STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PLANTS OF RUSKIN, INC.,

Petitioner,

vs. Case No. 17-0116

DEPARTMENT OF HEALTH,

Respondent.
_____/

TORNELLO LANDSCAPE CORP., d/b/a
3 BOYS FARM,

Petitioner,

Case No. 17-0117

vs.

DEPARTMENT OF HEALTH,

Respondent.
_____/

RECOMMENDED ORDER

These cases came before Administrative Law Judge John G. Van Laningham for final hearing on August 8 through 12, 15 through 19, and 22 through 26, 2016, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue to be decided is which of the Petitioners, based upon a systematic comparison of their relevant characteristics, is the most qualified, relative to the other, to receive a license to operate as a medical marijuana dispensing organization in Florida's southwest region.

PRELIMINARY STATEMENT

Respondent Department of Health is the state agency responsible for licensing medical marijuana dispensing organizations. Petitioners Plants of Ruskin, Inc., and Tornello Landscape Corp., d/b/a 3 Boys Farm, both of which are plant nurseries, applied in July 2015 for licensure as the dispensing organization for the southwest region of Florida. On November 23, 2015, the Department separately notified these applicants that it intended to deny their applications, having preliminarily

determined that another nursery, Alpha Foliage, Inc., was the most qualified applicant for the regional license in question.

Petitioners each filed a request for administrative hearing, which the Department, on December 18, 2016, forwarded to the Division of Administrative Hearings, where the cases were transferred to this Administrative Law Judge and eventually consolidated for a comparative determination (the "Proceeding"). The final hearing was held on August 8 through 12, 15 through 19, and 22 through 26, 2016.

At the final hearing, the Department called one witness, its Office of Compassionate Use director and Department representative Christian Bax. Plants of Ruskin, Inc., called 11 witnesses: John Tipton, Margarita Rosa Cabrera-Cancio, Melissa Wilcox, James Scarola, Kristopher Le, Ezra Michael Pryor, Joel Ruggiero, Jody Vukas, Phil Hague, Ronald Hartley, and Mr. Bax. Tornello Landscape Corp. called 14 witnesses: Bonnie Goldstein; Juan Sanchez-Ramos; John Michael Radick, V; Richard Frederick LaRoche; Martin Lee; Wendy Buck; Jahan Marcu; Greg Gundry; Dustin Sulak; Sunil Aggarwal; Robert Tornello; Mary Lyn Mathre; Greg Gerdeman; and Mr. Bax. All parties offered exhibits as reflected in the final hearing transcript. Some were admitted; others were not.

The 26-volume final hearing transcript was filed on September 16, 2016. The parties were allowed the opportunity to file written proffers after the final hearing was completed, which

Tornello Landscape Corp. and the Department each did. All parties submitted proposed recommended orders, which were due on November 7, 2016, and these were considered in preparing this Recommended Order.[1/]

On December 6, 2016, the parties filed a Joint Request for Relinquishment of Jurisdiction, "[d]ue to settlement." The following day an Order was entered closing the files and returning the Proceeding to the Department. The Department sent the Proceeding back to the Division of Administrative Hearings on January 6, 2017, with a Notice explaining that "[a]lthough the Department was willing to issue one additional license in hopes of settling the matter, the parties were unable to come to an agreement." The filing of this Notice initiated the instant cases (the "New Proceeding"), which were consolidated on February 2, 2017. The purpose of the New Proceeding is to complete the work begun in the Proceeding.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2016.

FINDINGS OF FACT

1. Respondent Department of Health (the "Department" or "DOH") is the agency responsible for administering and enforcing laws that relate to the general health of the people of the state. The Department's regulatory jurisdiction includes

matters arising under the Compassionate Medical Cannabis Act of 2014 (the "Act"). See Ch. 2014-157, § 2, at 1-5, Laws of Fla. (pertinent portions codified as amended at § 381.986, Fla. Stat. (2015)). In brief, the Act provides for the regulation and use of low-THC cannabis. The Act authorizes licensed physicians to order this non-euphoric "medical marijuana" for qualified patients having specified illnesses, such as cancer and other debilitating conditions that produce severe and persistent seizures and muscle spasms.

2. By authority granted in section 381.986(5), Florida Statutes, the Department is responsible for selecting a limited number of cannabis dispensing organizations, distributed territorially, which will operate as something like heavily regulated utilities, each having the primary (though nonexclusive[2/]) responsibility for one of five regions of the state.[3/] Each licensed dispensing organization ("DO") will be authorized to cultivate, process, and sell low-THC marijuana statewide to qualified patients for medicinal purposes. In its original form, the Act contemplated that DOH would appoint one DO per region, so that, initially, there would be only five DOs operating in the state of Florida.

3. Section 381.986(5)(b) prescribes various conditions that an applicant for approval as a DO must meet——which only an established plant nursery business could satisfy——and directs

the Department to "develop an application form and impose an initial application and biennial renewal fee." The Act further grants DOH the power to "adopt rules necessary to implement" the legislation. § 381.986(7)(j), Fla. Stat. Accordingly, the Office of Compassionate Use ("OCU") within the Department published and eventually adopted rules under which a nursery could apply for a DO license. Incorporated by reference in these rules is a form of an Application for Low-THC Cannabis Dispensing Organization Approval ("Application"). See Fla. Admin. Code R. 64-4.002 (incorporating Form DH9008-OCU-2/2015).

4. To apply for one of the initial DO licenses, a nursery needed to submit a completed Application, including the $60,063.00 application fee, no later than July 8, 2015.[4/] See Fla. Admin. Code R. 64-4.002(5). Petitioner Plants of Ruskin, Inc. ("POR"); Petitioner Tornello Landscape Corp., d/b/a 3 Boys Farm ("3BF"); Alpha Foliage, Inc. ("Alpha"); Perkins Nursery, Inc.; TropiFlora, LLC; and Sun Bulb Company, Inc., each timely submitted an application for licensure as the DO for the southwest region.

5. POR is a Florida corporation that has operated as a plant nursery since 1979. For approximately the last decade, POR's primary focus has been growing tomato plants for sale to farmers for cultivation.

6. 3BF has been registered as a nursey with the Florida Department of Agriculture and Consumer Services for more than 30 years. Robert Tornello has been 3BF's nurseryman throughout its existence.

7. All timely filed applications——numbering around 30 with the five regions combined——were initially reviewed by OCU Director Christian Bax for completeness, as required by section 120.60(1), Florida Statutes. If Mr. Bax determined there were any errors or omissions, he sent the applicant a certified letter identifying the deficiencies and providing a deadline for the applicant to provide additional information or documentation. The failure to submit a complete application establishing that the applicant "meets the requirements of Section 381.986(5)(b)" would result in denial on that basis "prior to any scoring as contemplated in [the applicable] rule." Fla. Admin. Code R. 64-4.002(4).

8. Because both POR's and 3BF's applications were deemed complete (after the submission of timely requested additional information), each nursery advanced to the "substantive review" phase of DOH's free-form decisional process for the selection of the state's first regional DOs.

9. The Department was required to "substantively review, evaluate, and score" all timely submitted and complete applications. Fla. Admin. Code R. 64-4.002(5)(a). This

evaluation was to be conducted, again according to rule, by a three-person committee (the "evaluators"), each member of which had the duty to independently review and score each application. See Fla. Admin. Code R. 64-4.002(5)(b). The applicant with the "highest aggregate score" in each region would be selected as the Department's intended licensee for that region.

10. By rule, the Department had identified the specific items that its evaluators would consider during the substantive review. These items are organized around subjects, which the undersigned will refer to as Main Topics. There are five Main Topics: Cultivation; Processing; and Dispensing, see rule 64-4.002(2)(b); Medical Director, see rule 64-4.002(2)(h); and Financials, see rule 64-4.002(2)(f).

