STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LOUIS DEL FAVERO ORCHIDS, INC.,

Petitioner,

and

MECCA FARMS, INC.,

Intervenor,

vs. Case No. 18-2838RP

FLORIDA DEPARTMENT OF HEALTH,
OFFICE OF COMPASSIONATE USE,

Respondent.
_____/

FINAL ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on July 2, 2018, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings ("DOAH"). The parties were represented as set forth below.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether proposed Florida Administrative Code Rule 64-4.002 (the "Proposed Rule") is an invalid exercise of the legislative authority delegated to the Department of Health (the "Department").

PRELIMINARY STATEMENT

On May 1, 2018, the Department published the Proposed Rule in the Florida Administrative Registry, Volume 44, Number 85. A public hearing was held on the Proposed Rule on May 24, 2018. Petitioner, Louis Del Favero Orchids, Inc. ("Favero"), timely filed an administrative challenge to the Proposed Rule, resulting in the instant proceeding. Intervenor, Mecca Farms, Inc. ("Mecca"), intervened for the purpose of declaring the

Proposed Rule an invalid exercise of delegated legislative authority.

At the final hearing, Favero called two witnesses: David Vukelja; and Courtney Coppola, deputy director of the Office of Medical Marijuana Use (formerly known as the Office of Compassionate Use). Favero's Exhibits 2, 3, 5, 8, 9, 12, 13, and 19 were admitted into evidence. Mecca did not call any witnesses; its Exhibits 7 through 9 were admitted into evidence. The Department called one witness: Shannon Shepp, executive director for the Florida Department of Citrus. Department Exhibits 9 through 12 were admitted into evidence. Joint Exhibit 1 was also admitted into evidence.

A transcript of the final hearing was ordered; it was filed at DOAH on July 12, 2018. The parties agreed to submit proposed final orders (PFOs) within 10 days after the Transcript was filed, but were subsequently granted one additional day. Each party timely submitted a PFO, and each was duly considered in the preparation of this Final Order.

Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2017 version.

FINDINGS OF FACT

1. In order to better contextualize the facts presented at final hearing and discussed below, the following excerpts from

the Proposed Rule and the underlying statutory provision are provided:

> Section 381.986, Florida Statutes
>
> (8) Medical Marijuana Treatment Centers.-
>
> (a) The department shall license medical marijuana treatment centers to ensure reasonable statewide accessibility and availability as necessary for qualified patients registered in the medical marijuana use registry and who are issued a physician certification under this section.
>
> * * *
>
> 2. The department shall license as medical marijuana treatment centers 10 applicants that meet the requirements of this section, under the following parameters:
>
> a. [Previously denied applicants meeting certain requirements not relevant to the instant action.]
>
> b. [One applicant from a specific class pursuant to a federal lawsuit.]
>
> c. As soon as practicable, but not 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.
>
> **3. For up to two of the licenses issued under subparagraph 2., the department shall give preference to applicants that demonstrate in their applications that they own one or more facilities that are, or were, used for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses and will use or convert the**

facility or facilities for the processing of marijuana.

(Emphasis added).

Florida Administrative Code Rule 64-4.002 (Proposed)

(1)(f) For applicants seeking preference for registration as a medical marijuana treatment center pursuant to ss. 381.986(8)(a)3., F.S., the applicant must provide evidence that:

1. The property at issue currently is or was previously used for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses. In order to demonstrate the property meets this criteria, the applicant may provide documentation that the applicant currently holds or has held a registration certificate pursuant to section 601.40, F.S. A letter from the Department of Citrus certifying that the property currently is or was previously used for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses will be accepted as sufficient evidence.

2. The applicant as an individual holds, in his or her name, or the applicant as an entity holds, in the legal name of the entity, the deed to property meeting the criteria set forth in subparagraph 1. above; and

3. A brief explanation of how the property will be used for purposes of growing, processing, or dispensing medical marijuana if the applicant is selected for registration.

* * *

(6) Subject matter experts will substantively and comparatively review,

evaluate, and score applications using [the Scorecard incorporated by reference].

* * *

(a)7.(b) Scores for each section of the application will be combined to create an applicant's total score. The department will generate a final ranking of the applicants in order of highest to lowest scores . . . .

(c) In accordance with ss. 391.986(8)(a)3., F.S., the two highest scoring applicants that own one or more facilities that are, or were, used for the canning, concentrating, or otherwise processing of citrus fruit or citrus molasses and will use or convert the facility or facilities for the processing of medical marijuana will receive an additional 35 points to their respective total score.

