

STATE OF FLORIDA
DEPARTMENT OF HEALTH

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PLANTS OF RUSKIN, INC

Petitioner,

DOH File No(s):

vs.

FLORIDA DEPARTMENT OF HEALTH

Respondent.

**PLANTS OF RUSKIN, INC.'S AMENDED PETITION
FOR FORMAL ADMINISTRATIVE HEARING**

Petitioner, PLANTS OF RUSKIN, INC. ("Plants of Ruskin") by and through its undersigned counsel and pursuant to Sections 120.569 and 120.57, Florida Statutes, and Rule 28-106.201, Florida Administrative Code ("F.A.C.") hereby files its Amended Petition for Formal Administrative Hearing challenging Respondent FLORIDA DEPARTMENT OF HEALTH's ("DOH") proposed agency action to issue a license to dispense low THC cannabis to each of the following applicants: Alpha Foliage, Inc., Chestnut Tree Hill Farm, LLC, Hackney Nursery Company, Knox Nursery Inc., and Costa Nursery Farms, LLC. In support thereof, Plants of Ruskin states as follows:

Name and Address of Parties

1. Petitioner, Plants of Ruskin, is a Florida corporation. For the purposes of this proceeding, all correspondence and pleadings should be addressed to the undersigned attorneys for Petitioner as follows:

Plants of Ruskin, Inc., c/o Douglas Manson
Manson Bolves Donaldson, P.A.
1101 West Swann Ave.
Tampa, Florida 33606
Telephone: 813-514-4700; Facsimile: 813-514-4701
Email: dmanson@mansonbolves.com; rfields@mansonbolves.com

2. The respondent agency affected by the outcome of this administrative proceeding is the DOH, Office of General Counsel, 4052 Bald Cypress Way, Bin A02, Tallahassee, Florida 32399.

Background

1. On or about May 27, 2015, Chapter 64, F.A.C., the current law for the cultivation and dispensing of low THC cannabis, became effective. Chapter 64, F.A.C., and Section 381.986, Florida Statutes, divide the state of Florida into five "dispensing regions" and require three people to be appointed as Graders to select one applicant per dispensing region for a license to operate a low THC dispensing organization ("license").

2. Rule 64-4.002, F.A.C., provides that "each nursery that meets the requirements of Section 381.986(5)(b)1., F.S., desiring to be approved as a Dispensing Organization shall make application, either electronically or in hard copy, to the department using Form DH8006-OCU-2/2015, 'Application for Low-THC Cannabis Dispensing Organization Approval,'" and sets forth the information required to be provided in each application. Each application must include "an explanation or written documentation, as applicable, showing how the Applicant meets the statutory criteria listed in Section 381.986(5)(b), F.S." Rule 64-4.002(2), F.A.C.

3. Rule 64-4.002(2), F.A.C., requires each applicant to explain how it meets each of the following criterion and provide the following:

- (a) The technical and technological ability to cultivate, process, and dispense low-THC cannabis by addressing the items listed in Rule 64-4.002(2)(a)1.-26.;
- (b) Written documentation demonstrating that the applicant possesses a valid certificate of registration issued by the Department of Agriculture and Consumer Services pursuant to Section 581.131, F.S., that is issued for the cultivation of more than 400,000 plants, is operated by a nurseryman as defined in Section 581.011, F.S., and has been operated as a registered nursery in this state for at least 30 continuous years;

- (c) The ability to secure the premises, resources, and personnel necessary to operate as a Dispensing Organization by addressing the items listed in Rule 64-4.002(2)(c)1.-16.;
- (d) The ability to maintain accountability of all raw materials, finished products, and any byproducts to prevent diversion or unlawful access to or possession of these substances by addressing the items listed in Rule 64-4.002(2)(d)1.-16.;
- (e) An infrastructure reasonably located to dispense low-THC cannabis to registered patients statewide or regionally as determined by the department by addressing the items listed in Rule 64-4.002(2)(e)1.-8.;
- (f) The financial ability to maintain operations for the duration of the 2-year approval cycle, including the provision of Certified Financials to the department, and provide the items listed in Rule 64-4.002(2)(f)1.-14.;
- (g) That all owners and managers have been fingerprinted and have successfully passed a level 2 background screening pursuant to Section 435.04, F.S., within the calendar year prior to application.
- (h) The employment of a medical director who is a physician licensed pursuant to Chapters 458 or 459, F.S., to supervise the activities of the proposed Dispensing Organization by addressing the items listed in Rule 64-4.002(2)(h)1.-17.; and
- (i) The ability to post a \$5 million performance bond for the biennial approval cycle.

4. Rule 64-4.002(5)(a), F.A.C., provides that DOH “will substantively review, evaluate, and score applications using Form DH8007-OCU-2/2015, “Scorecard for Low-THC Cannabis Dispensing Organization Selection” herein incorporated by reference and available at <http://www.flrules.org/Gateway/reference.asp?No=Ref-05461>.”

