STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL WEISSER,

Petitioner,

vs. Case No. 22-0032

MCCRORY' S SUNNY HILL NURSERY, LLC, D/B/A GROWHEALTHY AND FLORIDA DEPARTMENT OF HEALTH, OFFICE OF MEDICAL MARIJUANA USE,

Respondents,

and

GOTHAM GREEN PARTNERS, LLC; PARALLAX MASTER FUND, LP; PARALLAX VOLATILITY ADVISORS, L.P.; PARALLAX PARTNERS, LLC; SENVEST MASTER FUND, LP; AND SENVEST GLOBAL (KY), LP,

Intervenors.
_____/

RECOMMENDED ORDER OF DISMISSAL

On January 12, 2022, Gotham Green Partners, LLC; Parallax Master Fund, LP, Parallax Volatility Advisors, L.P., and Parallax Partners, LLC (collectively, Parallax); and Senvest Master Fund, LP, and Senvest Global (KY), LP (collectively, Senvest) (in their entirety, Intervenors), moved to dismiss this proceeding for lack of standing. Petitioner filed a response in opposition to the Motion to Dismiss on January 19, 2022. Neither Respondent has filed a response indicating agreement with, or objection to, the Motion.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether, as alleged in the Amended Petition for Formal Administrative Hearing (Amended Petition), Petitioner meets the requirements for standing in this proceeding.

PRELIMINARY STATEMENT

On November 6, 2020, Respondent, McCrory's Sunny Hill Nursery, LLC, d/b/a GrowHealthy (GrowHealthy), submitted a variance request to the Department of Health (DOH or Department), seeking a variance pursuant to section 381.986, Florida Statutes, and approval of a change in its ownership. After several requests for additional information, on October 29, 2021, the Department advised GrowHealthy that its variance was approved. Petitioner filed a Petition challenging the approval of the variance, and on December 6, 2021, the Department issued an Order to Show Cause directing Petitioner to file a response to the Order or to file an amended Petition on or before December 17, 2021. Petitioner filed its Amended Petition on December 17, 2021, as required by the Department's Order.

Intervenors each filed Notices of Intervention and Appearance on December 17, 2021, and on January 4, 2022, the Department forwarded the Amended Petition as well as the Notices of Intervention and Appearance to the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge.

On January 6, 2022, Petitioner filed a Motion to Strike Notices of Intervention and Appearance, arguing that Intervenors cannot rely on Florida Administrative Code Rule 28-106.205(3) to participate in the proceedings because the Amended Petition does not specifically name any of the investment entities as parties whose substantial interests are to be determined. Intervenors responded on January 13, 2022, noting that the rule states "specifically-named persons, whose substantial interests are being determined in the proceeding, may become a party." The Motion to Strike was denied by Order dated January 14, 2022.

The Amended Petition named Petitioner in his individual capacity and as "designated representative for more than 100 shareholders holding more than 7,500,000 shares." Neither the Amended Petition nor the Notice of Agency Referral were served on GrowHealthy or its counsel, and in the Joint Response to Initial Order, counsel for the Department indicated that it had not received any response from Respondent and was not sure that GrowHealthy intended to participate. On January 12, 2022, an Order was issued which stated in part:

> The Joint Response to the Initial Order indicates that it is unclear that GrowHealthy intends to participate in this proceeding. However, that answer might be different if GrowHealthy was actually served with the Amended Petition.
>
> In addition, the Amended Petition lists Petitioner as bringing this action "individually and as designated representative for more than 100 shareholders holding more than 7,500,000 shares," which seems more like a class action suit than a challenge to a variance. The Amended Petition does not allege the vehicle by which Petitioner is authorized to represent the interests of these unnamed shareholders, or the statutory authority in the Administrative Procedure Act to represent other petitioners in this manner.

Petitioner was directed to serve GrowHealthy with the Amended Petition, which he did, and to provide authority for appearing as a designated representative for other unnamed Petitioners. On January 18, 2022, Petitioner responded to the January 12, 2022, Order, indicating that he would proceed in his individual capacity. Because Petitioner is no longer seeking to represent other, unnamed Petitioners, Intervenors arguments regarding his ability to do so are moot and will not be addressed in this Order.

On January 12, 2022, Intervenors filed a Joint Motion to Dismiss in which they asserted that Petitioner does not have standing to bring this challenge to the Department's issuance of a variance to GrowHealthy. Petitioner filed its response on January 19, 2022.

FINDINGS OF FACT

For the purposes of analyzing a motion to dismiss, the undersigned may only consider the four corners of the Amended Petition. *Altee v. Duval Cnty. Sch. Bd.*, 990 So. 2d 1124, 1129 (Fla. 1st DCA 2008); *Mid-Chattahoochee River Users v. Dep't of Env't Reg.,* 948 So. 2d 794, 796 (Fla. 1st DCA 2007). The facts listed below are allegations listed in the Amended Petition that provide background and information with respect to Petitioner's standing. The undersigned has not considered any additional factual allegations contained in Intervenors' Joint Motion to Dismiss.

1. Petitioner, Michael Weisser, is a Florida resident and current shareholder of iAnthus Capital Holdings, Inc. (iAnthus), which is GrowHealthy's parent corporation.

2. Respondent, McCrory's Sunny Hill Nursery, LLC, d/b/a GrowHealthy, was initially licensed by the Department as a Low-THC Dispensing Organization pursuant to section 381.986, Florida Statutes (2014), and is now a licensed Medical Marijuana Treatment Center (MMTC) pursuant to

section 381.986, Florida Statutes (2017). As an MMTC, GrowHealthy is subject to the requirements of section 381.986 and is regulated by DOH.