(7) Licenses will be awarded, subject to availability as set forth in ss. 381.986(8)(a)2. and 381.986(8)(a)4., F.S., based on the highest total score in the following manner:

(a) The highest scoring applicant that is a recognized member of the *Pigford* or [the Black Farmers Discrimination Litigation] will receive a license.

(b) The remaining highest scoring applicants, after the addition of the preference points for applicants pursuant to paragraph (7)(c) above, will receive licenses up to the statutory cap set forth in ss. 381.986(8)(a)2., F.S.

(c) The remaining highest scoring applications, after removing any preference

> points received under paragraph (7)(c), will receive licenses up to the statutory cap . . . .

(Emphasis added).

2. The Department is an agency of the State of Florida charged with administering and enforcing laws related to the general health of the people of the state. § 381.0011(2), Fla. Stat. As part of this duty, the Department is charged with implementing the Compassionate Medical Cannabis Act of 2014. See § 381.986, Fla. Stat.

3. Favero is a Florida corporation in good standing since its incorporation in 1974, primarily engaged in the business of growing orchids. Favero aspires to file an application for licensure as a medical marijuana treatment center ("MMTC").

4. Following the passage of Senate Bill 8A by the 2017 Florida Legislature, which substantially rewrote section 318.986, Florida Statutes, Favero decided to seek the citrus preference described in section 381.986(3)(a)3. (hereinafter referred to as the "Preference Statute"). To that end, Favero purchased a citrus processing business in Safety Harbor, Florida, for approximately $775,000, including the business's real property and all facilities located thereon. The purchase took place prior to publication of the Proposed Rule.

5. The purchase of the Safety Harbor property reduced Favero's financial liquidity but, presumably, not its net worth as the value of the property would replace the cash expenditure made for the purchase. It is Favero's intent to convert the citrus processing facility located on the property into a medical marijuana processing facility if Favero receives the requisite license as a MMTC.

6. Favero contends, as stated in the following paragraphs of its Petition Challenging the Invalidity of Proposed Rule 64-4.002:

> 17. The Proposed Rule grants a preference to an applicant who owns "property" that was once used for citrus processing. The statute, however, clearly grants the preference only to applicants who "own one or more *facilities* that are, or were, used for the canning, concentrating, or otherwise processing . . . ."
>
> 18. By using the broader word "property" rather than "facility," the Department is granting the citrus preference to a broader group of applicants than the statute permits, such as owners of packinghouses and other properties that fail to meet the definition of "processor" or were not used for "canning" or "concentrating." The statute is clear and unambiguous.
>
> 19. The use of the word "property" rather than the statutory term "facilities" renders the rule invalid because the use of that term exceeds the Department's rulemaking authority, enlarges and modifies and contravenes the requirements of Section 381.986(8)(a)3., is vague, fails to establish adequate standards for agency

> decisions, vests unbridled discretion in the agency and is arbitrary and capricious. See § 120.52(8)., Fla. Stat.
>
> * * *
>
> 21. The Proposed Rule allows for a preference to only some applicants that own a citrus processing facility. Under the scoring system, applicants demonstrating that they own a citrus processing facility may receive an additional 35 points. However, the Proposed Rule does not guarantee that any applicant owning a citrus processing facility will actually receive those points or get a license.
>
> 22. The Proposed Rule merely grants an additional 35 points to two applicants. The Department of Citrus has indicated that more than a dozen companies will qualify for the citrus preference. Under the Proposed Rule, most of those applicants would receive no additional points despite qualifying for the statutory preference.
>
> 23. Additionally, the Proposed Rule provides no assurance that any applicant qualifying for the citrus preference will actually receive a license. The Form adopted by the Proposed Rule allows Department evaluators to award a maximum of 1,150 points in several categories. The additional 35 points available under the Proposed Rule amount to an addition of just a 3% bonus. If those extra 35 points are not enough to exceed the scores of other applicants, then no citrus-preference qualifying applicant will receive a license.

7. Favero contends that reduction of its liquid assets could have a negative impact on its overall financial condition when considered by the Department as it reviews Favero's MMTC

application. Favero is concerned that this negative impact may not be completely offset by the citrus preference it is seeking.

