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**THE STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

PERKINS NURSERY, INC.,

Petitioner,

v.

Case No.: \_\_\_\_\_

STATE OF FLORIDA,  
DEPARTMENT OF HEALTH,

Respondent.

\_\_\_\_\_ /

**AMENDED PETITION FOR ADMINISTRATIVE HEARING**

Petitioner Perkins Nursery, Inc. ("Perkins"), pursuant to sections 120.569 and 120.57, Florida Statutes, Rule 28-106.201, Florida Administrative Code, U.S. CONST. amend. XIV and FLA. CONST. art. I, §§ 9 & 21, Perkins hereby respectfully petitions for an administrative hearing regarding the Department of Health's denial of its application for licensure as a "dispensing organization" under section 381.986, Florida Statutes (the "Application"). As grounds for this Petition, Perkins alleges as follows:

**THE PARTIES**

1. The affected agency is the Department of Health (the "DOH"), 2585 Merchants Row Blvd., Prather Building, Suite 110, Tallahassee, Florida 32399.
2. Perkins is a Florida corporation whose mailing address is P.O. Box 2460, Labelle, FL 33975-2460.
3. Perkins has continuously operated as a registered nursery in the State of Florida since April 4, 1977 and possesses a valid certification from the Florida Department of

Agriculture and Consumer Services for the cultivation of more than 400,000 plants. As of July 2, 2015, Perkins had an inventory of 505,002 plants.

4. Perkins has been in continuous operation on its farm in Labelle, Florida and has been successfully run by operating nurseryman Danny W. Perkins for the entirety of its operations.

5. Perkins has retained the undersigned counsel and are obligated to pay those attorneys a reasonable fee for their services.

**PETITIONER'S SUBSTANTIAL INTEREST**

6. Pursuant to section 381.986(5)(b), Florida Statutes, Perkins is a qualified nursery that possesses a valid certificate of registration with the Department of Agriculture.

7. On July 8, 2015, Perkins submitted a timely application for approval as a "dispensing organization" pursuant to section 381.986, Florida Statutes, and received notice on November 23, 2015 that its application was denied.

8. Perkins invested heavily in the licensing process and assembled a team to conduct operations as a dispensing organization pursuant to section 381.986, Florida Statutes. As such, the denial of its application will have a substantial impact on Perkins, both substantively and financially.

**NOTICE**

9. Perkins received notice on November 23, 2015 when the DOH published its decision to its public internet website. A copy of the notice is attached hereto as Exhibit "A."

**DISPUTED ISSUES OF MATERIAL FACT**

10. On or about December 16, 2014, Patricia Nelson ("Nelson") was appointed the Director of the DOH's Office of Compassionate Use ("OCU").

11. On July 8, 2015, Perkins timely filed its Application to become a licensed dispensing organization pursuant to section 381.986, Florida Statutes along with the initial application fee of \$60,063.00.

12. Perkins detailed Application demonstrated that Perkins is the most qualified applicant in the Southwest Region to meet the needs of and compassionately serve those citizens of Florida authorized to obtain low-THC cannabis under section 381.986, Florida Statutes.<sup>1</sup>

13. Perkins has been in continuous operation on its farm in Labelle, Florida and has been successfully run by operating nurseryman Danny W. Perkins for the last thirty-eight (38) years.

14. Some of the unique qualifications that make Perkins the ideal dispensing organization for the Southwest Region are:

- a. Perkins is ready to grow – Perkins is prepared to immediately plant its predominant cannabis strain at the proposed cultivation facility. Perkins' ability to quickly prepare a crop for processing allows for prompt delivery of low-THC cannabis oil to patients.
- b. Perkins is already extracting oils for human consumption – Perkins is the only nursery in the region which is already operating a massive, custom-built CF Technologies CO<sub>2</sub> extractor. For nine (9) years, Perkins has been cultivating saw palmetto and extracting oil for use in pharmaceutical supplements intended for human consumption. Its CF Technologies Extractor is ready to immediately extract low-THC, high-CBD oil upon cultivation of the first batch of cannabis. Perkins believes it will be the first dispensary to market since Perkins is already in

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<sup>1</sup> In support of this Petition and its qualifications, Perkins hereby incorporates by reference its Application filed with the DOH as if set forth herein.

the business of growing plants and operating the existing onsite CF Technologies Extractor to extract plant oils for human medical/supplement consumption.