3. On November 6, 2020, GrowHealthy submitted a variance request to the Department seeking approval of a change to its original ownership organizational structure. More specifically, GrowHealthy sought approval of a change in ownership for purposes of facilitating a recapitalization transaction of GrowHealthy's ultimate parent company, iAnthus. The proposed ownership change is part of a complex effort to restructure the relationship between the shareholders and iAnthus' lenders pursuant to a Restructuring Support Agreement (RSA) between iAnthus and certain of its lenders. The requested variance would enable the lenders to become equity holders of 97.25 percent or greater of iAnthus *and thereby diluting existing shareholders' equity to 2.75 percent of the company.*[1] The approval of the variance would result in a dramatic dilution of the position of existing shareholders, including Weisser.[2]

4. Counsel for existing shareholders of iAnthus (including Petitioner) expressed their concerns in correspondence to the Department on five different occasions from June 29, 2021, through September 28, 2021, stating that the proposed ownership change would unlawfully enable the lenders to acquire ownership interests in more than one Florida MMTC in direct violation of section 381.986(8)(e).

5. Petitioner believes and alleges that the approval of the variance by the Department on October 29, 2021, would effectively result in approval of dual ownership by certain of the lenders in iAnthus, GrowHealthy's parent entity,

[1] The Amended Petition does not allege what percentage of iAnthus' equity Petitioner currently holds, only that the change would be a "dramatic dilution" of his current, unspecified, share.

[2] The Amended Petition actually states "including Weisser and those he represents." Given that Petitioner no longer seeks to represent any other shareholders, any reference to these other unnamed persons is deleted throughout, and Petitioner's standing is evaluated based on his individual participation.

and other Florida licensed MMTCs in direct contravention of section 381.986(8)(e)2.

6. Petitioner currently owns 2.5 million shares of iAnthus. Petitioner alleges that his substantial interests will be adversely affected if the Department's approval of the variance stands. The current shareholders of iAnthus presently own 100 percent of the company. If the variance is approved, almost 100 percent ownership of iAnthus will be transferred away from the shareholders to the lenders listed in the variance request. The lending groups would end up owning 97.25 percent of iAnthus leaving the shareholders with only 2.75 percent of the ownership, thus severely diluting the value of their shares in favor of the lending groups. Petitioner alleges that the Department's approval of the variance would result in the current shareholders losing hundreds of millions of dollars in value for their interest in iAnthus and could impact the ability of GrowHealthy to expand its business in Florida and timely provide quality products to patients in need.

7. Petitioner alleges that he falls within the zone of interests protected by section 381.986, because his injuries fall within the purpose and intent of section 381.086. He alleged that the statute seeks to protect against common or dual ownership among MMTCs in order to ensure continued access to a variety of medical marijuana products at a competitive price and to provide access to safe, quality medicine while ensuring independence among the licensed MMTCs and protecting the value of the companies so that they can provide quality medical marijuana products.

CONCLUSIONS OF LAW

8. DOAH has jurisdiction over the parties to and the subject matter of these proceedings pursuant to sections 120.569 and 120.57(1), Florida Statutes.

9. In their Joint Motion to Dismiss, Intervenors contend that there is no basis for the proposition that a shareholder of a parent company has standing

to challenge an agency's regulatory action taken at the request of the parent company's subsidiary, and that, based on the allegations in the Amended Petition, Petitioner does not satisfy either prong of the standing test enunciated in *Agrico Chemical Co. v. Department of Environmental Protection*, 406 So. 2d 478 (Fla. 2d DCA 1981).

10. As a preliminary matter, Petitioner responds that Intervenors do not have the right to challenge his standing because of their status as intervenors. Petitioner states that an intervenor takes a case as it finds it and may not raise new issues or challenge the sufficiency of the pleadings by filing a motion to dismiss. Petitioner relies on *Environmental Confederation of Southwest Florida, Inc. v. IMC Phosphates,* 857 So. 2d 207 (Fla. 1st DCA 2003) (citing *Hoechst Celanese Corp. v. Fry*, 693 So. 2d 1003 (Fla. 3d DCA 1997) and *Bay Park Towers Condominium Ass'n v. H.J. Ross & Assoc.*, 503 So. 2d 1333 (Fla. 3d DCA 1987)), and *State Trust Realty, LLC v. Deutsche Bank Trust Co. Americas*, 207 So. 3d 923, 925-26 (Fla. 4th DCA 2016).

11. All four of these cases rely on Florida Rule of Civil Procedure 1.230, which provides:

> Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless ordered by the court in its discretion.

12. However, other than rules regarding discovery identified in section 120.569, the Florida Rules of Civil Procedure provide only persuasive authority and are not directly applicable to administrative proceedings. Moreover, the Uniform Rules of Procedure contain a rule governing intervention that is significantly different than rule 1.230, and it provides as follows:

> 28-106.205 Intervention.
> (1) Persons other than the original parties to a pending proceeding whose substantial interest will

be affected by the proceeding *and who desire to become parties* may move the presiding officer for leave to intervene. Except for good cause shown, motions for leave to intervene must be filed at least 20 days before the final hearing unless otherwise provided by law. The parties may, within 7 days of service of the motion, file a response in opposition. The presiding officer may impose terms and conditions on the intervenor to limit prejudice to other parties.