8. Mecca is a Florida corporation located at 7965 Lantana Road, Lantana, Florida. It has existed since November 15, 1973, has operated in Florida since the early 1970s, and began citrus farming on approximately 2,000 acres in 1983. Mecca has been and is currently licensed as a citrus dealer and a regulated citrus processing plant and citrus packinghouse. The "processing" done by Mecca does not involve canning or concentrating citrus. Mecca "processes" citrus in its "fresh fruit form" (discussed more fully below). Mecca intends to convert its property and facilities for the purpose of growing, processing or dispensing medical marijuana if its application for an MMTC license is approved. Mecca contends the citrus preference in the Proposed Rule needs further clarification. Mecca also asserts the evaluation and scoring system with respect to the citrus preference constitutes an invalid exercise of the Department's delegated legislative authority.

The Scoring System

9. The MMTC application has 16 separate sections. An applicant may be awarded up to 50 points on some sections, up to 100 points on other sections. The total number of points any application might receive is 1150, presuming a perfect score on each section. Each of the individual sections, whether

for 50 or 100 points, is graded in accordance with an evaluation rubric. The rubric contains five categories of scores which are used by reviewers, allowing for a range of points in each section. The five categories each have a range depending on whether the section allows 50 or 100 points. The rubric directs that a category 5 response could be awarded between 40 and 50 points in the 50-point sections, or between 80 and 100 points in a 100-point section. A category 4 response could get between 30 and 39 points (or 60 to 79 points); a category 3 could award 20 to 29 points (or 40 to 59 points); a category 2 could be worth 10 to 19 points (or 20 to 39 points); and a category 1 might award 0 to 9 points (or 0 to 19 points). Thus, an applicant may be awarded points anywhere within the range in each category for each section of the application.

10. By way of example, category 5 under the rubric (wherein a reviewer may give an application 40 to 50 or 80 to 100 points) directs the reviewer as follows:

> Applicant addressed all items. When necessary, each item has multiple, specific examples of experience and knowledge. Experience and knowledge are connected to specific, identifiable people in the application. Plans are clear, detailed, well documented, and thorough. All charts, photographs, maps, sketches, and other supplemental information are clear and legible. When necessary, applicant provides full documentation for representations of future performance. Responses related to financial reflect robust financial resources

> and clear lines of authority within the organizations.

11. By comparison, under Category 3, which could award 20 to 29 or 40 to 59 points, the rubric directs the reviewer to consider:

> Either:
>
> (1) Applicant responded to all items. Applicant responds to items addressing experience and knowledge, though answers tend to lack specificity. Plans are provided, but are lacking in clarity, documentation, or thoroughness. When necessary, some supplemental information is provided. Responses related to financials do not reflect robust financial resources, but do not raise doubts of applicant's financial viability, or the organization has unclear lines of authority, or;
>
> (2) Most responses are sufficient to be considered Category 4 or 5 Responses, but applicant fails to address some items.

12. Favero asserts that allowing a reviewer to award points from an allowable range gives unbridled discretion to the Department. The argument misses the point that the ranges in each category direct the reviewer on how to score, while allowing some leeway in determining which applications are slightly better or worse than their competitors. Depending on the strength or weakness of one applicant's response vis-à-vis another applicant, it is reasonable to assign more or fewer points in a comparative review. The rubric is quite descriptive

and allows for a nuanced review of responses by the Department reviewers.

The Preference

13. The Preference Statute asserts a preference "for up to two of the licenses issued," i.e., past tense. There are no licenses "issued" during the application review process, so the preference is actually assigned before licensure. The Preference Statute is somewhat confusing in this regard.

14. The Proposed Rule attempts to reconcile this discrepancy by assigning preference points as a part of the application review process, while still approving the most qualified applicants. That approach is reasonable and has merit; it allows the preference to be assigned but does not attempt to insert it into the actual licensure process. The Proposed Rule assigns the preference points at the end of the review, i.e., after an application receives its "total score." Thus, an applicant could conceivably be awarded 1185 points on the 0 to 1150 point scale.

15. Regardless of how the points are assigned, Favero contends that the 35 preference points are too insignificant as compared to a possible (perfect) score of 1150 during application review. That number of points (35) would be only about three percent of a perfect score. The lower the average scores of all applications, however, the more the 35 points

might come into play. If all applicants received an average score of 575 total points, the preference points would be twice as important as compared to perfect 1150 scores.