- c. Perkins hired experienced professionals from Colorado – Perkins’ managers, cultivators, processors, chemist, inventory control staff, and security personnel previously operated cannabis dispensaries in Colorado. Perkins has retained proven experts in cannabis production, purity, safety, and regulation to join its team.
- d. Perkins has significant experience with non-native plants – Danny Perkins has years of experience growing non-native plants in Florida and has held six (6) United States trademarks on plants that he developed. Mr. Perkins has also received awards from farming groups such as “Plant of the Year,” and his plants are used in FDOT Landscape Beautification Projects.

15. On July 14, 2015, a representative of Perkins submitted an email inquiry to the OCU requesting the time period for the decision on its pending Application. *See* Exhibit “B” hereto.

16. On July 15, 2015, OCU Director Nelson responded to Perkins’ representative via email stating “Section 120.60, F.S., sets the statutory requirements for licensing.” *Id.*

17. Section 120.60(1), Florida Statutes requires, in pertinent part, that “An application for a license must be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law.”

18. Section 120.60(1), Florida Statutes further provides that “Any application for a license which is not approved or denied within the 90-day or shorter time period, within 15 days after conclusion of a public hearing held on the application, or within 45 days after a



recommended order is submitted to the agency and the parties, whichever action and timeframe is latest and applicable, is considered approved unless the recommended order recommends that the agency deny the license.”

19. By letter dated July 29, 2015, DOH requested that Perkins “clarify” the roles of certain individuals identified in its Application.

20. Perkins responded to the DOH’s inquiry via letter delivered to DOH on August 11, 2015.

21. On November 23, 2015, DOH posted a letter on its public internet website indicating that Perkins’ Application was denied. See <http://www.floridahealth.gov/media/ocu/all-letters.pdf> (last visited Dec. 11, 2015); see also Exhibit “A” hereto.

22. DOH’s failure to timely approve or deny Perkins’ Application entitles Perkins to be issued a “default license” under section 120.60(1), Florida Statutes.

23. Also posted to the DOH’s website on November 23, 2015 were the “scorecards” utilized to determine Perkins’ application. See <http://www.floridahealth.gov/programs-and-services/office-of-compassionate-use/> (last visited Dec. 11, 2015).

24. The DOH’s application form states, in pertinent part, that “It is important for each Applicant to remember that the Applicant is competing with other Applicants, not with any mandatory minimum criteria set by the OCU.” See <http://www.floridahealth.gov/programs-and-services/office-of-compassionate-use/documents/64-4-application-dh8006.pdf> (last visited Dec. 11, 2015).

25. Review of the Perkins’ scorecards reveals that the scores among the three panelists varied wildly so much so that they appear to have been determined in an arbitrary manner, and not systematically as required under Chapter 64-4, Florida Administrative Code.

26. For instance, one of the categories scored was "Cultivation," which comprised 30% of the scoring scheme. See <http://www.floridahealth.gov/programs-and-services/office-of-compassionate-use/documents/64-4-application-dh8006.pdf> (last visited Dec. 11, 2015).

27. Cultivation includes the sub-categories of: (a) Technical Ability; (b) Infrastructure, Premises, Resources, (c) Personnel, and (d) Accountability, all of which were thoroughly addressed by Perkins' application.

28. Notwithstanding, scorer Hutson arbitrarily awarded Perkins the lowest value of one (1) on each and every one of the four sub-categories for Cultivation. Scorer Nelson, on the other hand, awarded Perkins significantly higher values. These enormous variations cannot be logically reconciled.

29. In addition, scorer Hutson awarded Applicant Alpha Foliage, Inc. the highest value of five (5) on all but one of the Cultivation sub-categories and the second highest value of four (4) on the remaining Cultivation sub-category, despite the fact that Alpha Foliage, Inc. is not even located within the Southwest Region in which it applied, while Perkins, which has been continuously operating in that region continuously for 38 years, was scored a one (1) on all.

30. According to Alpha Foliage, Inc.'s application, which is now posted online on the DOH's public internet website, "Alpha Foliage began business 34 years ago in 1981 as a partnership and was then incorporated in 1991 as Alpha Foliage, Inc., a Florida corporation." The application goes on to state that "During August of 1992, Alpha's headquarters, located in southern Florida, suffered a complete loss during Hurricane Andrew." See <http://www.floridahealth.gov/media/ocu/alpha-foliage-sw.zip> (last visited Dec. 11, 2015).