11. In the Application, DOH prescribed a more detailed classification scheme, placing four Subtopics (the undersigned's term) under three of the Main Topics (namely, Cultivation, Processing, and Dispensing), and assigning a weight to each Main Topic and Subtopic, denoting the relative importance of each in assessing an applicant's overall merit. In these regards, the Application states:

> A. Cultivation (30%)
> 1. Technical Ability (4.002(2)(a)) [25%]
> 2. Infrastructure (4.002(2)(e)) [25%]
> 3. Premises Resources Personnel (4.002(2)(c)) [25%]
> 4. Accountability (4.002(2)(d)) [25%]

B. Processing (30%)
  1. Technical Ability (4.002(2)(a)) [25%]
  2. Infrastructure (4.002(2)(e)) [25%]
  3. Premises Resources Personnel (4.002(2)(c)) [25%]
  4. Accountability (4.002(2)(d)) [25%]
C. Dispensing (15%)
  1. Technical Ability (4.002(2)(a)) [25%]
  2. Infrastructure (4.002(2)(e)) [25%]
  3. Premises Resources Personnel (4.002(2)(c)) [25%]
  4. Accountability (4.002(2)(d)) [25%]
D. Medical Director (5%)
E. Financials (20%)

12. There are, in total, 152 specific items comprising the evaluation criteria, which the undersigned calls Factors. The Factors are discrete, (mostly) evidence-based data points including, among other things, attributes such as "experience cultivating cannabis"; tangible items such as "awards, recognition or certifications received"; disclosures concerning, e.g., personnel, assets, and business plans; and promissory representations about, for example, proposed staffing and projected budgets. Eighteen of the Factors, in turn, have associated Subfactors, which are set forth in the Application.

13. The possession or satisfaction of any individual Factor is not mandatory; as a group, however, they represent the set of all items the Department deems important to consider in selecting applicants for licensure. Thus, applicants are required to address the Factors, if not all of them, in their applications.

14. In the Application, the Factors are organized by Subtopic (where applicable) or Main Topic (in the absence of Subtopics). Thus, there are 14 categories of Factors, four each (due to Subtopics) for Cultivation, Processing, and Dispensing, making 12; plus two: Medical Director and Financials. The undersigned refers to these 14 categories as Domains.

15. Each Domain has a relative weight as determined by the Department. The Medical Director and Financials Domains, having no Subtopics, count 5% and 20%, respectively, towards the computation of an applicant's overall merit. The four Cultivation Domains and the four Processing Domains are worth 7.5% apiece.[5/] The four Dispensing Domains are valued at 3.75% each.[6/]

16. Unlike the Domains, the Factors are not separately weighted; the Department's evaluators were allowed to use their discretion in applying the Factors, provided they used them "holistically" and exclusively, that is, as a complete system and to the exclusion of other considerations not specified for the Domain under review.

17. To summarize, the Domains, the number of Factors belonging to each, and their relative weights are set forth in the following table:

DOMAIN		No. of Factors	Weight
Main Topic	**Subtopic**		
I. A. Cultivation	1. Technical Ability	14	7.50%
II. A. Cultivation	2. Infrastructure	3	7.50%
III. A. Cultivation	3. Premises, Resources, Personnel	13	7.50%
IV. A. Cultivation	4. Accountability	13	7.50%
V. B. Processing	1. Technical Ability	9	7.50%
VI. B. Processing	2. Infrastructure	3	7.50%
VII. B. Processing	3. Premises, Resources, Personnel	12	7.50%
VIII. B. Processing	4. Accountability	15	7.50%
IX. C. Dispensing	1. Technical Ability	8	3.75%
X. C. Dispensing	2. Infrastructure	8	3.75%
XI. C. Dispensing	3. Premises, Resources, Personnel	10	3.75%
XII. C. Dispensing	4. Accountability	13	3.75%
XIII. Medical Director		17	5.00%
XIV. Financials		14	20.0%

A larger table that includes the text of each Factor and Subfactor is attached to this Recommended Order as Appendix A.

18. In performing the substantive review of the initial applications filed in 2015, DOH's three evaluators were required to use Form DH8007-OCU-2/2015, "Scorecard for Low-THC Cannabis Dispensing Organization Selection" (the "Scorecard"), which is incorporated by reference in rule 64-4.002(5)(a). The Scorecard is a two-column table that contains, in the left-hand column, a list of all the Factors (divided into separate rows) within each Domain; shows the weight assigned to each Main Topic; and creates, where the right-hand column intersects the row in which a particular Factor is set forth, an empty cell that might be used for recording a score. There are no instructions on the Scorecard.

19. The Department's rules are also silent as to how the evaluators were supposed to score applications using the

Scorecard. To fill this gap, the Department devised an extra-rule methodology, which is described in a Memorandum dated September 15, 2015. In that document, the Department's general counsel instructed the evaluators in relevant part as follows:

> - Scoring of the applications is comparative. That is, you compare each application to the others in the particular region for which the license is sought.
> - Applications should be segregated by region and evaluated comparatively. Applications should be scored highest to lowest in each [Domain], as indicated on the attached Sample Scorecard. By way of example, if there are five (5) applicants in a region, the highest rank score is five (5) and the lowest is one (1).

20. The evaluators followed these instructions. Thus, during the substantive review, the evaluators compared competing applicants, sorted by region, so that the applicants for the southwest regional license were graded as one group, those seeking the southeast regional license as another, and so forth. There was no cross-regional comparative review. For each of the 14 Domains, the evaluators ranked the applicants, by regional group, in order of preference, the first-ranked applicant being the one deemed the most desirable of the regional competitors with respect to the Domain in view, followed by the next best, then the third best, etc. In this manner, an applicant would be

ranked (by each of three evaluators) in comparison to its regional competitors 14 separate times.

21. In determining the orders of preference within the Domains, there were no external standards against which the applicants were measured. Lacking an objective yardstick for measuring absolute quality, each evaluator needed to determine for himself or herself how persuasively an applicant had demonstrated its possession or satisfaction of (or compliance with) the relevant Factors within the Domain being evaluated, in comparison with the other regional applicants, and then use those findings to decide which applicant was——relatively speaking——the best of the group within that Domain (hereafter, "BGD"). After that, the BGD served, in theory at least, as the benchmark, for the other applicants would be ranked below the BGD in descending order, reflecting the evaluator's judgment about the general direction of the decline in relative quality from the BGD's mark.

22. To be clear, an applicant's being selected as the BGD did not mean that it was "superior" according to any standard defining "superior"; "best" in this instance meant only that the first-ranked applicant was considered better than the others in the group within that Domain. By the same token, to be named, e.g., the second-place applicant did not mean that the applicant necessarily was "excellent" or merely "good"; it meant only that

this applicant was less good, *in some unknown degree*, than the applicant ranked above it. The degree of qualitative difference between any two applicants in the ranking might have been a tiny sliver or a wide gap. The evaluators made no findings with respect to degrees of difference.

23. After ranking the applicants, by regional group, from top to bottom within each Domain, the applicants were "scored" 14 times by each evaluator——according to rank order. Thus, each Domain ostensibly offered an applicant a separate "scoring opportunity." The top score was determined by the number of applications in the region. If there were five applicants, as in the southwest region, then 5 would be the highest score, and the first-ranked applicant would receive 5 points. In a four-applicant field, by way of contrast, the highest score would be 4.[7/] The second-place and lower ranked applicants received scores that were 1 point less than the score assigned to the applicant immediately ahead of them in the order of rank.

24. To complete the evaluation process, the evaluators' 14 scores were weighted (using the percentages set forth in the table above), by Domain, and added together to produce a total score per reviewer. A perfect score——5 in this case of the southwest region——would be equal to the number of regional applicants. The reviewers' respective total scores were then combined and averaged to produce an aggregate score, which the

Department referred to as the "final rank." The highest "final rank" in the region was awarded the highest "regional rank," which, in a five-applicant field, would be 5. The applicant with the highest regional rank was selected as the intended recipient of the regional license (with one exception that is not relevant here).

25. Under the methodology just described, Alpha achieved the highest regional rank in the southwest region and, accordingly, received notice of DOH's preliminary decision to approve Alpha's application. POR and 3BF, in contrast, each received notices dated November 23, 2015, which assured them that "a panel of evaluators" had "substantively reviewed, evaluated, and scored" their applications "according to the requirements of Section 381.986, Florida Statutes and Chapter 64-4, of the Florida Administrative Code" and gave notice that DOH intended to deny their applications because both were "not the highest scored applicant in the Southwest region."