16. The assignment of the preference points only after totaling the scores is a legitimate and acceptable method. Taking the 16 sections of the application separately, 35 points assigned in any one section could be quite significant. In fact, the Department arrived at the 35 points by taking the average number of possible points per section, i.e., 72, and assigning approximately half of that amount to reach the 35-point preference. The preference points are not just an arbitrary number assigned by the Department.

17. Favero also objects that the Proposed Rule only assigns the 35 preference points to the two highest scoring, eligible applicants, i.e., those who will convert a citrus facility to process medical marijuana. If those two eligible applicants were more than 35 points below other, non-eligible applicants' scores, assignment of the preference points would not result in the approval of any eligible applicants.

18. The plain language in the Preference Statute and the Proposed Rule allows for a preference of "up to two" applicants. There is, therefore, no mandate that <u>any</u> applicants <u>must</u> receive the preference. While the Legislature can be presumed to have wanted preference points to be awarded (else why would the

Preference Statute exist?), the language of the statute merely limits the number of entities which could get such a preference.

19. The Department, interpreting a statute it is charged with implementing, interprets section 381.986(8)(a)3. to mean the issuance of available licenses to as many as two entities which are eligible for the preference. The Proposed Rule allows the Department to assess an applicant's entitlement to the preference, to assign the preference, and to meet its statutory obligation.

Property versus Facility

20. The Legislature clearly intended to give a preference to applicants who "own . . . facilities that are, or were, used for canning, concentrating, or otherwise processing of citrus . . . and will use or convert the . . . facilities for the processing of medical marijuana." The Legislature failed, however, to provide guidance by way of definitions.

21. While the Legislature chose the words "facility or facilities" in the Preference Statute, the Department complicated the issue by using the word "property" for the most part, but also using the words "facility" and "facilities" at times. Favero contends that a property is much broader in scope than a facility, and the Department therefore exceeded its delegated legislative authority. The Department argues that facilities used to process citrus must be located on some

property, obviously. But, facilities located on a property might be leased, so that the fee simple owner of the property is different from the leaseholder of that facility. Thus, if an applicant for a medical marijuana treatment center license wants to avail itself of the preference, it would need to own the facility. Whether that means the applicant must own the property on which the facility is located is not clear in the Preference Statute or in the Proposed Rule.

22. The Department argues that the way to show ownership of a facility is by way of a deed to the property on which the facility is located. In fact, Favero will use a warranty deed to prove ownership of the facilities it purchased in order to obtain the preference. But if Favero purchased land on which citrus had been grown but not processed, i.e., if there had been no facilities on the land to can, concentrate or otherwise process the fruit, except in fresh fruit form, the preference would not apply. And if an applicant obtained a leasehold interest in a facility, it would not be able to "show ownership" by way of a deed to the property.

23. The Preference Statute requires the applicant to convert the facility in order to gain the preference. It is unclear how a piece of unimproved property can be "converted" to another use; land is land. This begs the question of whether growing citrus on a piece of property, and then removing all the

citrus trees in order to grow medical marijuana, is a "conversion" of a facility as contemplated by the Legislature. Neither the Preference Statute nor the Proposed Rule contain any definitional assistance to answer that question.

24. An important question to be answered is whether the growing of citrus constitutes "processing" as alluded to by the Legislature. The Preference Statute provides no definition of the word. The Citrus Code (chapter 601, Florida Statutes) also does not define "processing," but does describe a "processor" of citrus as: '[A]ny person engaged within this state in the business of canning, concentrating, or otherwise processing citrus fruit for market other than for shipment in fresh fruit form." § 601.03(32), Fla. Stat. (Emphasis added).

25. Processing must therefore mean something other than merely growing citrus and packing it up for shipment. That being the case, a property where citrus is grown that is "converted" to a property growing marijuana would not afford an applicant a preference. There must be some "facility" that is or has been used to process citrus, i.e., doing something more with the raw product, in order to constitute "processing."

26. Therefore, a "packinghouse," i.e., "[a]ny building, structure, or place where citrus fruit is packed or otherwise prepared for market or shipment in fresh fruit form," would not be engaged in "processing" citrus. See § 601.03(29), Fla. Stat.

27. Mecca, which owns property where citrus was grown, picked, graded, sorted, polished, cleaned and packaged for transfer "in fresh fruit form," would not be a processor, either. Mecca owns a packinghouse only, not a processing facility as that term seems to be used by the Legislature. Its operations were not part of the "canning, concentrating, or otherwise processing citrus fruit other than for shipment in fresh fruit form."