(2) The motion to intervene shall contain the following information:

(a) The name, address, e-mail address, telephone number, and any facsimile number of the intervenor, if the intervenor is not represented by an attorney or qualified representative; and

(b) The name, address, e-mail address, telephone number, and any facsimile number of the intervenor's attorney or qualified representative; and

(c) Allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to agency rule, or that the substantial interests of the intervenor are subject to determination or will be affected by the proceeding; and

(d) A statement as to whether the intervenor supports or opposes the preliminary agency action; and

(e) The statement required by subsection 28-106.204(3); and

(f) The signature of the intervenor or intervenor's attorney or qualified representative; and

(g) The date.

(3) *Specifically-named persons*, whose substantial interests are being determined in the proceeding, may become a *party* by entering an appearance and need not request leave to intervene.

> Rulemaking Authority 14.202, 120.54(5) FS. Law Implemented 120.54(5) FS. History–New 4-1-97, Amended 1-15-07, 2-5-13. (emphasis added) [3]

13. Rule 28-106.205 is consistent with section 120.52(13), which provides in pertinent part:

> (13) "Party" means:
>
> (a) Specifically named persons whose substantial interests are being determined in the proceeding.
>
> (b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.
>
> (c) Any other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding as a party. An agency may by rule authorize limited forms of participation in agency proceedings for persons who are not eligible to become parties.
>
> (d) Any county representative, agency, department, or unit funded and authorized by state statute or county ordinance to represent the interests of the consumers of a county, when the proceeding involves the substantial interests of a significant number of residents of the county and the board of county commissioners has, by resolution, authorized the representative, agency, department, or unit to represent the class of interested persons. The authorizing resolution shall apply to a specific proceeding and to appeals and ancillary proceedings thereto, and it shall not be

[3] It is noted that *Environmental Coalition of Southwest Florida* is an administrative proceeding under the Administrative Procedure Act, and it relies squarely on rule 1.230 for part of its reasoning. However, the current version of Florida Administrative Code Rule 28-106.205, which significantly broadens intervenor status in administrative proceedings, did not become effective until 2013, well after *Environmental Coalition of Southwest Florida* was decided.

> required to state the names of the persons whose interests are to be represented.

14. Intervenors are specifically mentioned in the Amended Petition. *See* paragraphs 14-17, 28-33, 35-41, 43-44, 66-70, 73-76, 83-84, 86, and the unnumbered paragraph in the Reservation to Amend. References to them are not incidental, but central to the Amended Petition. Given that the nature of Intervenors' proposed interest in iAnthus is at the heart of Petitioner's complaint, it cannot be said that their substantial interests are not affected by the proposed agency action or the outcome of this proceeding.

15. Under these circumstances, Intervenors are permitted to raise the issue of Petitioner's standing.

16. Moreover, in administrative proceedings, standing is a jurisdictional issue. In *Abbott Laboratories v. Mylan Pharmaceuticals, Inc.,* 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2003), the First District dealt with whether Abbott Laboratories had standing to appeal a final order in a rule challenge. The First District found that Abbott did have standing, but stated:

> Mylan admits that standing was not raised as an issue by either party in the proceeding below. Interestingly, as pointed out by Abbott, Mylan did not challenge Abbott's standing below, because Mylan's standing to initiate this rule challenge proceeding was also based on its financial interests. Nevertheless, Mylan asks this court to deny Abbott standing to bring this appeal on the ground that Abbott's only interest in the proceeding is financial and to overlook that both parties based their standing below on their financial interests at stake in the implementation of the generic substitution law. As recognized by this court in *Grand Dunes Ltd. v. Walton County*, 714 So. 2d 473, 475 (Fla. 1st DCA 1998), standing in the administrative context is a matter of subject matter jurisdiction and cannot be conferred by consent of the parties. Thus, if indeed economic interest was not sufficient to grant these parties the necessary standing to participate in the rule challenge proceeding below,

> the ALJ *would have lacked jurisdiction to rule on the merits* of the rule challenge and her order would have been a nullity. (emphasis added)

17. "It is a cornerstone of administrative law that administrative bodies or commissions, unless specifically created within the constitution, are creatures of statute and derive only the power specified therein." *Grove Isle, Ltd. v. Dep't of Env't Reg.,* 454 So. 2d 571, 573 (Fla. 1st DCA 1984). DOAH is clearly a statutorily-created entity and must confine its decision-making to the parameters defined by the Legislature. *S.T. v. Sch. Bd. of Seminole Cnty.*, 783 So. 2d 1231, 1233 (Fla. 5th DCA 2001) (DOAH has no common law powers and has only such powers as the legislature chooses to confer on it by statute.). Given that the legislature has only permitted hearings to challenge agency action where a party's substantial interests are affected, Petitioner's standing must be determined before this case can proceed.

18. The polestar for determining standing in administrative proceedings is the test established in *Agrico Chemical Co. v. Department of Environmental Protection*, supra. In *Agrico*, Agrico Chemical Company sought permits for solid Sulphur-handling facilities. Two of Agrico's competitors filed objections to the issuance of permits to Agrico, and with respect to the air permit sought, the then-hearing officer granted standing to the competitors for three reasons: 1) the competitors' substantial interests were affected because of the adverse economic impact the issuance of the permit would cause; 2) the Agency's forwarding of the petitions to DOAH allowed the competitors to intervene pursuant to the definition of "party" in section 120.52(10)(c); and 3) the LRACT rule (Florida Administrative Code Rule 17-2.03) entitled them to participate as parties pursuant to section 120.52(1)(b). The Department rejected the first two grounds for standing in its Final Order but adopted the recommended disposition of denying the permit.