26. For reasons set forth in brief below——and detailed in the Informational Order on the Multi-Criteria Evaluation of Applications for Approval to Operate As a Dispensing Organization (the "Info-Order"),[8/] which was issued on September 8, 2016——DOH did not actually *score* the applications, as required by rule 64-4.002(5)(a); it merely *ranked* them.

27. A ranking determines an item's position within a set of items, as, for example, 1st, 2nd, 3rd. Numbers which designate the respective places (ranks) occupied by items in an ordered list are called ordinal numbers. A score, in contrast, is "a number that expresses accomplishment (as in a game or test) or excellence (as in quality) either absolutely in points gained or by comparison to a standard." See "Score," Merriam-Webster.com, http://www.merriam-webster.com (last visited May 3, 2017). Scores are expressed in cardinal numbers, which show quantity, e.g., how many or how much. When used as a verb in this context, the word "score" plainly means "to determine the merit of," or to "grade," id., so that the assigned score should be a cardinal number that tells how much quality the graded application has as compared to the competing applications.

28. As stated above, the Department's "scoring" methodology assigned to first place (most preferred) in any series a "score" equal to the ordinal number denominating the last place (least preferred) in the series, e.g., 5 if there were five applicants under review, and to each place below 1st a "score" that was one point less than that given to the immediately preceding rank. In other words, an applicant's "score" for a given series was simply its ordinal position in the series, inverted. Thus, the evaluators did not *rank applicants by score* for each Domain, nor did they score any

application; instead, they *scored each applicant's rank*, per Domain, with a fixed and predetermined value, i.e., a number between 1 and *x*, where *x* equaled the total number of applications being comparatively evaluated for a given region.

29. Thus, the evaluators automatically assigned the maximum score (100% of the points available) to the BGD; 80% of the maximum score to the second-place applicant (if, as here, *x* = 5); to the one after that, 60%; then 40%; and finally 20%.[9/] These scores did *not* reflect the relative merit of each applicant as compared to the BGD. Indeed, because degrees of qualitative difference were not important to the evaluators in making their determinations regarding relative quality, as Mr. Bax testified without contradiction at hearing, no findings concerning *how much* quality an applicant offered in relation to the others with which it was competing were required of, or made by, them. Yet, without such findings, no genuine *score* could be assigned.

30. The Department's process gave the impression of scoring, without accomplishing the reality of scoring, because a score of 4, say, did not mean that the second-ranked applicant was judged to be 25% inferior to (or 80% as good as) the BGD in a five-applicant field. Nor did a score of 1 mean that the last-ranked applicant per Domain was found to be 400% worse than the BGD. If the qualitative difference between the BGD and the

fifth-place applicant (although actually unknown) were 10%, for example, meaning that the last-ranked applicant was 90% as good as the BGD, fifth place (out of five) would still get only 20% of the points.

31. Whether intentional or not,[10/] the Department's scoring methodology imposed predetermined, artificial degrees of qualitative separation between the applicants, creating deceptive numerical margins having no rational relationship to actual qualitative proximities, which latter were not determined by, and thus were unknown to, the evaluators. The imposition of fixed, across-the-board scoring margins between adjacent positions in the evaluators' orders of preference was arbitrary because it placed specific values on unknown quantities. DOH's reliance upon arbitrary scores to determine the winners in a multi-criteria evaluation featuring 14 separately-weighted categories makes the results of its substantive review of the applications unreliable. It is unlikely that the five applicants originally chosen by the Department actually were, as a group, "the [five] most qualified Applicants." Application, at 1.

32. This is important because the Department has taken the position that its preliminary rankings of the applicants are not to be treated as matters of fact up for grabs in a de novo hearing, but rather as presumptively correct, "policy-infused"

findings of fact entitled to some measure of deference. The Department's legal arguments, which are rejected, will be dealt with later.[11/] For now, at the risk of belaboring the point, the undersigned will illustrate how the Department's arbitrary scoring methodology fatally undermines its preliminary rankings, which would not survive even the most deferential standards of review.

33. Suppose that after scoring hypothetical applicants on the first 13 Domains, an evaluator using DOH's scoring methodology has applicants *A* and *B* in first and second place, in a five-applicant field, with respective scores of 3.625 and 3.575.[12/] The last Domain (Financials), worth 20%, will determine the winner. Imagine that the evaluator ranks *B* as the best of the group in Domain XIV, while putting *A* in 3rd place, behind *C*. Under the Department's system, *B* wins, edging *A* with a score of 4.575 to 4.225.

34. Imagine, now, the same facts, but with one difference. Instead of using the Department's methodology, the evaluator quantifies his judgments regarding the degrees of difference in quality between the applicants and awards points based on these qualitative assessments rather than on each applicant's place in his order of preference.[13/] The evaluator's order of preference in Domain XIV, again, is *B*, *C*, *A*, but he considers all three applicants to be very close in quality——nearly

indistinguishable, in fact——deeming *C* to be 98% as good as *B*, and *A* 96% as good. The qualitative space between adjacent positions among the top three applicants, in other words, is actually 2% instead of the arbitrary 20% that the Department's methodology imposes. As a result, 0.96 points are added to *A*'s cumulative total, 1.00 to *B*'s, and 0.94 to *C*'s. In this scenario, *A* wins despite its 3rd-place ranking in Domain XIV, beating *B* in a photo finish, 4.585 to 4.575.

35. As this illustration demonstrates, the more qualified-in-fact applicant, *A*, would lose under DOH's system, which irrationally awards points based on arbitrarily imposed qualitative spaces between applicants, magnifying the effects of very small differences in actual relative quality, while minimizing the effects of large ones. This flaw would fatally distort the results of any multi-criteria, multi-category evaluation, but it is grossly influential where the categories are separately weighted——here, from 3.75% to 20%——because DOH's methodology is capable of transforming narrow qualitative differences-in-fact (especially in the heavier weighted Domains) into wide scoring margins, and vice versa.

36. These dynamics operated under the radar to affect the outcome of the substantive review of applicants for the southwest region's DO license. It is impossible to know whether Alpha would have ended up with the highest aggregate score if

the evaluators had awarded points based upon some reasonable measurement of actual relative quality. All we can be sure of is that the evaluators' scores reflect artificial gaps in relative quality predetermined by a procrustean scheme that fixed the degree of difference between adjacently ranked applicants at a constant margin, e.g., 20%, derived from the number of applicants for the region——a datum wholly unrelated to quality.[14/]

37. Because this is not a review proceeding, and because the Department's scoring of the applicants was, in any event, clearly erroneous, arbitrary, capricious, or an abuse of discretion, it has fallen to the undersigned, as the trier of fact in this de novo hearing, to perform a substantive review of POR and 3BF's applications for the purpose of determining which of these, the last remaining competitors for the southwest region's DO license, is in fact, the most qualified applicant.[15/] In so doing, as promised in the Info-Order, the undersigned has followed the statutes and existing rules pertaining to the comparative evaluation of applicants, to the extent such laws are applicable in this formal hearing. Accordingly, the undersigned used the 14 Domains, giving them, respectively, the weights assigned by the Department. Likewise, the undersigned used the Factors just as the Department said it did.

38. Because, however, as explained above, the Department's scoring methodology violates the plain language of rule 64-4.002(5) and cannot reliably achieve the stated goal of selecting the most qualified applicant,[16/] the undersigned was compelled to score the applications differently, i.e., in the true sense of the word, so that the degrees of difference between the competitors could be taken into account in the assignment of points. This required that findings of fact be made concerning the degrees of qualitative difference between POR and 3BF as to each Domain.

39. Early in the process the undersigned learned that determining a BGD without an external benchmark was just too undisciplined to be workable. The temptation would be to overvalue some Factors, overlook others, consider undisclosed criteria, and finally resort to making gut decisions about which applicant was better and by how much. So, it was decided that the applicants would be awarded Individual Performance Points ("IPPs") for every Factor, with each score reflecting the undersigned's ultimate factual determination concerning how well the applicant, considered independently of others, performed vis-à-vis that Factor as measured against a constructed scale (described below).