31. As proof that Alpha Foliage, Inc. has operated as a nursery in Florida for at least thirty (30) years, a threshold eligibility requirement under the law, Alpha Foliage, Inc. submitted

the following: (a) "List from the Department of Agriculture and Consumer Services of confirmed 30 Year and 400,000 Plant Nurseries"; (b) "Finance documents from 1984 and 1986"; (c) "Email confirmation from Florida's Department of Agriculture verifying eligibility"; and (d) "Florida Secretary of State document evidencing the 1991 incorporation of Alpha Foliage, Inc." None of these items are sufficient to establish Alpha Foliage, Inc.'s eligibility to be a dispensing organization pursuant to section 381.986, Florida Statutes.

32. As to the "List from the Department of Agriculture and Consumer Services of confirmed 30 Year and 400,000 Plant Nurseries," this document expressly indicates on its face that: "The inclusion of a nursery on this list is NOT a determination of eligibility for licensure as a medical marijuana dispensary pursuant to Section 381.986, Florida Statutes."

33. As to the "Finance documents from 1984 and 1986," although they are redacted from the publicly released version of Alpha Foliage, Inc.'s redacted application released by the DOH, it is not subject to dispute that isolated "finance documents" from two non-continuous years adds nothing to whether Alpha Foliage, Inc. has *operated as a nursery in Florida for at least 30 continuous years*, as required by Fla. Stat. § 381.986(5)(b)1.

34. As to the supposed "Email confirmation from Florida's Department of Agriculture verifying eligibility," the emails indicates, in pertinent part:

Per your request, I have attached the list of nurseries that meet the 30 years in business and 400,000 plant inventory requirements as of February 27, 2015. As you can see, the list reflects that both Alpha Foliage **Inc.** and Redland Nursery Inc. meet these requirements.

Notwithstanding this email, Alpha Foliage, Inc. concedes in its application that it was *not* incorporated until 1991, so the relevance of the statement that "Alpha Foliage **Inc**" meets the 30 years in business requirement is questionable, at best. Indeed, the "List from the Department of

Agriculture and Consumer Services of confirmed 30 Year and 400,000 Plant Nurseries” that is discussed above states: “The inclusion of a nursery on this list is NOT a determination of eligibility for licensure as a medical marijuana dispensary pursuant to Section 381.986, Florida Statutes.”

35. As to the “Florida Secretary of State document evidencing the 1991 incorporation of Alpha Foliage, Inc.,” this document cannot serve to establish the 30 year requirement because 1991 is less than 30 years ago.

36. DOH’s selection of Alpha Foliage, Inc. to receive the Southwest Region license absent Alpha Foliage, Inc. sufficiently demonstrating its compliance with the requirements of the section 381.986(5)(b)1., Florida Statutes, was illegal, arbitrary and capricious and an improper exercise of its authority.

37. DOH also improperly accepted applications from nurseries whose principals were members of the Negotiated Rulemaking Committee and issued licenses to such applicants.

38. Rules 64-4.001, .002, .004, and .005, F.A.C. constitute an invalid exercise of delegated legislative authority as applied by the DOH in that such Rules:

- (a) are vague, fail to establish adequate standards for the DOH decisions or vest an unbridled discretion in the DOH to the extent that the Rules or the interpretation of the Rules by the DOH did not prohibit members of the Negotiated Rulemaking Committee from submitting applications;
- (b) were negotiated and applied so as to only result in members of the Negotiated Rulemaking Committee received licenses in that four of five licenses were awarded to applicants whose principals were members of the Committee thus, vested unbridled discretion in the DOH; and



- (c) are arbitrary or capricious as applied and when applied are not supported by logic or necessary facts.

39. DOH's interpretation of the Rules to allow members of the Negotiated Rulemaking Committee to submit applications and to be awarded such licenses after the time for Perkins to institute a rule challenge violated Article I, Section 21, Fla. Const. by denying Perkins access to courts.

40. In addition, DOH improperly approved applications that did not meet the requirements regarding the certification or attestation of forward looking projections of Section 381.986(5)(b)5., Florida Statutes, Rule 64-4.001(6) & (12), F.A.C., and the Final Order dated November 14, 2014 entered in *Costa Farms, LLC v. Department of Health*, DOAH Case No. 14-4296RP at 62-63 (hereinafter "Costa Farms Final Order").<sup>2</sup>

41. Perkins reserves the right to amend this Petition to assert additional facts or argument to the extent that any such additional relevant facts or arguments are uncovered during discovery.

#### ULTIMATE FACTS ALLEGED

42. DOH's denial of Perkins' Application was untimely and Perkins is entitled to the immediate issuance of a "default license" pursuant to section 120.60(1), Florida Statutes.