19. The Second District held that the Department erred in granting standing to the competitors and allowing them, as economic competitors, to

participate in Agrico's permitting process, and in doing so, established the test for evaluating standing that is regarded as the benchmark in administrative proceedings. The court stated:

> We believe that before one can be considered to have a substantial interest in the outcome of a proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. While petitioners in the instant case were able to show a high degree of potential economic injury, they were wholly unable to show that the nature of the injury was one under the protection of chapter 403.

406 So. 2d at 482. The competitors argued that the language in rule 17-2.03(1)(a), which directed the Department to consider "the social and economic impact of the application of technology" when issuing a permit, was broad enough to include consideration of the economic impact on a business entity when a competitor is first on the market with a less expensive product, which was the case with *Agrico*. The court rejected this argument, stating that the cited provision in the rule is a

> cost/benefit test; cost to the affected business as opposed to the benefit to environmental interests served by the new technology. The provision does not require DER to balance the cost of new technology to the affected business against possible economic losses to a business competitor. Thus, the LRACT Rule is not a "provision of agency regulation" which allows a competitor to object, solely on the basis of potential competitive economic injury, to the issuance of a permit under chapter 403.

406 So. 2d at 482-83.

20. *Agrico* remains the standard by which standing issues are measured, and both Petitioner and the Intervenors have cited cases that rely on the *Agrico* test to support their arguments in this case. Intervenors argue that a shareholder does not have standing to challenge the regulatory actions taken at the request of a subsidiary of the entity in which Petitioner is a shareholder and asserts that Petitioner does not satisfy either prong of the *Agrico* test. They contend that the only injury that he specifically alleges is the dilution of his equity holdings and diminished value, and that this injury flows not from the granting of the variance, but from the decision by iAnthus to enter into the restructuring agreement. Intervenors claim that Petitioner's injury will occur regardless of the corporate makeup of the additional equity owners contemplated by the restructuring agreement.

21. Intervenors cite to several cases in support of their position that Petitioner does not have standing to bring this proceeding. The first is *Village Park Mobile Home Association v. Department of Business Regulation*, 506 So. 2d 426 (Fla. 1st DCA 1987), a case in which a mobile home park owner provided a proposed prospectus to the Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes (Division) for review and approval, as was required by section 723.011, Florida Statutes. The Division approved the prospectus, and the association and individual residents within the park filed a petition to initiate formal proceedings. They argued that the Division should not have approved the proposed prospectus because its terms greatly increased the cost of residence in the park; substantially reduced the services previously provided by the park owner; and modified the terms under which they had previously resided in the park. The Department of Business Regulation denied the petition to initiate formal proceedings, stating that neither the Act nor the rules adopted thereto contemplated homeowners' participation in the prospectus approval process, and the petition failed to state that their substantial interests had been determined by the agency in the review process. Since specific statutory

remedies were available with respect to rent increases or decreases in services when actually threatened, the petitioners needed to pursue those remedies as opposed to participation in the prospectus review process.

22. On appeal, the First District agreed with the Division that the mobile home owners and their association were not entitled to participate in the prospectus review process. The Court noted that the prospectus was a disclosure document which has elements required by statute and must be offered by the park owner in the rental of mobile home lots. The purpose of the prospectus was to disclose to prospective lessees information regarding the future operation of the park. It was given only to prospective lessees and to tenants upon renewal of an existing rental agreement. A separate statutory provision contained a notice requirement and separate remedies for lot rental increases, reductions in services, and changes in rules or regulations.

23. Based on this framework, the court stated that the legislature contemplated exclusive participation in the prospectus review process by park owners, and the petitioners failed to establish that the prospectus review affected their substantial interests. The court found petitioners' concerns to be speculative, inasmuch as there were no allegations that mobile homes had been offered for sale, sold, or could not be sold as a result of the provisions in the prospectus. It also found that the alleged injury was not the type of injury the prospectus review process was designed to protect, and that participation by the mobile home owners would do nothing to prevent the perceived injury. On rehearing, the court added:

> All of this indicates that the *approval* of the prospectus does not automatically result in the increase of rents, reduction in services, or changes in park rules or regulations. Rather, it is the *implementation* of the provisions of the prospectus by the park owner which may result in a rent increase, reduction in services, or a change in park rules. Thus, in the event that any harm is suffered,

> it will result from the *implementation* of the provisions contained in the prospectus and not from agency approval of the prospectus.

506 So. 2d at 434.

24. In *Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund,* 595 So. 2d 186 (Fla. 1st DCA 1992), property purchased pursuant to the Conservation and Recreation Lands (CARL) statute was originally used as a botanical site by the Department of Natural Resources, Division of Recreation and Parks. The Trustees decided to lease a portion of the site for use as a juvenile detention facility, and Friends of the Everglades filed a petition to challenge the change in use. They alleged that use as a juvenile detention facility was contrary to the statutory requirements of the CARL program that the land be used for public recreation and conservation.

25. Friends of the Everglades based its standing on two things: their substantial lobbying efforts in the acquisition of the site for purchase, and the loss of use of the recreational facilities by its members. The court rejected the lobbying efforts as a basis for standing, saying that while commendable, those efforts did not equate to an injury supporting standing. It found however, that using the site as a juvenile facility would immediately preclude use as a recreation area, as well as cause environmental damage to the proposed site. The court found that these assertions, if found to be true, were the type of injury that the CARL statute was designed to protect, and established petitioner's standing.