40. For each Domain, an applicant's IPPs were added to produce a Composite Score.[17/] The Composite Scores would be

compared, and the applicant with the highest Composite Score would be deemed the BGD. The BGD's Composite Score for the Domain then became, for purposes of the comparative review, the perfect score, entitled to 100% of the Relative Quality Points ("RQPs") available for the Domain in question. For simplicity's sake, the undersigned had decided that there should be a grand total of 100 RQPs available, so that the maximum number of RQPs awardable per Domain would equal each Domain's relative weight in DOH's scheme. Domain I.A.1, for example, has a relative weight of 7.5%. Thus, the BGD for that Domain would receive a Domanial Score of 7.5 RQPs.

41. The second-place applicant per Domain received a scaled percentage of the maximum number of RQPs available for the Domain in question. If the BGD's Composite Score were 50, for example, and the other applicant's 45, then the second-place applicant would receive 90% of the RQPs available for the Domain——90% reflecting the magnitude-of-difference ratio ($\frac{45}{50}$) between the two competitors. Thus, if the maximum Domanial Score were 7.5, this applicant would receive a Domanial Score of 6.75 RQPs.

42. After scoring both applicants, their Domanial Scores were totaled to produce a Regional Score for each. The applicant with the highest Regional Score would be the most qualified applicant in the field.

43. As mentioned above, the undersigned found it necessary to construct a rating scale because experience taught that it is a fool's errand to try to choose——*without* a frame of reference—— the better of two applicants who have responded to the Factors using (oftentimes) different but reasonable approaches. Indeed, the nature of the Factors is such that, in many instances, the question of whether one applicant's response is "better" than another's largely comes down to personal preference, so that formulating an answer is like deciding which fast food chain makes a better hamburger——except more difficult, because we are evaluating what are, essentially, startup companies aiming to enter a newly created, heretofore illegal market. Ordinarily, the *market* would decide, based on collective experience accumulated over time, which company provides the better combination of products and services; here, however, someone (or some limited number of persons) must decide, in advance, for the market. In exercising such a heavy responsibility, the decision maker(s) should endeavor to minimize the influence of rank subjectivity.

44. So, as a means of making the required decision pursuant to a logical method, the undersigned devised the following seven-level[18/] scale:

IPPs RATING SCALE	
Level (Points)	**Description**
5	Proved not only the existence or satisfaction of, or compliance with, the Factor, but also mastery or preeminence (if, e.g., knowledge, experience, or qualifications), or "state of the art" quality or development (if, e.g., device, technique, facility).
4	Proved not only the existence or satisfaction of, or compliance with, the Factor, but also excellence or expertise (if, e.g., knowledge, experience, or qualifications), or exceptional quality or development (if, e.g., device, technique, facility).
3	Clearly proved the existence or satisfaction of, or compliance with, the Factor, leaving little or no reasonable doubt.
2	Proved the existence or satisfaction of, or compliance with, the Factor, persuasively but not forcefully.
1	Proved the partial, but not complete, satisfaction of, or compliance with, the Factor.
0	No response, nonresponsive, or failed to prove the existence or satisfaction of, or compliance with, the Factor.
NC (2.5)[19/]	Not contested, i.e., no applicant identified this Factor as a potential point of preference.

45. In awarding IPPs to the applicants for each of the Factors, the undersigned considered all the relevant evidence in the record, resolved conflicts therein, if any, to ascertain the relevant historical, objective, or empirical facts, and made determinations of ultimate fact concerning the level to which, in the scale above, an applicant's response to a particular Factor rose. Each IPP score, therefore, numerically expresses

an ultimate fact representing the culmination of a rigorous deliberation. These ultimate facts are set forth in the scoresheet attached as Appendix B to this Recommended Order.

46. The undersigned readily acknowledges that the ultimate facts set forth in Appendix B are not falsifiable. The reality is that no one could perform this evaluation to the satisfaction of all reasonable observers. Indeed, there are likely few individual IPP scores that are beyond reasonable dispute, to say nothing of the outcome itself. That is simply the irreducible nature of the case. If the undersigned were to burden this Recommended Order with explanations of each scoring decision, therefore, those dissatisfied with the result could easily pick them apart, while others could just as easily find ample support for them in the record. The game's not worth the candle.

47. The table below shows the Domanial and Regional Scores for POR and 3BF:

	DOMANIAL SCORES	
	POR	**3BF**
Domain I.A.1	6.52	7.50
Domain II.A.2	7.50	6.56
Domain III.A.3	6.65	7.50
Domain IV.A.4	7.50	7.28
Domain V.B.1	5.94	7.50
Domain VI.B.2	7.50	7.50
Domain VII.B.3	6.75	7.50
Domain VIII.B.4	7.50	7.31
Domain IX.C.1	3.75	3.41
Domain X.C.2	3.75	3.75
Domain XI.C.3	3.75	3.47
Domain XII.C.4	3.75	3.53
Domain XIII.D	4.70	5.00

Domain XIV.E	20.00	18.31
REGIONAL SCORES	**95.56**	**96.12**

48. 3BF is the apparent "winner" by 0.56 RQPs. This margin of victory, however, reflects a false precision. The Regional Scores are reported above as numbers having two decimal digits, to the hundredths place. These numbers to the right of the decimal point are spurious digits introduced by calculations carried out to greater precision than the original data, the IPPs, which were awarded in whole numbers (unless the Factor was not contested). The Domanial Scores could not possibly have been more precise than the underlying IPP scores having the *least* number of significant figures in the equation, and these were always one-digit integers (with the unusual exception of Domain VI.B.2, where each applicant received straight 2.5s because no Factor was contested). To eliminate the false precision, the spurious digits should be rounded off. This produces a tie score of 96-96.

49. The undersigned therefore determines as a matter of ultimate fact that there is no meaningful qualitative difference between POR and 3BF when they are comparatively evaluated using the prescribed weighted Domains and unweighted Factors.

50. Both POR and 3BF are qualified for licensure, for each meets the requirements set forth in section 381.986(5)(b). It is unnecessary to make findings of fact regarding the

applicants' satisfaction of these conditions because DOH never gave timely notice of intent to deny either party's application for failing to demonstrate that it had the necessary abilities, infrastructure, or personnel.

CONCLUSIONS OF LAW

51. The Division of Administrative Hearings ("DOAH") has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

52. As applicants competing for licensure in a zero sum situation, POR and 3BF have the ultimate burden of persuasion and must prove, by a preponderance of the evidence, that one of them is the better qualified applicant in comparison to the other. § 120.57(1)(j), Fla. Stat.; see Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

53. When the substantial interests of an applicant are determined by denial in favor of a mutually exclusive application, the competing applicants are entitled to a comparative review hearing. Bio-Med. Apps. of Clearwater, Inc. v. Dep't of HRS, Office of Cmty. Med. Facilities, 370 So. 2d 19 (Fla. 2d DCA 1979). Applications are "mutually exclusive" where the decision on one application will substantially prejudice another pending application because all applicants are competing for the right to serve a market that only one of them can in practical effect be authorized to serve. Id. at 23. Thus, when

an applicant is able to show that the granting of authority to some other applicant would substantially prejudice his or her application, fairness requires that the agency conduct a comparative hearing pursuant to section 120.57 at which the competing applications are considered simultaneously. Id.; see Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327, 333 (1945); see also Gulf Court Nursing Ctr. v. Dep't of HRS, 483 So. 2d 700, 705 (Fla. 1st DCA 1985).

54. Comparative administrative hearings are not typically required in determining the interests of license applicants in Florida, and thus our state courts have not, as yet, developed detailed guidelines for conducting them. In conducting this hearing, the undersigned found the following discussion in Johnston Broadcasting Company v. Federal Communications Commission, 175 F.2d 351, 356-58 (D.C. Cir. 1949), to be instructive:

> A choice between two applicants involve[s] more than the bare qualifications of each applicant. It involves a comparison of characteristics. Both A and B may be qualified, but if a choice must be made, the question is which is the better qualified. Both might be ready, able and willing to serve the public interest. But in choosing between them, the inquiry must reveal which would better serve that interest. So the nature of the material, the findings and the bases for conclusion differ when (1) the inquiry is merely whether an applicant is qualified and (2) when the purpose is to

make a proper choice between two qualified applicants. . . .