5. On or about July 8, 2015, six applicants, including Plants of Ruskin, filed applications for a license in the southwest region of the State of Florida pursuant to Chapter 64, F.A.C. Additionally, five applicants filed applications for a license in the southeast region, four applicants filed applications for a license in the northwest region, five applicants filed

applications for a license in the northeast region, and eight applicants filed applications for a license in the central region.¹

6. On or about November 23, 2015, DOH issued letters notifying the applicants of the scoring results for the applications and of DOH's decision to grant Alpha Foliage, Inc., Chestnut Tree Hill Farm, LLC, Hackney Nursery Company, Knox Nursery Inc., and Costa Nursery Farms, LLC each a license and deny the other applicants the subject license based on the scoring results.

7. Plants of Ruskin has reviewed all available redacted applications for this process. However, the documents provided to Plants of Ruskin to date are so heavily redacted it is impossible to discern the content of many portions of the applications and to identify all of the issues of Material Fact at this time. On or about December 2, 2015, Plants of Ruskin made a public records request for unredacted copies of all the documents in DOH's possession related to the applications filed in the southwest region as well as any documents sent by DOH to the applicants. Plants of Ruskin intends to amend this Petition upon receipt of all of the unredacted documents after its initial discovery to make additional claims.

Notice of Proposed Agency Action

8. On or about November 23, 2015, Plants of Ruskin received Notice of DOH's Proposed Agency Action ("Notice") via electronic mail containing a link to the Notice that was published on the DOH website. A few days later, Plants of Ruskin received a letter from DOH notifying Plants of Ruskin of DOH's decision to deny issuance of its requested License.

¹ All of the applications submitted to DOH for the five regions will be referred to as the "subject applications" for purposes of this Petition.

Plants of Ruskin's Substantial Interests

9. Plants of Ruskin is a qualified nursery that possesses a valid certificate of registration with the Department of Agriculture pursuant to Section 381.986(5)(b), Florida Statutes.

10. Plants of Ruskin timely submitted an application for the subject license pursuant to Rule 64-4.002(5), F.A.C.

11. Plants of Ruskin provided sufficient information in its Application demonstrating entitlement to the requested license pursuant to Chapter 64, F.A.C. But for DOH's erroneous and arbitrary scoring of the subject applications, Plants of Ruskin would have been scored higher than the other applicants for the southwest region and been granted the requested license.

12. Furthermore, while Rule 64-4.001(9), F.A.C., limits an entity awarded the subject license to *cultivating and producing* cannabis only in its own "dispensing region," there is no such limitation for where the cannabis may be *dispensed* at retail. (emphasis added). Both section 381.896(5)(b)4., Florida Statutes, and Rule 64-4.002(2)(e), F.A.C., recognize that Cannabis Dispensing Organizations may dispense the low-THC cannabis to registered patients *statewide or regionally*. (emphasis added). Thus, DOH's erroneous and arbitrary decision to grant Chestnut Tree Hill Farm, LLC, Hackney Nursery Company, Knox Nursery Inc., and Costa Nursery Farms, LLC a license for each of the other four regions, affects Plants of Ruskin's substantial interests because if they are granted the subject license(s) they will be able to dispense cannabis not only in each of their own regions, but also throughout the state, including the southwest region for which Plants of Ruskin applied. If Plants of Ruskin only challenged DOH's decision for the southwest region license, and one of the other four erroneously and arbitrarily-selected applicants for the other four regions were not challenged, that applicant

would be provided an unfair advantage by being allowed to begin dispensing cannabis statewide or regionally during the pendency of Plants of Ruskin's litigation determining entitlement to the license for the southwest region. This monopoly by one entity being able to sell the product during the time period before Plants of Ruskin can obtain its license will substantially impact Plants of Ruskin's ability to market and sell its product and successfully provide low-THC cannabis.

Disputed Issues of Material Fact and Law

13. Pursuant to Rule 28-106.201, F.A.C., Petitioner initially identifies the following material facts and law that are in dispute, and reserves the right to supplement and amend as additional facts become known to Petitioner:

- a) Whether DOH properly scored the subject applications pursuant to Rule 64-4.002, F.A.C., and Form DH8007-OCU-2/2015, "Scorecard for Low-THC Cannabis Dispensing Organization Selection";
- b) Whether DOH improperly selected Alpha Foliage Inc., Chestnut Tree Hill Farm, LLC, Hackney Nursery Company, Knox Nursery Inc., and Costa Nursery Farms, LLC for issuance of the subject licenses;
- c) Whether DOH's application of the rules contained in Chapter 64, F.A.C., constitute an invalid exercise of delegated legislative authority by allowing DOH to act with unbridled discretion in its scoring of the subject applications;
- d) Whether DOH's scoring of the subject applications was contrary to the applicable rules and/or was arbitrary or capricious;
- e) Whether DOH failed to properly evaluate and score the subject applicants' technical and technological ability to cultivate, process, and dispense low-THC cannabis pursuant to Rule 64-4.002(2)(a), F.A.C.;
- f) Whether DOH failed to insure all applicants operated as a registered nursery continuously for 30 years pursuant to Chapter 381.986(5)(b)1, Florida Statutes, and met the criteria set forth in Rule 64-4.002(2)(b), F.A.C.;
- g) Whether DOH failed to properly evaluate and score the subject applicants' ability to secure the premises, resources, and personnel necessary to operate as a Dispensing Organization pursuant to Rule 64-4.002(2)(c), F.A.C.;