26. Intervenors also cited *Advance Barricades & Signing, Inc. v. Department of Transportation,* 632 So. 2d 704 (Fla. 1st DCA 1994). Advance Barricades was a disadvantaged business enterprise and a subcontractor on a project awarded to the Hardaway Company by the Department of Transportation (DOT). Hardaway terminated Advance Barricades and sought approval from DOT to substitute another subcontractor, pursuant to the

requirements of Florida Administrative Code Rule 14-78.003. Advance Barricades sought a hearing to have DOT rescind its approval, and DOT denied its request for hearing. On appeal, the First District affirmed the denial, stating in part:

> The question in this case is simply whether [the applicable rule] confers on the DOT any authority, or imposes on DOT any obligation, to withhold approval of a substitution if the prime contractor has no "valid grounds for the removal." We agree with the position of DOT that this approval is merely a ministerial act so long as the new subcontractor is on the list of certified DBEs, and that all the prime contractor must prove to DOT if the new subcontractor is not a DBE is a good faith effort to subcontract with another DBE. The language in the rule regarding removal of DBE subcontractors for failure to perform has no force and effect with regard to the duties and obligations of DOT. … Advance Barricades does not seek to prove that the DOT acted "fraudulently, arbitrarily, illegally, or dishonestly," rather, Advanced Barricades wants a hearing to prove to the DOT that Hardaway acted "fraudulently, arbitrarily, illegally, or dishonestly" in its request to DOT for approval of substitution of DBE subcontractors. Advance Barricades does not have standing to request such a hearing because there is no statute or rule under which DOT is empowered or obligated to protect DBE subcontractors from wrongful termination by prime contractors. *See Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981).

632 So. 2d at 705-06.

27. Intervenors rely on *Mid-Chattahoochee River Users* for the premise that standing is not demonstrated where the injuries alleged are not related to the issues resolved in the intended agency action. In *Mid-Chattahoochee River Users,* the Department of Environmental Protection (DEP) denied a permit application filed by the U.S. Army Corps of Engineers to use sovereign

lands to maintenance-dredge the Apalachicola River navigation channel. The permit application was denied because of DEP's concerns about adverse environmental impacts caused by prior permitted activities. The Mid-Chattahoochee River Users (River Users) petitioned for a hearing on the permit denial, contending that if the permit was not issued, its members would suffer immediate harm from the inability to navigate down the river, requiring them to use other, more expensive routes to ship large pieces of industrial equipment. DEP addressed its jurisdiction to consider the River Users' amended petition and stated that with respect to standing, River Users' members' economic injury was not within the zone of interest to be protected under the pertinent regulatory scheme.

28. On appellate review, the First District cited to the *Agrico* test, and stated that "[t]he intent of *Agrico* was to preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings." *Id*. at 797. The court focused on the second prong of the *Agrico* test, and examined the statutory criteria DEP was to consider when a proposed activity is on, in, or over surface waters. Economic injury was not among the factors identified. The First District concluded the River Users did not have standing and stated:

> Here, there is no question that any harm suffered by appellant's members as a result of the notice of denial would be economic in nature. Appellant essentially acknowledges such when it argues that if the notice of denial is not reversed, a substantial number of its members will be adversely affected because the Apalachicola River "will not longer be a reliable avenue for commercial navigation to the Gulf of Mexico." Unlike the situation in *Ybor III, Ltd.* [v. Florida Housing Finance Corporation, 843 So. 2d 344, 345 (Fla. 1st DCA 2003)], where the harm suffered by the appellant was of the type that the proceeding at issue was designed to protect, any economic injury suffered by appellant's

> members as a result of the notice of denial is not of the type that chapter 373's permitting process was designed to protect.

948 So. 2d at 799.

29. Finally, Intervenors cite the Final Order in *Leonard v. Department of Banking and Finance and Sunniland Bank*, Case No. 96-3805 (Fla. DOAH Apr. 11, 1997) for the premise that a shareholder does not have standing to challenge regulatory actions. In *Leonard*, the Department of Banking and Finance notified Sunniland Bank that the Department had conducted its investigation of the bank's director and did not intend to disapprove him as director of the bank. Leonard filed a petition challenging the Department's decision, stating that she had standing based on her 46 percent interest in the bank's outstanding common shares, and as a depositor of the bank. The administrative law judge found that she did not have standing, saying that while she did have an interest in protecting her funds in the bank and the value of her stock, it was a matter of "conjecture and speculation, however, that Petitioner will suffer any loss of her deposit monies or decrease in the value of her stock as a result of the Department's failure to disapprove McLaughlin as a director of the bank." *Id*. at 13-14. Most importantly, the Order states,

> [N]either section 655.0385, Florida Statutes, Rule 3C-100.0385, Florida Administrative [Code], nor any other statutory or rule provision or any constitutional provision entitles Petitioner as a current depositor and shareholder of the bank to initiate such a challenge. An examination of [the statutes and rule] reveals no indication of any intent to involve the depositors or shareholders of a financial institution in the process to determine whether a proposed director of the institution should be disapproved by the Department.

Id. at 16.

30. Petitioner cites five different cases to support his standing to challenge the issuance of the variance. He also asserts that DOH forwarded the Amended Petition in order to develop and complete factual record on the issue of dual ownership.[4] Petitioner states that the degree of injury, or injury in fact, relates to the reduction in value of his investment, that as an existing shareholder of iAnthus, he is injured if the ownership restrictions in section 381.986 are ignored or circumvented, and that his interest as a shareholder to ensure proper interpretation of statute regarding ownership falls within the zone of interest protected.