[Where] both applicants [are found] to be qualified for a permit[,] the question [becomes] which should receive it. Comparative qualities and not mere positive characteristics must then be considered.

The principles which govern . . . a comparative consideration are basically the same as those which govern the determination of the qualification of a single applicant. . . . But the essentials to legally valid conclusions differ, as the two problems, one of bare qualification and the other of comparative qualifications, differ. In respect to comparative decisions, these are the essentials: (1) The bases or reasons for the final conclusion must be clearly stated. (2) That conclusion must be a rational result from the findings of ultimate facts, and those findings must be sufficient in number and substance to support the conclusion. (3) The ultimate facts as found must appear as rational inferences from the findings of basic facts. (4) The findings of the basic facts must be supported by substantial evidence. (5) Findings must be made in respect to every difference, except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. (6) The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant. . . .

The last two essentials above stated——(5) and (6)——are made necessary by the peculiar characteristics of a comparative determination. The [trier of fact] cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only. Neither can it base its conclusion upon a selection from

among its findings of differences and ignore all other findings. It must take into account all the characteristics which indicate differences, and reach an over-all relative determination upon an evaluation of all factors, conflicting in many cases. . . .

We say that the required findings need go no further than the evidence and the proposals of the parties. . . . [W]e think that the [trier of fact] may rely upon the parties to present whatever factual matter bears upon a choice between them. When the minimum qualifications of both applicants have been established, the public interest will be protected no matter which applicant is chosen. From there on the public interest is served by the selection of the better qualified applicant, and the private interest of each applicant comes into play upon that question. Thus, the comparative hearing is an adversary proceeding. The applicants are hostile, and their respective interests depend not only upon their own virtues but upon the relative shortcomings of their adversaries. We think, therefore, that the [trier of fact] is entitled to assume that in such a proceeding the record of the testimony will contain reference to all the facts in respect to which a difference between the parties exists, and that the parties will urge, each in his own behalf, the substantial points of preference. . . .

In this respect, a comparative determination differs from the determination of each applicant's qualifications for a permit. A choice can properly be made upon those differences advanced by the parties as reasons for the choice. To illustrate, if neither applicant presents as a material factor the relative financial resources of himself and his adversary, the [trier of fact] need not require testimony upon the point or make a finding in respect to it,

> beyond the requisite ability for bare qualification. It may assume that there is no material difference between the applicants upon that point.
>
> Our view upon the foregoing matter rests upon the actualities of a truly adversary proceeding, upon the difficulty, if not the impossibility, of defining a list of things in respect to which applicants may differ, and upon the practicalities of the [fact-finder's] task. It is only common sense to assume that adversaries with substantial interests at stake will overlook no advantage to be found in an opponent's weaknesses. . . . [I]f evidence were required on a list of subjects, immaterial as well as material, . . . without exception from the parties, the complexity, length and expense of proceedings would be vastly increased wholly unnecessarily.

55. On the matter of what the Johnston court referred to as the applicants' "bare qualifications," DOH never timely alleged that either POR or 3BF is *unqualified* for licensure as a DO. Rather, in its written notices of intent to deny, which the Department was required to give POR and 3BF pursuant to section 120.60(3), the Department informed the applicants that their respective applications would be denied, not for failure to meet any required qualification for licensure, but because the evaluators had selected Alpha as the highest-scored applicant.

56. On the last day of hearing, however, the Department announced that it was taking the position that neither POR nor 3BF had proved it met all the minimum conditions for licensure.

DOH repeats this contention in its Proposed Recommended Order but has neither specified what requirements were not allegedly met, nor offered any evidence in support of this purported reversal of its preliminary determination that both Petitioners were eligible for the substantive, comparative review of qualified applicants. Evidently, the Department believes that the applicants were required to prove at hearing their satisfaction of all the requirements for licensure, even though no disputed issues of material fact had ever been raised concerning these matters.

57. That is not how this process works. Section 120.60(3) provides that an applicant for licensure "shall be given written notice, personally or by mail, that the agency intends to grant or deny, or has granted or denied, the application for license. The notice must state with particularity the grounds or basis for the issuance or denial of the license, except when issuance is a ministerial act," which was not the case here. The issues for hearing in a license application denial case, as between the agency and the applicant, are framed by the section 120.60(3) denial letter and the applicant's petition for hearing. See, e.g., Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Reg., Div. of Pari-Mutuel Wagering, 53 So. 3d 1158, 1162 (Fla. 1st DCA 2011).

58. Thus, if there are seven requirements for licensure, and the agency gives notice of its intent to deny an application for failure to demonstrate satisfaction of condition No. 5, then the "statement of all disputed issues of material fact" that the applicant's petition for hearing must contain pursuant to Florida Administrative Code Rule 28-106.201(2)(d) should be limited to those bearing on whether the applicant meets condition No. 5 because that is the only requirement whose nonfulfillment the agency has asserted as grounds for denial. Obviously, the applicant has no reason to dispute the agency's preliminary determination——necessarily implicit in the denial letter——that he *meets* condition Nos. 1 through 4, 6, and 7. At the ensuing hearing, the applicant need not prove that *all* the conditions for licensure are met, including the undisputed ones, but only that No. 5 is.

59. In this instance, the Department never disputed the "bare" qualifications of POR and 3BF until the hearing was nearly over, when it was too late. Neither applicant, therefore, was required to prove, at hearing, the undisputed fact that it met all the conditions for licensure. To prevail, rather, the applicants needed to prove something different: that one of them, comparatively speaking, is the most qualified applicant. The question in a comparative hearing such as this,

as noted by the Johnston court, is *which* qualified applicant should receive the license, not which applicant is *qualified*.

60. As a last observation on this point, the Department could have contested the failure of one or both the applicants to satisfy some requirement or another, despite not having done so in the original denial letter. Clearly, however, due process demands that an applicant be given adequate notice of all grounds for the denial of its application. Therefore, to assert additional grounds for denial, DOH would have needed to timely amend the section 120.60(3) letters, or otherwise afford adequate notice of its change of position. It is not necessary in this case to explore in depth questions concerning when and how such notice must be given. It suffices to say that, absent extraordinary circumstances not present here, an agency cannot be allowed to ambush an applicant on the final day of a three-week hearing with the allegation that the applicant has failed to prove requirements for licensure that were never in dispute.

61. At hearing, the Department argued insistently that this is not an ordinary de novo proceeding whose purpose is to formulate agency action, but rather a more deferential review of some sort. For the most part, this argument was framed as an objection to any evidence being offered by either POR or 3BF that might "amend" an application on file with the Department on or before November 23, 2015. Seeking to preclude the applicants

from relying upon any "new" evidence supplementing or changing any statement in an application, even proof of events occurring after November 2015 that might be relevant to the consideration of comparative qualities, DOH describes this hearing as a "backward-looking, retrospective comparison" of the applications. Needless to say, a retroactive review would tend to protect the Department's proposed agency action against additional evidence of old facts, as well as newly available evidence of changed circumstances——and substantially modify POR and 3BF's administrative remedies under sections 120.569 and 120.57(1).

62. The starting point for consideration of the Department's contention that the non-adversarial record assembled by the Department during the free-form application process should not be reopened in the formal adversarial hearing (except *perhaps* to admit evidence that merely explains a statement in an application) is section 120.57(1)(k), which mandates that "[a]ll proceedings conducted under this subsection shall be de novo." De novo administrative hearings "are designed to give affected parties an opportunity to change the agency's mind." E.g., Couch Constr. Co. v. Dep't of Transp., 361 So. 2d 172, 176 (Fla. 1st DCA 1978). This opportunity, it has been said, "is one of the highest achievements of chapter 120 disciplines." State v. Falls Chase Special Taxing

Dist., 424 So. 2d 787, 813 (Fla. 1st DCA 1982) (Smith, C.J., dissenting).

