posted the bond, met the requirements of and requested cultivation authorization, and expended $100,000. The new law, however, does not provide Loop's with standing to challenge whether the Department adequately made these factual findings. Loop's is not asserting that Loop's was the organization that received notice from the Department that it was approved or that Loop's was the organization that posted the bond in the Northeast region. Likewise, Loop's petitions do not aver that it received the highest aggregate score. Loop's did not meet the criteria in subsection (1) of the new law and cannot be approved as a DO under subsection (1).

Subsection (2) of the new law provides the third way an applicant can be approved, stating:

> 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.

In *Loop's Nursery & Greenhouses, Inc. v. Dep't of Health*, DOAH case no. 15-7274, Loop's is seeking approval as a DO, arguing that it is entitled to be a DO under section 381.986, Florida Statutes and the applicable rules. If Loop's prevails in that case, Loop's will be able to operate as a DO in the Northeast region under subsection (2) of the new law, along with Chestnut Hill and San Felasco.

As referenced by the ALJ in paragraphs 15 and 16 of the Recommended Order, Loop's cannot seek the same relief in the instant proceeding that Loop's is seeking in DOAH case no. 15-7274. The only remaining relief Loop's seeks in the instant matter is the revocation of the approvals granted to Chestnut Hill and San Felasco, relief that does not impact Loop's substantial interests. Revoking the approval granted to Chestnut Hill and San Felasco does not result in the approval of Loop's application to operate as a DO.

The ALJ's interpretation of chapter 2016-123, section 3, Laws of Florida, is well reasoned, consistent with the plain language of the law and consistent with the Department's interpretation.

Loop's exception no. 1 is rejected.

Ruling on Exception No. 2

Loop's takes exception to paragraph 6 and paragraph 8 in the Recommended Order under the heading "Findings of Fact From Loop's Petition." Loop's avers that the paragraphs are not drawn from Loop's petitions.

Paragraph 6 of the Recommended Order states:

> Chestnut's earlier preliminary approval to become a DO became final when the new law went into effect. On April 4, 2016, the Department further issued notice of its intent to approve San Felasco's pending application to serve as a DO in the Northeast region, 'pursuant to chapter

> 2016-123, § 3, Laws of Florida.' Both Chestnut and San Felasco were deemed approved, but would have to thereafter demonstrate compliance with criteria set forth in the new law.

Loop's takes exception to the ALJ's conclusion that Chestnut Hill and San Felasco were deemed approved. Loop's asserts that chapter 2016-123, section 3, Laws of Florida, does not state that Chestnut Hill and San Felasco must demonstrate compliance after approval, but that an applicant must demonstrate compliance prior to approval.

Despite being labeled a finding of fact derived from Loop's petitions, paragraph 6 of the Recommended Order is an interpretation of chapter 2016-123, section 3, Laws of Florida, and a conclusion of law. *See Willis,* 41 So. 3d at 278; *Pillsbury*, 744 So. 2d at 1041.

As stated under the Ruling on Exception No. 1, supra, the Department is in agreement with the ALJ, that the effect of chapter 2016-123, section 3, Laws of Florida, was to deem the applications of Chestnut Hill and San Felasco approved. The ALJ is also correct that the DOs "would have to thereafter demonstrate compliance with criteria set forth in the new law." Chapter 2016-123, section 1, Laws of Florida, amended section 381.986(6), Florida Statutes, directing that an approved DO "must at all times" maintain compliance with the criteria demonstrated for approval "and the criteria in this subsection." The additional criteria in section 381.986(6), Florida Statutes, includes requirements related to pesticide use, laboratory testing and security.

Loop's exception no. 2 is rejected as to paragraph 6 in the Recommended Order.

Loop's also takes exception to the findings of fact in paragraph 8 of the Recommended Order. Paragraph 8 states:

> Loop's has not asserted in its petitions in this case that it received the highest aggregate score when its application was comparatively reviewed with competing applications. It merely questions whether its application

satisfies all statutory and regulatory requirements for approval, pursuant to section 381.986(5)(b), and applicable rule criteria.

Loop's avers that the findings in paragraph 8 were not drawn from its petitions. Loop's states that its petitions seek to preserve Loop's entitlement, under section 381.986, Florida Statutes, to a comparative review against the applications filed by San Felasco and Chestnut Hill in a formal evidentiary proceeding.

Upon review of Loop's two petitions, there is competent substantial evidence to support that the ALJ's findings of fact in paragraph 8 are drawn from the petitions. The petitions indicate that Loop's filed an application that was comparatively reviewed with four other competing applications, including San Felasco and Chestnut Hill. The petitions do not allege that Loop's received the highest aggregate score. In the disputed facts section of each petition, Loop's questions whether its application satisfies the statutory and regulatory requirements for approval.

Loop's exception no. 2 is rejected as to paragraph 8 of the Recommended Order.

Ruling on Exception No. 3

Loop's takes exception to the conclusion of law in paragraph 15 in the Recommended Order, which concludes that "Loop's may not seek revocation of the approvals of Chestnut and/or San Felasco; their applications have already been deemed approved by Legislative action." Using the same rationale for rejecting Loop's exception no. 1, Loop's exception no. 3 is rejected. The ALJ's interpretation of chapter 2016-123, section 3, Laws of Florida, is correct and consistent with the Department's interpretation that the effect of the law was to deem San Felasco and Chestnut Hill's applications approved by Legislative action.