31. Petitioner relies in part on *Ybor III, Ltd.* for the premise that an economic interest can, in some instances, be a legitimate basis for establishing standing. Ybor III, Ltd. was a housing developer which applied for funding from the Florida Housing Finance Corporation (FHFC) pursuant to the process authorized in chapter 420, Florida Statutes. In the relevant cycle of applications, another developer (Windsong II) was awarded funding and Ybor III was not. Ybor III petitioned for a hearing, alleged that Windsong II's application was scored incorrectly, and had it been scored properly, Ybor III would have received the funding awarded to Windsong II. FHFC dismissed the petition, and Ybor III appealed.

32. On appeal, the First District reversed FHFC's final order, stating that having raised disputed issues of material fact, Appellant, Ybor III, still had to establish standing to request and participate in a formal administrative hearing. The court recited the *Agrico* test and stated:

> We conclude that Appellant meets the first prong of the test requiring that it show a "substantial

[4] It is noted that the agency referral does not make such a statement. It is a standard referral, which says, "Please be advised that the Department of Health has received a Petition for Hearing from the above-designated Petitioner. The Department requests that the Division of Administrative Hearings (DOAH) to assign this matter to an Administrative Law Judge to conduct all necessary proceedings required under the law, and to submit a Recommended Order to the Department. A copy of the Petitioners' Amended Petition for Formal Administrative Hearing with all attachments and the Notices of Intervention and Appearance for the Intervenors are included herein."

> interest." Appellee, by granting Windsong II's application, excluded Appellant from that cycle of the funding process; such exclusion provides a sufficient interest to support a section 120.57 hearing from Appellant.
>
> We also conclude that Appellant meets the second prong of the *Agrico Chem. Co.* test, i.e., Appellant's injury is of the type or nature that the proceeding is designed to protect. Common sense and logic dictate that is such a program of economic incentives to private investors to commit to low-income is to succeed, the process of determining who is qualified for loans and/or tax credits must be administered fairly, honestly, and consistently according to the rules that Appellee is charged with implementing. … The administrative need for decisional finality is a nullity if the road toward closure does not permit a reasonable point of entry for an aggrieved applicant to speak and be heard. Because Appellant demonstrated the requisite substantial injury and was denied such an opportunity, we conclude that Appellant has standing to request a formal administrative hearing to address the disputed facts alleged in the petition.

843 So. 2d at 346-47.

33. Another case cited by Petitioner involving economic injury is *Shands Jacksonville Medical Center, Inc., v. Department of Health*, 123 So. 3d 86 (Fla. 1st DCA 2013). In *Shands*, several hospitals with existing trauma centers sought to challenge the grant of provisional licenses to nearby hospitals to operate new trauma centers. The DOH consolidated the requests for hearing and dismissed them for lack of standing. The appellate court reversed, stating that DOH erred in dismissing the challenges for lack of standing. The court held that the substantial interests of the existing trauma centers were within the zone of interest protected by the trauma care statutes, which required DOH to consider the impact that new trauma

centers will have on existing trauma centers. The new trauma centers did not contest that the existing trauma centers would suffer significant injuries, but argued that because those injuries were financial, they were not within the zone of interests protected by statute.

34. The court rejected this argument, noting that section 395.40(2), Florida Statutes, provides, in part, that an "inclusive trauma system" means a system "designed to meet the needs of all injured trauma victims who require care in an acute-care setting and *into which every health care provider or facility with resources to care for the injured trauma victim is incorporated."* (emphasis added). The court stated that the injuries alleged by the existing trauma centers could impact whether they continued to have the financial resourcing or staffing to care for patients if new centers were permitted when no need existed for them. In addition, while the new trauma centers focused on the care of trauma victims, the court stated that section 395.40(2) did not nullify the language in section 395.402 requiring DOH to consider factors which would affect existing facilities, and to take into consideration the need to maintain effective trauma care in areas served by existing centers.

35. Similarly, in *SCF, Inc. v. Florida Thoroughbred Breeders' Ass'n,* 227 So. 3d 770 (Fla. 1st DCA 2017), the Florida Thoroughbred Breeders' and Owners' Association (FTBOA) was authorized by the legislature to decide the amount and distribution of racing awards, with the goal of encouraging the agricultural activity of breeding racehorses in the state. § 550.26165, Fla. Stat. (1993). FTBOA was to create a uniform rate and procedure for the payment of awards that provide for the maximum possible payments within revenues and make breeders' and stallion award payments in strict compliance with the established uniform rate and procedure plan. §§ 550.26165(2); 550.2625(3), Fla. Stat. Southern Cross Farms, d/b/a SCF, Inc. (SCF), had received breeders' awards from FTBOA every year but one

since 1998, and in 2015 earned awards based on the performance of four horses which they planned to race again in 2016.

36. The Division of Pari-Mutuel Wagering (PMW) was required to approve the annual plan before implementation, and approved the plan for the 2016 race year. SCF challenged the plan's compliance with statutory requirements, and the ALJ dismissed SCF's Amended Petition, holding that SCF lacked standing because its substantial interests were not affected by the "mere approval" of the plan. On appeal, the First District reversed, stating that SCF's petition alleged a scope of interest and relief requested that demonstrated the type of substantial interest that could be administratively addressed and resolved. "Indeed, the raison d'etre for the plan to establish breeders' awards of optimal magnitude is to encourage the very activity in which SCF has successfully engaged." 227 So. 3d at 776. With respect to the first prong of the *Agrico* test, the court rejected the claim that SCF's prospect of earning an award was speculative: "[T]he proper inquiry is on the likelihood of injury, not that it be certain." *Id*. It rejected the claim that the statute did not contemplate the participation in the process by individual breeders to protect their individual interests, saying that such a conclusion

> overlooks that much of the impetus and focus of the statutory framework is to optimize payouts to top Florida-bred horse owners whose horses excel in Florida, SCF being one. Because the statutory framework was set up to provide economic inducements for Florida breeders like SCF to operate successful equestrian programs in-state, it would be a curious conclusion that none of them individually or as a group has a legal basis to complain about the plan's compliance with the statutory guidelines as to awards.