63. "The supreme goal of the Administrative Procedure Act of 1974 is increased initiative and self-discipline within the executive branch. All its remedies press toward that goal . . . [of] promot[ing] agency responsibility, changing the agency head's mind if that is indicated." Id. The administrative law judge's ("ALJ's") essential function is neither to further nor frustrate the agency's proposed action, nor is it "merely [to] find the facts and supply the law, as would a court." McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 583 (Fla. 1st DCA 1977). Rather, the ALJ is supposed to conduct a hearing that "independently serves the public interest by providing a forum to expose, inform and challenge agency policy and discretion." State ex rel. Dep't of Gen. Servs. v. Willis, 344 So. 2d 580, 591 (Fla. 1st DCA 1977). Performing this function, the ALJ must, when necessary, "subject[] agency policymakers to the sobering realization their policies lack convincing wisdom, and require[] them to cope with [his or her] adverse commentary." McDonald, 346 So. 2d at 583. Thus, in a typical chapter 120 hearing to formulate final agency action, the agency's preliminary decision is given no deference. J.D. v. Fla. Dep't of Child. & Fams., 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013).

64. In the specific context of licensing, the de novo hearing requirement ensures that questions regarding the applicant's qualifications are to be determined based upon the circumstances that exist at the time of the final agency action, not some earlier date. Otherwise, the agency might issue "a permit contrary to existing legislation." Lavernia v. Dep't of Prof'l Reg., 616 So. 2d 53, 54 (Fla. 1st DCA 1993). "Florida follows the general rule that a change in a licensure statute that occurs during the pendency of an application for licensure is operative as to the application, so that the law as changed, rather than as it existed at the time the application was filed, determines whether the license should be granted." Id. at 53-54.

65. The same logic applies to factual developments which are material to an applicant's qualifications for licensure. If, between the time an application is filed and the time the agency takes final action on the application, some fact material to the applicant's qualifications changes to his detriment, so that he no longer satisfies the conditions for licensure under existing legislation, then the agency need not, and indeed should not, issue the license, even though the applicant was eligible for licensure when he applied. See Bd. of Med. v. Mata, 561 So. 2d 364, 365 (Fla. 1st DCA 1990).[20/]

66. Just as changing circumstances adversely affecting an applicant's qualification for licensure can be considered by the agency if evidence of the facts is received prior to the final decision, so too is the applicant entitled to present, and have the agency consider, proof of recent developments which positively affect the applicant's qualifications. This has long been recognized. See McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977). As the court explained in McDonald,

> The hearing officer's decision to permit evidence of circumstances as they existed at the time of the hearing was correct. The agency may appropriately control the number and frequency of amendments to licensing applications and may by rule prevent substantial amendment of the application in midproceeding.[21/] But the hearing officer or agency head conducting Section 120.57 proceedings should freely consider relevant evidence of changing economic conditions and other current circumstances external to the application. Section 120.57 proceedings are intended to formulate final agency action, not to review action taken earlier and preliminarily.

Id. at 584 (footnote omitted)(emphasis added). What matters, in the end, is that the applicant be qualified (or not) at the time of the final decision, not at some earlier point in the process. See also MVP Health, Inc. v. Ag. for Health Care Admin., Case No. 09-6021, 2010 Fla. Div. Adm. Hear. LEXIS 557, 37 n.13 (Fla. DOAH Apr. 22, 2010).

67. The Department argues that the Legislature removed DO licensing proceedings from this body of administrative law when it enacted chapter 2016-123, Laws of Florida (the "2016 Amendment"), which amended the Act. The 2016 Amendment took effect on March 25, 2016, during the pendency of this proceeding.

68. The relevant language of the 2016 Amendment is located in subsections (1) and (2) of section 3. Subsection (1) provides that, "[n]otwithstanding s. 381.986(5)(b), Florida Statutes," any applicant meeting certain conditions "must be granted cultivation authorization by the department and is approved to operate as a dispensing organization." With one exception, the only applicants that met the conditions for direct legislative approval outside of section 381.986(5)(b) were the applicants, including Alpha, that had received a notice from the Department of its intent to issue them a license.

69. Although the Legislature chose to authorize the applicants whom the Department intended to approve, it need not have picked these particular applicants; it could have approved any applicant(s)——or even an organization that had not applied. When the Legislature exercises its constitutional power to make a law "notwithstanding" an existing statute, it can do whatever it wants (within constitutional bounds). Through a legislative decree untouchable by the Administrative Procedure Act ("APA"),

therefore, a number of DO applicants received "fiat licenses" without any of them needing to prove, in a formal administrative hearing, that it was the best qualified among the applicants for licensure in a particular region.

70. Subsection (2) provides as follows:

> If an organization that does not meet the criteria of subsection (1) receives a final determination from the Division of Administrative Hearings, the Department of Health, or a court of competent jurisdiction that it was entitled to be a dispensing organization under s. 381.986, Florida Statutes, and applicable rules, such organization and an organization that meets the criteria of subsection (1) shall both be dispensing organizations in the same region. During the operations of any dispensing organization that meets the criteria in this section, the Department of Health may enforce rule 64-4.005, Florida Administrative Code, as filed on June 17, 2015.

(Underlining removed). This subsection authorized the disappointed applicants to continue pursuing their timely requested administrative remedies despite the issuance of the fiat licenses. The Department contends that subsection (2) redefined the ultimate issue for determination in this proceeding from "Which applicant *is* the most qualified?" to "Which applicant *was* the most qualified in November 2015?" From there, DOH argues, further, that the only admissible evidence (with limited exceptions not worth mentioning) of the facts as

of November 2015 consists of the applications themselves. These arguments, addressed below in reverse order, are rejected.

71. As the court noted in Mata, the "Administrative Procedure Act makes the hearing officer's fact-finding function in licensing proceedings an integral part of the whole process by which the agency determines whether to issue or deny the license." 561 So. 2d at 367. The APA requires, moreover, that the formal hearing be de novo, providing an administrative remedy that "contemplate[s] the presentation and consideration of new evidence." J.D., 114 So. 3d at 1132 (emphasis added). The 2016 Amendment says nothing about supplanting section 120.57(1)(k) or any other provision of the APA, and it should not be construed as doing so by implication. See Gopman v. Dep't of Educ., 908 So. 2d 1118, 1120 (Fla. 1st DCA 2005).

72. Concerning the contention that subsection (2) redefined the ultimate issue, turning the comparative hearing into a contemporaneous evaluation of the applicants as they were at a time in the past, long before they could have hoped to commence DO operations, and regardless of what has happened since, to decide which might better serve as a DO in the future, the Department places undue emphasis on the legislation's use of the past tense form of "to be" in the conditional clause ("If . . . a final [order] determin[es] . . . that [an applicant] *was* entitled to be a dispensing organization"). To

begin, the Department assumes that the verb "was" implies that the vantage point is the formal administrative hearing, from which the ALJ must look back.[22/] This *might* make *some* sense if subsection (2) conditioned licensure on receipt of an ALJ's recommended order finding that the applicant "was entitled" to be a DO because, if the relevant time were some point in the past, then from the ALJ's perspective that time most naturally would be thought to predate the final hearing, where the evidence on which the recommended order was based would have been adduced.

73. But that is not what subsection (2) says. Instead, subsection (2) conditions licensure on receipt of a "final determination," and it identifies three institutions from which such a decision might issue: DOAH, DOH, and a court. Whether an applicant "was entitled" to be a DO is a question that could be answered, therefore, from up to three different perspectives——not just DOAH's, as the Department's position takes for granted. Yet, DOAH does not have authority to issue a final determination of entitlement in licensing matters. Only DOH and the appellate courts have that power.[23/] This strongly implies that if subsection (2) requires a backwards look, as DOH argues, the one perspective that should *not* determine the vantage point is the ALJ's. The proper perspective should be, rather, DOH's or the court's, as applicable. And because

neither DOH nor an appellate court is a trier of fact, neither of them, in preparing a final decision, would be expected to look back on the time frame before the preliminary agency action; they would base final determinations of entitlement on the review of a recommended or final order, as the case may be, and the record behind it.