- h) Whether DOH failed to properly evaluate and score the subject applicants' ability to maintain accountability of all raw materials, finished products, and any byproducts to prevent diversion or unlawful access to or possession of these substances pursuant to Rule 64-4.002(2)(d), F.A.C.;
- i) Whether DOH failed to properly evaluate and score each of the subject applicants' "infrastructure reasonably located to dispense low-THC cannabis to registered patients statewide or regionally" pursuant to Rule 64-4.002(2)(e), F.A.C.;
- j) Whether DOH failed to properly evaluate and score each applicant's certified financial statements and their financial ability to maintain operations for the duration of the 2-year approval cycle pursuant to Rule 64-4.002(2)(f), F.A.C.;
- k) Whether DOH failed to require level 2 screening for all the applicants pursuant to Chapter 381.986(B)(6), Florida Statutes, and Rule 64-4.002(2)(g), F.A.C.; and
- l) Whether DOH failed to properly score the subject applications regarding the criterion requiring the employment of a medical director who is a physician licensed pursuant to Chapters 458 or 459, F.S., to supervise the activities of the proposed Dispensing Organization pursuant to Rule 64-4.002(2)(h), F.A.C.

Statement of Ultimate Facts

- 14. DOH improperly and arbitrarily scored the subject applications.
- 15. DOH failed to insure all applicants operated as a registered nursery continuously for 30 years pursuant to Chapter 381.986(5)(b)1, Florida Statutes.
- 16. DOH failed to require level 2 screening for all the applicants pursuant to Chapter 381.986(B)(6), Florida Statutes.
- 17. DOH failed to properly evaluate and score each applicant's certified financial statements pursuant to the applicable rules and statutes.
- 18. DOH improperly scored the subject applications and improperly selected Alpha Foliage Inc., Chestnut Tree Hill Farm, LLC, Hackney Nursery Company, Knox Nursery Inc., and Costa Nursery Farms, LLC for issuance of the subject license and, but for these errors, Petitioner would have been entitled to issuance of its requested license.

19. Plants of Ruskin reserves the right to amend this Petition to assert additional ultimate facts should they become known during discovery.

Statutes and Rules Requiring Reversal of DOH's Decision

20. The applicable statutes and rules that warrant reversal of the proposed decision include Section 381.986, Florida Statutes, Chapter 64, F.A.C, and Chapter 28-106, F.A.C.

WHEREFORE, Petitioner Plants of Ruskin requests that:

A. The Florida Department of Health refer this Amended Petition to the Division of Administrative Hearings for a formal administrative hearing and the assignment of an Administrative Law Judge pursuant to Section 120.57, Florida Statutes;

B. The Administrative Law Judge enter a Recommended Order recommending DOH issue Plants of Ruskin its requested license, and determining that:

- a) DOH improperly scored the subject applications pursuant to Rule 64-4.002, F.A.C.;
- b) DOH improperly selected Alpha Foliage Inc., Chestnut Tree Hill Farm, LLC, Hackney Nursery Company, Knox Nursery Inc., and Costa Nursery Farms, LLC for issuance of the subject licenses;
- c) DOH's application of the rules contained in Chapter 64, F.A.C., constituted an invalid exercise of delegated legislative authority by allowing DOH to act with unbridled discretion in its scoring of the subject applications; and
- d) DOH's scoring of the subject applications was contrary to the applicable rules and/or was arbitrary or capricious.

D. DOH enter a Final Order issuing Plants of Ruskin its requested license; and

E. It be granted such other relief as may be deemed appropriate.


Respectfully submitted this 14th day of December, 2015.

MANSON BOLVES DONALDSON, P.A.
1101 West Swann Avenue
Tampa, Florida 33606
813-514-4700 (phone)
813-514-4701 (fax)
Attorneys for Petitioner

By: *Pamela Skirgadi* for
Douglas Manson
Florida Bar # 542687
E-mail: dmanson@mansonbolves.com
Rodney Fields
Florida Bar # 0708917
E-mail: rfields@mansonbolves.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Facsimile to the Agency Clerk at the Office of the General Counsel, Florida Department of Health, 4052 Bald Cypress Way, Bin A-02, Tallahassee, Florida 32399, this 14th day of December, 2015.



Attorney