37. Another case cited by Petitioner to support the notion that financial interests may be the basis for standing is *Bluefield Ranch Mitigation Bank v. South Florida Water Management District,* 263 So. 2d 125 (Fla. 4th DCA 2018). Bluefield Ranch filed a petition for hearing to challenge the water

management district's issuance of a permit to DOT for a road-widening project. The water management district dismissed the petition, determining that Bluefield Ranch lacked standing to challenge the permit because its interest was mere economic injury. The Fourth District reversed, holding that Bluefield demonstrated standing beyond mere economic injury.

38. The crux of Bluefield Ranch's complaint was that DOT was required to purchase mitigation credits as a means of offsetting the environmental impact of the project. Most of the mitigation credits purchased were to be provided by a different mitigation bank. Bluefield Ranch contended that the other mitigation bank did not meet statutory criteria to be considered for mitigation on the project, and DOT was required to consider Bluefield Ranch for the credits. Bluefield Ranch's petition alleged that it had standing because as a mitigation bank, it had an interest in the enforcement of statutory compliance for the mitigation within its service area, to prevent environmental harm caused by unlawful mitigation. It also alleged that as a landowner, it had a substantial interest in the protection of the environment and the continued restoration, enhancement, and preservation of wetlands within its service area.

39. The Fourth District examined Bluefield Ranch's standing in light of the *Agrico* test, stating,

> It is well established that mere economic interests and the general interests of citizens are insufficient to establish standing. The reason, in part, is because we seek to "limit unwarranted use of judicial resources in challenges involving discretionary decisions of legislative bodies." However, we are also cognizant that "one of the major legislative purposes of the Administrative Procedure Act was the expansion of public access to the activities of governmental agencies."
>
> *Agrico's* intent was not to preclude participation by parties who stand to be affected by the actual and foreseeable results of agency action. … Instead,

> *Agrico's* intent was to "preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings. Examples of parties that have been precluded from intervening in a proceeding per this *Agrico* substantial interest test are *Mid-Chattahoochee River Users* and *City of Sunrise* [*v. S. Fla. Water Mgmt. Dist.,* 615 So. 2d 746, (Fla. 4th DCA 1993] – two cases where the petitioners lacked standing for alleging mere economic injury, and not the kind of injury for which the proceeding was designed to protect, namely, the protection and conservation of water and related land sources.

263 So. 3d at 128-29 (citations omitted). The court found that Bluefield Ranch's interest was more than mere economic injury, in that it was reasonably foreseeable that Bluefield Ranch's conservation acreage could be adversely affected by the degradation of the regional watershed and ecosystem because of the selection of a purportedly unlawful mitigation option. Bluefield Ranch disputed whether the other mitigation bank was qualified to be considered for mitigation in the project area. The court noted that Bluefield Ranch was located with the same regional watershed and service area as the project, creating a substantial interest in the enforcement of statutory compliance for mitigation for the project. It stated,

> An argument of potential *environmental* injury to Bluefield's conservation acreage is reasonable based on Bluefield's location within the same regional watershed and mitigation service area. That is not to say that mitigation banks within a service area will have standing to challenge a permit on that fact alone, but Bluefield is also located in close proximity to the project within the same regional watershed, and it could reasonably be affected by the issuance of a permit to allow Dupuis, without the statutory compliance required, to provide mitigation in the same service area and regional watershed. … should mitigation by Dupuis be unlawful, it subjects the shared service area and

> regional watershed to harm, including degradation of the mitigation bank that Bluefield is entrusted to protect and manage into perpetuity. Harm to the wetlands is the injury in fact, and Bluefield has a substantial interest in ensuring compliance with the statutory scheme. Here too, it can be reasonably argued that if anyone has the ability to challenge FDOT's compliance with the "must consider" provision, it would be those permitted mitigation banks like Bluefield, which seek to challenge a permit that purportedly allows unlawful mitigation within its service area and regional watershed.

263 So. 3d at 131-32 (emphasis added).

40. Finally, Petitioner relies on *Calder Race Course, Inc. v. SCF, Inc.*, 326 So. 3d 777 (Fla. 2d DCA 2021), in which the Second District reversed a finding by an administrative law judge that the Division of Pari-Mutuel Wagering (PMW) engaged in unadopted rule making when it renewed Calder's slot machine gaming license for the 2019-2020 fiscal year. As a backdrop to this litigation, Calder once had a seven-story "grandstand" from which people could view the track and wager on the races from designated betting terminals. In 2016, Calder demolished the grandstand, and patrons now use the "apron," which consists of outdoor seating, wagering machines, and other amenities, to view and bet on the races. A concrete walkway connects the apron to Calder's slot machine building.