74. From the standpoint of a final decision-maker sitting in a review capacity, which is the relevant perspective under subsection (2), the past-tense phrase "was entitled" fits comfortably with the understanding that the evidence will already have been received, the facts found. To illustrate, in ordinary conversation, if we said the district court determined that Acme Corp. "was entitled" to be a dispensing organization, our statement would be understood most readily as meaning that Acme Corp.'s entitlement had been established in the record, which the court would have reviewed in making its determination. But a listener could not reasonably infer, from our statement alone, that evidence of recent factual developments had been admitted or rejected at the final hearing because the statement does not go that far.[24/]

75. If the Legislature had intended to preclude the Department or an appellate court from making a final determination of entitlement based upon all relevant findings of fact——including those reflecting the most recent developments

pro and con each applicant——that are supported by competent substantial evidence adduced at the final hearing, it surely would have said so with much greater clarity of expression.

76. Another indication that the Legislature did not intend to imbue the words "was entitled" with the meaning ascribed to them by the Department is that, as a matter of law, no applicant is ever "entitled" to be a DO until DOH makes a final affirmative decision on its application either by issuing a license (in the absence of a hearing) or, if a hearing is timely requested, by issuing a final order approving the issuance of a license. Even if ultimately successful, therefore, neither POR nor 3BF was entitled to licensure in the past; neither applicant is so entitled as of the date hereof; and neither applicant will be entitled to licensure in the future unless and until DOH enters a final order granting its application. It makes no sense to read subsection (2) as conditioning an applicant's licensure on a final determination that it was entitled to be a DO based on facts and circumstances leading up to, but not beyond, a point in time when no applicant was entitled to be a DO.

77. It is concluded that the past tense form of "to be" in subsection (2) is clearly *not* intended to direct the fact-finder to decide which applicant *was* the best choice based on what *was* the situation at some unspecified point in the past, regardless

of how the material facts might have changed over time. Since the first one then might later be last, a backward-looking review would raise the genuine possibility of handing out one of the few available licenses to an applicant that started fast but faded down the stretch and was overtaken by another; it would be counterproductive to the goal of choosing the most qualified applicant. Rather than requiring us to ignore present reality, the language at issue communicates the idea that, to be successful now, an applicant must show that it is better than *not only* (i) all other applicants still contending for the same regional license *but also* (ii) the applicant in that region to which the Legislature granted a fiat license outside of the administrative process, "[n]otwithstanding s. 381.986(5)(b)."

78. This is because, only of an applicant able to prove these things can it be said that such applicant——*rather than the fiat licensee that was approved* notwithstanding *section 381.986*——"was entitled" to be a DO "under s. 381.986" in the sense that such applicant ultimately would have received a license under section 381.986 but for the Legislature's intervention in 2016. Note that the "s. 381.986" under which a subsection (2) licensee's entitlement would have arisen is plainly the *pre-2016 Amendment* version of the statute. This gives the words "was entitled" a meaning roughly equivalent to "was on track" or "was in line" to be licensed *under section 381.986(5), Florida*

Statutes (2015), which was the law before the enactment of the 2016 Amendment. To the extent these proceedings are backward looking, the focus of the look-back is the former *law*, not the former *facts*.

79. This common sense understanding of the phrase "was entitled to be a dispensing organization under s. 381.986" has the additional advantage of making clear (as the Legislature no doubt intended) that only an applicant who had timely challenged the denial of its application under section 381.986, Florida Statutes (2015), for one of the original five DO licenses, and who was still in litigation when the 2016 Amendment was enacted, would be able to obtain a license. Thus, the 2016 Amendment authorized *up to* one more license per region.

80. In sum, the conditional clause in the first sentence of subsection (2) does not (i) transform this de novo hearing into a retrospective review; (ii) limit the record to information on file with the Department as of November 23, 2015; or (iii) require that applicants be compared as though no facts have changed since that date. Rather, it declares that any applicant, having applied for licensure under section 381.986, Florida Statutes (2015), may still be approved to operate as a DO, despite the establishment of a fiat licensee in the applicant's region of choice, if such applicant prevails in an administrative proceeding pending as of March 25, 2016, by

demonstrating its superiority to the fiat licensee, as well as all other remaining competitors for the same license.

81. At hearing, the Department asserted that its ranking of the applicants for the southwest region's license is a policy-infused finding of fact ("PIFF") entitled to deference under the standard of judicial review announced in McDonald v. Department of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977). Bids for deference have no place in a de novo hearing under sections 120.569 and 120.57; agencies should save them for the appeal. Nevertheless, because DOH threw down the gauntlet, the undersigned will take it up and explain, in detail, why the argument is rejected.

82. Without question, McDonald is a seminal case. Decided in the early days of the "modern" Florida APA, McDonald enjoys near-canonical status, and for good reason. The opinion is chock-full of magisterial pronouncements on Florida administrative law, all of which are interesting and insightful, many of which have stood the test of time. But the court was not infallible, and its writ not inerrant. Moreover, today's APA is substantially different in many crucial respects from the APA that existed when the McDonald court did its exegetical work. McDonald must be read with care and applied with caution in deciding current disputes.

83. McDonald, coincidentally, is a licensing case. The applicant sought to organize a bank and applied, in 1973, for the necessary authority, which, after a long and winding process that included a trip to circuit court, the agency declined to grant. This resulted in the referral of the matter, in 1976, to DOAH, then a fledgling agency which had only recently opened its doors. After conducting a formal hearing, the hearing officer ("HO") entered a recommended order that included detailed findings of fact upon which she determined, ultimately, that the applicant met each of the six statutory criteria——(a) through (f)——for licensure. Id. at 574-77.

84. In its final order, the agency rejected "many of the hearing officer's findings of fact as not based on competent substantial evidence" and denied the application. Id. at 577. The agency agreed that the proposed bank satisfied criteria (a) and (c), as the HO had found, but it "displaced" the HO's findings as to criteria (b), (d), (e), and (f), making substitute findings to the effect that the applicant had failed to satisfy these requirements. The applicant appealed the unfavorable decision.

85. The main issue on appeal was whether, as the appellant maintained, the agency had "erroneously discarded the hearing officer's findings of fact which are supported by competent substantial evidence and erroneously based [its] decision on

improperly substituted findings of fact." Id. at 574-75. It is important to note that, at the time of McDonald, unlike today, the APA allowed an agency to freely reject any conclusions of law in a recommended order, but, as now, forbade the agency from rejecting or modifying findings of fact without "first determin[ing] from a review of the complete record, and stat[ing] with particularity in the order, that the findings of fact were not based on competent substantial evidence." See § 120.57(1)(b)9., Fla. Stat. (Supp. 1976). Thus, the question presented should have been answered in the affirmative if, as the appellant claimed, the HO's findings of fact were supported by competent substantial evidence ("CSE").

86. Unfortunately for the development of Florida administrative law, however, the court identified a nonexistent problem and looked to federal law for a solution. The "problem" arose from section 120.68(10), Florida Statutes (Supp. 1976), which then provided in relevant part:

> If the agency's action depends on any fact found by the agency in a proceeding meeting the requirements of s. 120.57, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact.

§ 120.68(10), Fla. Stat. (emphasis added). Instead of treating this section as *in pari materia* with section 120.57(1)(b)9., and

interpreting both sections in light of each other, the court imagined them to be in tension.[25/]

87. The court described this purported tension as follows:

> [T]he Department was required to honor the hearing officer's findings of fact unless "not based upon competent substantial evidence." . . . Yet we as the reviewing court are required to sustain the Department's findings of fact——those which petitioners urge were wrongfully submitted—— if *they* are supported by competent substantial evidence. Section 120.68(10). The result is a conundrum: bound as we are to honor agency findings of fact supported by competent substantial evidence, how shall we determine whether the agency, as required, accorded similar respect to the hearing officer's findings?

Id. at 578. The court's rhetorical question invited a simple answer: Determine whether the HO's displaced findings of fact were not supported by CSE for the reasons stated with particularity in the final order and, if the agency incorrectly rejected or modified a material finding, reverse the final order on grounds of the agency's erroneous application of section 120.57(1)(b)9., but for which the "agency findings of fact" would not have been made. The court, in short, should have answered its own question by saying that "agency findings of fact" conceived in derogation of section 120.57(1)(b)9. deserve no "honor" on appeal. See endnote 25. But the court had other ideas.