43. DOH's award of the Southwest Region license to Alpha Foliage, Inc. was illegal, arbitrary and capricious and an improper exercise of its authority. As a result, the award of the

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<sup>2</sup> Because the Certified Financials and Independent Auditor's Reports submitted with applications were publically released by DOH only in redacted form, it is not possible for Perkins at the time of filing this Petition to determine compliance with Rule 64-4.001(6) & (12). Notwithstanding, upon information and belief, no CPA licensed in the State of Florida could "certify (attest) that the applicant has the financial stability, resources and capability to maintain low-THC cannabis operations for at least a minimum of two years from approval" as contemplated by the Costa Farms Final Order. See Costa Farms Final Order at 63.

license to Alpha Foliage, Inc. should be overturned and the license issued to Perkins. Alternatively, Perkins is entitled to a comparative review hearing with regard to its Application. *See, e.g., Bio-Med. Applications of Clearwater, Inc. v. Dept. of Health & Rehab Svcs.*, 370 So. 2d 19 (Fla. 2d DCA 1979).

44. DOH improperly approved licenses to applicants whose principals were on the Negotiated Rulemaking Committee and did not disclose in writing to the DOH or other Committee members that they intend to submit applications on or about July 8, 2015.

45. DOH improperly approved applications that did not meet the requirements of Section 381.986(5)(b)5., Rule 64-4.001(6) & (12), F.A.C., and the Costa Farms Final Order.

46. Rules 64-4.001, .002, .004, and .005, F.A.C. constitute an invalid exercise of delegated legislative authority as applied by the DOH.

47. DOH's denial of Perkins' Application constitutes a denial of due process and is inconsistent with fundamental fairness.

48. Perkins reserves the right to amend this Petition to assert additional facts or argument to the extent that any such additional relevant facts or arguments are uncovered during discovery.

#### **RULES AND STATUTES THAT ENTITLE PETITIONER TO RELIEF**

49. The rules and statutes entitling Perkins to relief include, but are not necessarily limited to, Chapter 28-106, Florida Administrative Code, and Chapter 381, Sections 120.569 and 120.57, Florida Statutes, and U.S. CONST. amend. XIV and FLA. CONST. art. I, §§ 9 & 21.

**RELIEF SOUGHT**

WHEREFORE, Perkins respectfully requests that the Division of Administrative Hearings:

- a) Conduct a formal hearing on this petition pursuant to Sections 120.569 and 120.57, Florida Statutes;
- b) Issue a final order finding: (1) that Perkins is entitled to the immediate issuance of a "default license," pursuant to section 120.60(1), Florida Statutes; and/or (2) overturning the award of the Southwest Region license to Alpha Foliage, Inc. and awarding it to Perkins. Alternatively, issue an order finding that Perkins is entitled to a comparative review hearing with regard to its Application.
- d) Award Perkins its costs and attorney's fees incurred in this action; and,
- e) Provide Perkins any and all such other relief that the Administrative Law Judge deems appropriate.<sup>3</sup>

Dated: December 14, 2015

Respectfully submitted,

**AKERMAN LLP**  
One S.E. Third Avenue, 25th Floor  
Miami, Florida 33131-1704  
Telephone: 305-374-5600  
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/s/ Ari H. Gerstin  
Ari H. Gerstin, Esq.  
Florida Bar No. 839671  
*Counsel for Perkins Nursery, Inc.*

<sup>3</sup> As detailed in a letter contemporaneously submitted by Perkins to DOH with this Amended Petition, any and all actions relative to the Southwest Region license that would prejudice Perkins' right to a license should be stayed pending resolution of Perkins' arguments. Perkins hereby incorporates by reference the contents of said letter as if set forth herein.

**Mission:**

To protect, promote & improve the health of all people in Florida through integrated state, county & community efforts.



**Rick Scott**

Governor

**John H. Armstrong, MD, FACS**

State Surgeon General & Secretary

**Vision:** To be the Healthiest State in the Nation

November 23<sup>rd</sup>, 2015

Perkins Nursery, Inc.  
PO Box 2480  
Labelle, FL 33935

Re: Low-THC Cannabis Dispensing Organization Application

Dear Applicant:

Perkins Nursery, Inc.'s Application to become a Low-THC Cannabis Dispensing Organization for the Southwest region has been substantively reviewed, evaluated, and scored by a panel of evaluators according to the requirements of Section 381.986, Florida Statutes and Chapter 64-4, of the Florida Administrative Code. As Perkins Nursery, Inc. was not the highest scored applicant in the Southwest region, your application for the Southwest region is denied.