41. In 2017, an unadopted rule challenge was filed against PMW for failing to enforce the requirements of section 551.114(4), Florida Statutes, because Calder was allowed to maintain its slot machine gaming license in the absence of the grandstand. An administrative law judge found the renewal of the 2017-2018 license did not constitute an unadopted rule and the Order was not appealed. In 2018, another challenge to the renewal of Calder's license was filed, and a different administrative law judge recommended that Calder's application for renewal be denied, because

Calder's apron was not a compliant live-gaming facility and its slot machine gaming area was not contiguous and connected to a live-gaming facility. PMW rejected the administrative law judge's conclusions of law and found Calder's racetrack and viewing locations to comply with statutory requirements, and the Fourth District affirmed the Final Order without opinion. In August 2019, SCF filed the petition under review, challenging the renewal of Calder's licenses as an unadopted rules once again. This time, the administrative law judge issued a Final Order concluding that SCF had standing, and that PMW's renewal of Calder's licenses were unadopted rules.

42. On appeal, the court restricted its ruling to SCF's standing to bring an unadopted rule challenge related to Calder's license renewal. The court held that SCF had no standing to challenge the renewal and stated that no evidence showed any actual or likely harm to SCF based on Calder's renewed license. The court distinguished *SCF, Inc. v. Florida Thoroughbred Breeders' Association,* stating that in that case, the statutory framework for the annual plan for distribution of awards was specifically created to provide economic inducements for breeders to operate successful programs in-state. In contrast, the statutory framework regarding the structures and geographic relationships between live gaming and slot machine gaming areas was not set up to provide economic inducements for Florida breeders.

43. After careful review of the cases cited by both Petitioner and Intervenors, Petitioner has not established that he will or could suffer an injury in fact as a consequence of the grant of a variance to GrowHealthy, in order to satisfy the first prong of the *Agrico* test. Instead, the injury flows from iAnthus' decision to restructure, and that injury will occur whether or not any of the Intervenors has a prohibited interest in another license holder. In this respect, this proceeding is most like *Village Park Mobile Home Association*, where the court held that any injury flowed from the possible implementation of the prospectus submitted to the agency, as opposed to the agency's approval of the prospectus itself. Similarly, in *Advance Barricades*,

the injury flowed from the primary contractor's actions in terminating Advance Barricades' services, as opposed to any action by DOT. And like the Petitioners in *Mid-Chattahoochee River Users,* the injuries alleged here are not related to the issues resolved in the requested variance. Petitioner's injury is the diminution of his stock value. The variance request is not concerned with how much stock any one shareholder will possess. It is concerned with whether the restructuring of GrowHealthy's parent company is a proposal presented to DOH that "can demonstrate to the department that it has a proposed alternative to the specific representation made it its application that fulfills the same or a similar purpose as the specific representation in a way that the department can reasonably determine will not be a lower standard that the specific representation in the application." While the prohibition against dual ownership clearly remains in force, it is not the possibility of dual ownership that causes Petitioner's alleged injury.[5]

44. Several of the cases cited by Petitioner do allow for standing based on an economic injury. In each of those cases, however, the economic injury was related to the purpose of the intended agency action. In *Ybor III,* the agency action itself was the award of funds for which the litigant applied, and in *SCF, Inc. v. Florida Thoroughbred Breeders' Association,* the agency action was the approval of the plan for the distribution of financial awards, some of which the litigant had been awarded historically. At the heart of both cases, standing was based on the petitioners' alleged right to receive the funds at issue, and the distribution of those funds was at the heart of the agency action. Similarly, in *Shands,* the agency's granting of new licenses for trauma centers was statutorily conditioned on a consideration of the effect on existing facilities like the petitioners. And in *Bluefield Ranch,* the court focused not on Bluefield Ranch's economic injury, but its environmental injury.

[5] Moreover, Petitioner has not cited to any authority that allows an individual shareholder of a corporation, much less a shareholder of a parent corporation, to challenge the actions taken by the corporation, outside the confines of a derivative shareholder action.

45. Other cases cited by the parties also do not support Petitioner's standing in this proceeding. For example, *Friends of the Everglades* did not involve an economic interest at all, but rather the use of property purchased through the CARL program that was incompatible with the use for which the property was purchased. The injury alleged was directly related to the loss of use of the land for its intended purpose. Here, the value of Petitioner's holdings has nothing to do with the requirements for licensure. Similarly, the court in *Calder* found that the statutory framework regarding the structures and geographic relationships between live gaming and slot machine gaming areas was not set up to provide economic inducements for Florida breeders. And finally, the hearing officer in *Leonard* determined that nothing in the statutory scheme or applicable rules indicated any intent for a current depositor or shareholder in a bank to be involved in determining whether a proposed director should be approved. The same can be said here.

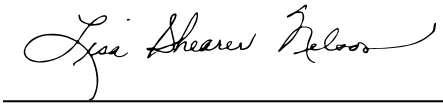
46. Petitioner insists that the injury here is the type of injury that section 381.986 is designed to protect, because of the possibility that one of the lenders may have dual ownership of MMTCs in violation of section 381.986. He contends, "the question to be resolved is whether the proposed ownership changes violate the prohibition against dual ownership." However, as previously stated, it is not the possible dual ownership that causes Petitioner's injury. It is the addition of investors in the company, regardless of whether they have an interest of any other entity, that serves to reduce Petitioner's share.

47. Petitioner has not demonstrated that his alleged injury, the loss of value of his share in GrowHealthy's parent company, is an injury that section 381.986 was designed to protect. As a result, it is concluded that Petitioner does not have standing to contest the waiver sought by GrowHealthy.

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 Petitioner's Amended Petition for lack of standing.

DONE AND ENTERED this 3rd day of February, 2022, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.