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.56, 120.569, and 120.57(1), Florida Statutes (2018).

29. 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, Florida Statutes, 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)).

30. The party challenging a proposed agency rule has the burden of going forward. Then the agency has the burden to prove by a preponderance of evidence that the Proposed Rule is not an invalid exercise of delegated legislative authority as to the objections raised. § 120.56(2)(a), Fla. Stat.

31. A petitioner satisfies its burden of going forward by establishing a factual basis for its objections to the proposed rule. See St. Johns River Water Mgt. v. Consol.-Tomoka Land Co., 717 So. 2d 72, 76 (Fla. 1st DCA 1998)(superseded on other grounds by chapter 99-379, §§ 2, 3, Laws of Fla.). This burden requires Petitioner to offer more than mere conclusions or allegations that a rule is arbitrary or capricious or is an invalid exercise of delegated legislative authority in some other way. See Combs Oil Co. v. Dep't of Fin Servs., Div. of State Fire Marshall, Case No. 11-3627RP, FO at 14 (Fla. DOAH Mar. 9, 2012). The petitioner must meet its burden by offering competent, substantial evidence that would support the objections.

32. Favero met its burden of going forward, so the burden shifts to the agency, which must demonstrate by way of a preponderance of the evidence that the proposed rule is not invalid. § 120.56(2)(a), Fla. Stat. The Department must prove that despite Favero's objections, the rule nonetheless is not an

invalid exercise of delegated legislative authority. See section 120.52(8), which states:

> (8) "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have

> authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

33. In this case, Favero and Mecca expressed concerns with how the Proposed Rule implements section 381.986(8). The Department's interpretation of the statute it is charged with administering is entitled to great deference. Verizon Fla., Inc. v. Jacobs, 810 So. 2d 906, 908 (Fla. 2002); Bellsouth Telecomms., Inc. v. Johnson, 708 So. 2d 594, 596 (Fla. 1998). That deference is given notwithstanding whether other viable or reasonable interpretations exist. Atlantic Shores Resort v. 507 S. St. Corp., 937 So. 2d 1239, 1245 (Fla. 3d DCA 2006); Miles v. Fla. A & M Univ., 813 So. 2d 242, 245 (Fla. 1st DCA 2002). So long as the agency interprets the statute in a permissible way, that interpretation will prevail over other, even perhaps preferable, interpretations. Humhosco, Inc. v. Dep't of Health and Rehab. Servs., 476 So. 2d 258, 261 (Fla. 1st DCA 1985). So long as the agency's interpretation is within the range of permissible interpretations, it must stand (unless

clearly erroneous). Pan Am. World Airways, Inc. v. Fla. Pub. Serv. Comm'n., 427 So. 2d 716 (Fla. 1983).

34. In this instance, the Department interprets the statutory language concerning "facility or facilities" to include "property." It is impossible to reconcile that interpretation, especially in light of the fact the Legislature contemplated conversion of the facilities. The Department's interpretation is hereby rejected as being outside the range of permissible interpretations. See Cleveland v. Fla. Dep't of Child. & Fams., 868 So. 2d 1227 (Fla. 1st DCA 2004).

35. The test is whether the agency's proposed rule properly implements specific laws. See § 120.52(8)(f), Fla. Stat. The Preference Statute specifically provided a preferences for using or converting citrus facilities, not properties. The Proposed Rule does not implement that specific provision of the law.

36. As to the scoring system utilized by the Department in evaluating competing applicants, the Department proved that its scoring rubric was reasonably effective in making a determination as to competing applications. Though perhaps not the best possible method for scoring applications, it is an acceptable process.

37. In the instant matter, Favero proved, by a preponderance of evidence, that the Proposed Rule is an invalid

exercise of delegated legislative authority. The Department did not persuasively rebut that assertion. The Proposed Rule is therefore declared invalid.

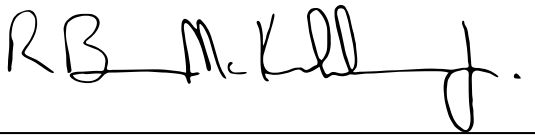
ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that:

Proposed Florida Administrative Code Rule 64-4.002 is an invalid exercise of delegated legislative authority.

Pursuant to section 120.595(2), Florida Statutes, jurisdiction is reserved in order to consider requests for attorney's fees and costs.

DONE AND ORDERED this 6th day of August, 2018, in Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.