Sincerely,

Dr. Celeste Philip  
Deputy Secretary for Health

CB/cc

Cc: Office of the General Counsel

Exhibit "A"



Perkins Nursery, Inc.  
November 23<sup>rd</sup>, 2015

**NOTICE OF RIGHTS**

This notice is agency action for purposes of section 120.569, Florida Statutes. A party whose substantial interest is affected by this action may petition for an administrative hearing pursuant to sections 120.569 and 120.57, Florida Statutes. A petition must be filed in writing and must be received by the Agency Clerk within twenty-one (21) days from receipt of this notice. The petition may be mailed to the Agency Clerk, Department of Health, 4052 Bald Cypress Way, BIN #A-02, Tallahassee, FL 32399-1703; hand delivered to the Agency Clerk, Department of Health, 2585 Merchants Row Blvd., Prather Building, Suite 110, Tallahassee, FL; or sent by facsimile to (850) 413-8743. Such petition must be filed in conformance with Florida Administrative Code Rules 28-106.201 or 28-106.301, as applicable.

Mediation is not available.

Failure to file a petition within 21 days shall constitute a waiver of the right to a hearing on this agency action.

From: **zzzz Feedback, Compassionate Use** <CompassionateUse@flhealth.gov>  
Date: Wed, Jul 15, 2015 at 10:56 AM  
Subject: RE: Questions  
To: "zachdavis517@gmail.com" <zachdavis517@gmail.com>

Mr. Davis,

Section 120.60, F.S., sets the statutory requirements for licensing.

Patty

**From:** Zachary Davis [mailto:[zachdavis517@gmail.com](mailto:zachdavis517@gmail.com)]  
**Sent:** Tuesday, July 14, 2015 9:54 AM  
**To:** zzzz Feedback, Compassionate Use  
**Subject:** Re: Questions

Hello Patty,

Can you please point me to the time period the DOH has to decide on the winner of the license?

Thank You,

Zach

Exhibit "B"



Ari H. Gerstin

Akerman LLP  
One Southeast Third Avenue  
Suite 2500  
Miami, FL 33131-1714  
Tel: 305.374.5600  
Fax: 305.349.4656

Dir: 305.982.5680  
ari.gerstin@akerman.com

December 14, 2015

*Via facsimile to (850) 413-8743*

Agency Clerk  
Department of Health  
2585 Merchants Row Blvd.,  
Prather Building, Suite 110  
Tallahassee, Florida 32399

**Re: Perkins Nursery, Inc., Low-THC Cannabis Dispensing Organization Application;  
Request for Stay Pending Resolution of Amended Petition and/or Issuance of  
Default License**

Dear Agency Clerk:

The undersigned and this firm represents Perkins Nursery, Inc. ("Perkins") with respect to its application to become a licensed dispensing organization pursuant to section 381.986, Florida Statutes.

Recently, Perkins filed with the Department of Health (the "Department") its: (a) Amended Petition for Administrative Hearing; and (2) Notice of Intent to Reply on Default License Provision of Fla. Stat. § 120.60(1).

Pending the resolution of these filings, Perkins respectfully submits that the Department should stay all action related to the Southwest Region license and not take any action that would prejudice Perkins' right to receive a Southwest Region license if its arguments are successful.

The Department's notice of agency action expressly recognizes the right of Perkins to challenge the Department's denial of Perkins' Application. Because the intended award of a license to Alpha Foliage, Inc. could result in Perkins being denied a license, or otherwise irreparably harm Perkins' right to a license, the Department must refrain from taking any action during the pendency of these matter that would prejudice Perkins' right to receive a Southwest Region

akerman.com

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Agency Clerk, Department of Health  
December 14, 2015  
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license if its pending arguments are successful. *See, e.g., Ashbacker Radio Corp., v. FCC*, 326 U.S. 327 (1945) (recognizing due process considerations and establishing the right of a competitor to seek a comparative hearing when a governmental entity selects between competing applicants); *see also Bio-Medical Applications of Clearwater, Inc. v. Dep 't of HRS*, 370 So. 2d 19 (Fla. 2d DCA 1979) (applying *Ashbacker* in Florida and holding that failure to conduct a comparative hearing constituted a material error in procedure requiring that the matter be remanded for further agency action in accordance with Florida's Administrative Procedure Act). Failure to do so will render the administrative points of entry provided by the Department illusory, and deny Perkins its rights under chapter 120 and constitutional due process.

Accordingly, please confirm that the Department has (or will immediately) stay all action related to the Southwest Region license and will not take any action that would prejudice Perkins' right to receive a Southwest Region license if its arguments are successful.

Should you have any questions, please feel free to contact me at the telephone number above. Thank you.

Sincerely,



Ari H. Gerstin, Esq.