Loop's exception no. 3 is rejected.

Ruling on Exception No. 4

Loop's takes exception to the conclusion of law in paragraph 16 to the extent it incorporates the conclusion of law in paragraph 15. For the same reasons that the Department rejects Loop's exception no. 3, the Department rejects Loop's exception no. 4.

Ruling on Exception No. 5

Loop's takes exception to the conclusion of law in paragraph 16, alleging that it denies Loop's the opportunity to build an evidentiary record pertaining to the allegations in Loop's Amended Petition that chapter 2016-123, section 3, Laws of Florida, is unconstitutional. Paragraph 16 of the Recommended Order states:

> Accepting the factual allegations in the Loop's petitions filed in this matter as true, Loop's cannot obtain the relief it seeks, to wit: Revocation of the approvals granted Chestnut and San Felasco as DOs in the Northeast region. Since the legal insufficiency of the Loop's petitions cannot be cured, the dismissal of those petitions should be with prejudice.

Loop's does not articulate a legal basis for the premise that an administrative agency has jurisdiction to entertain a facial constitutional challenge to a law. Regardless, paragraph 16 of the Recommended Order does not address any constitutional issues, and the Department does not have substantive jurisdiction over constitutional law. The Department is in agreement with the ALJ's conclusion that Loop's cannot seek revocation of the approvals granted Chestnut Hill and San Felasco. In DOAH case no. 15-7274, Loop's has already been granted an evidentiary hearing concerning whether Loop's should be granted approval to operate as a DO in the Northeast region.

Loop's exception no. 5 is rejected.

FINDINGS OF FACT

1. The Findings of Fact set forth in the Recommended Order, attached as Exhibit A, are adopted and incorporated by reference in this Final Order.

CONCLUSIONS OF LAW

2. The Conclusions of Law set forth in the Recommended Order, attached as Exhibit A, are adopted and incorporated by reference in this Final Order.

ORDER

Based on the foregoing, the Recommendation of the Administrative Law Judge is adopted in this Final Order. The Petitions for Formal Administrative Hearing filed by Loop's Nursery and Greenhouses, Inc., are dismissed with prejudice.

DONE AND ORDERED in Tallahassee, Leon County, Florida this 20th day of September 2016.

Celeste Philip, MD, MPH
Surgeon General & Secretary

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY ADVERSELY AFFECTED BY THIS ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. A REVIEW PROCEEDING IS INITIATED BY FILING A NOTICE OF APPEAL WITH THE CLERK OF THE DEPARTMENT OF HEALTH AND A COPY ACCOMPANIED BY THE FILING FEE WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES OR IN THE FIRST DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE FILING DATE OF THIS ORDER.

Copies furnished to:

Counsel for Loop's

Jon C. Moyle, Esquire
Karen A. Putnal, Esquire
Robert A. Weiss, Esquire
The Moyle Law Firm, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
jmoyle@moylelaw.com
kputnal@moylelaw.com
rweiss@moylelaw.com

Counsel for San Felasco

Michael J. Glazer, Esquire
Dylan Rivers, Esquire
Ausley McMullen
123 S. Calhoun Street
P.O. Box 391
Tallahassee, Florida 32301
mglazer@ausley.com
drivers@ausley.com

J. Stephen Menton, Esquire
Rutledge, Ecenia & Purnell, P.A.
119 S. Monroe Street, Suite 202
Tallahassee, Florida 32301
smenton@rutledge-ecenia.com

James A. McKee, Esquire
Benjamin J. Grossman, Esquire
Foley & Lardner, LLP
106 E. College Avenue, Suite 900
Tallahassee, Florida 32301
jmckee@foley.com
bjgrossman@foley.com

Administrative Law Judge

R. Bruce McKibben
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

Counsel for Chestnut Hill

John Lockwood, Esquire
Thomas J. Morton, Esquire
Kala Shankle, Esquire
The Lockwood Law Firm
106 E. College Avenue, Suite 810
Tallahassee, Florida 32301
john@lockwoodlawfirm.com
tj@lockwoodlawfirm.com
kala@lockwoodlawfirm.com

Kelly Johnson, Esquire
Amy Schrader, Esquire
Baker Donelson
101 N. Monroe Street, Suite 925
Tallahassee, Florida 32301
kjohnson@bakerdonelson.com
aschrader@bakerdonelson.com

Counsel for the Department

W. Robert Vezina, III, Esquire
Eduardo S. Lombard, Esquire
Megan S. Reynolds, Esquire
Vezina, Lawrence & Piscitelli, P.A.
413 East Park Avenue
Tallahassee, Florida 32301
rvezina@vlplaw.com
elombard@vlplaw.com
mreynolds@vlplaw.com
rhodge@vlplaw.com

Nichole Geary, General Counsel
Florida Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399-1703
nichole.geary@flhealth.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been sent to the above named parties by email and regular U.S. mail or interoffice mail this 21st day of September 2016.

Shannon Revels

Agency Clerk
Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399-1703