88. It turned to federal law for guidance, specifically Universal Camera v. National Labor Relations Board, 340 U.S. 474 (1951), which established important principles for the judicial review of a federal agency's findings of fact. In Universal Camera, the U.S. Supreme Court examined the contention that the court of appeals had "erred in holding that it was barred from taking into account the report of the [hearing] examiner on questions of fact insofar as that report was rejected by the" agency. Id. at 491. This contention, the Court explained, raised "serious questions," id. at 492, due to several intersecting developments in federal law, which are too involved and too remote to recount here.

89. Take note, though, that the question presented in Universal Camera was whether a reviewing court may (or must) *exclude from consideration* the findings made by a hearing examiner to the extent they were discarded by the agency. In view of this issue, it comes as no surprise to learn that, under the federal APA, agencies possessed the power to reverse a hearing examiner's findings of fact without regard to whether such findings were supported by CSE.

90. Indeed, the Court forcefully rejected the notion that an agency has the "power to reverse an examiner's findings only when they are 'clearly erroneous,'" saying this idea represented "so drastic a departure from prior administrative practice that"

an explicit statute would be required to impose such a limitation. 340 U.S. at 492.[26/] It was on the basis of this deeply ingrained premise that the lower court in Universal Camera had ignored the examiner's discarded findings, even while acknowledging that the agency would have been "wrong" to "totally disregard[]" them, because it feared that treating the agency's "wrong[ful]" disregard of the examiner's findings as *reversible error* would be tantamount to forcing agencies via judicial review to adopt findings they were free under statutory authority to reject. Id. at 492-93.

91. It is worthwhile to pause here, before looking at the Supreme Court's solution to this apparent dilemma, to observe that, contrary to the McDonald court's analysis, the circuit court of appeals in Universal Camera did *not* face the "same question" which the McDonald court asked itself——namely, how should the court determine whether the agency, *as required by law*, honored the HO's findings of fact supported by CSE? McDonald, 356 So. 2d at 578. Unlike the agency in McDonald, which under an *explicit statute* had only the limited power to reverse an HO's findings when they were not supported by CSE, the agency in Universal Camera had the power to reverse such findings even if they were supported by CSE; that is, the federal agency was *not required by law* to honor the examiner's legally correct findings. See endnote 26. Nor were federal

agencies required to state any grounds, with particularity or otherwise, explaining the reversal of an examiner's findings of fact. The dilemma in Universal Camera thus was whether a court could reverse an agency's substituted findings of fact without effectively limiting the agency's indisputable statutory authority to disregard practically any fact found by an examiner where the evidentiary record provides at least some support for an alternative finding. The McDonald court asserted that it confronted the same "conundrum"——but it did not. Unlike the situation in Universal Camera, a reversal in McDonald on grounds of the agency's noncompliance with section 120.57(1)(b)9. would *not* have diminished the agency's statutory authority to reverse an HO's findings of fact; rather, a reversal on such grounds would simply have confined the agency to its statutorily limited authority in this regard. For this reason, Universal Camera was materially distinguishable.

92. The Supreme Court solved the Universal Camera dilemma by, in effect, demoting the hearing examiner from trier of fact to something like a competent, experienced, and impartial expert witness——someone to whom attention must be paid, but not a person who must usually be obeyed. It reasoned as follows. As mentioned, the agency was not required to accept the examiner's findings, even if they were legally correct. Moreover, under the federal standard for reviewing agency action, the findings

of the agency were to be regarded as "conclusive" if supported by "substantial evidence" upon consideration of the whole record. But this did not warrant an "exclusionary rule" requiring courts to ignore an examiner's discarded findings, as the lower court had done, because the "examiner's report is as much a part of the record as the complaint or the testimony." Universal Camera, 340 U.S. at 493. Therefore, the Court concluded, "a reviewing court [must] determine the substantiality of evidence on the record including the examiner's report." Id.

93. The Court hastened to add, however, that:

> the examiner's findings [need not] be given more weight than in reason and in the light of judicial experience they deserve. The "substantial evidence" standard is not modified in any way when the [agency] and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the [agency]'s than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is "substantial."

Id. at 496-97 (emphasis added). In other words, when a court must determine on appeal whether an agency's findings of fact are supported by substantial evidence, the hearing examiner's rejected findings are to be treated as just another piece of evidence in the record, sometimes meriting greater weight than the testimony (especially when dependent upon credibility determinations or, e.g., when the examiner is highly "experienced"), sometimes not, but always sufficiently relevant that "courts [may not] deny [them] the probative force they would have in the conduct of affairs outside a courtroom." Id. at 497.

94. The McDonald court believed that it was "free to . . . adopt[] Universal Camera's standard of judicial review" because "Florida's APA does not require that the reviewing court ignore the hearing officer's findings to the extent they are displaced by agency findings. McDonald, 346 So. 2d at 579. This statement was true, as far as it went, but it was not a sufficient basis for conforming Florida law to federal law on the matter of judicial review. The court failed to consider whether the Florida APA required the reviewing court to (i) ignore the agency's reasons for rejecting or modifying the HO's findings of fact, which reasons were supposed to have been stated with particularity in the final order, and thus (ii) *not* determine if those reasons were correct before reaching the

question of whether CSE supports the agency's substituted findings. Of course, the APA did not require *that*, either.

95. To the contrary, the APA required, at least by the strongest of implications, if not expressly, that the reviewing court determine as a threshold matter whether the agency exceeded its authority in rejecting or modifying a finding of fact. Read, again, the then-applicable statutory language:

> The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order. The agency may not reject or modify the findings of fact . . . unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Observe the difference between the agency's authority with respect to conclusions of law, on one hand, and findings of fact, on the other. The agency "may reject or modify" legal conclusions *without explanation*. In contrast, the agency "may *not* reject or modify the findings of fact" without giving an explanation, the substance of which must be limited to either of just two grounds. The requirement of an explanation, together with the limitation on the permissible grounds, for discarding an HO's findings of fact make sense only if the agency's exercise of its narrow authority to discard findings is subject

to judicial review as a distinct issue, separate from the question of whether the substituted findings are based on CSE. Otherwise, these statutory restrictions serve no meaningful purpose.

96. In adopting Universal Camera, the court introduced a nonnative invasive weed into the garden of Florida administrative law, which threatened to blot out the section 120.57(1)(b)9. limitations on agency authority to reject or modify findings of fact. McDonald steered the focus of judicial review of substituted findings away from the sufficiency of the agency's explanation for discarding the HO's findings, and placed it squarely on the sufficiency of the HO's findings, which would need to be both evidentially supported *and logically persuasive* if the agency's findings were to be disturbed. In this scheme, the burden was not on the agency to defend its rejection of the HO's contrary findings, but on the other party to show that the rejected findings, considered in conjunction with corroborating CSE, had *greater probative force* than the evidence relied upon by the agency in support of its substituted findings. In Universal Camera the Court took care, in crafting a needed standard of judicial review, to avoid imposing nonstatutory limitations on the agency's broad authority to reject findings of fact. The court in McDonald did the opposite, carelessly eliminating the need for judicial review,

as a separate matter, of the agency's exercise of its limited authority to reject findings of fact, thereby effectively easing the restrictions on such authority set forth in section 120.57(1)(b)9.

97. The McDonald court did not adopt Universal Camera wholesale, but adapted the federal standard of review to fit its purposes. Building upon Universal Camera, the court explained that the amount of probative force courts should give an HO's finding, in determining the substantiality of evidence supporting the agency's substituted finding, will generally depend on where the HO's finding falls on a continuum of factual issues, ranging from disputes involving historical or objective facts ("empirical facts"), where the HO's findings "carry relatively greater probative force," to disagreements over PIFFs, i.e., "ultimate facts . . . infused by policy considerations for which the agency has special responsibility," where the HO's findings deserve "less weight." 346 So. 2d at 579.

98. The "PIFF Doctrine," as the undersigned calls it, which is a subset of the larger McDonald holding on the judicial review of agency findings, is this: Agencies possess the "power," which increases "as the 'facts' blur into opinions and opinions into policies," "to substitute [PIFFs in place of HO] findings" with considerable leeway. Id. at 583. This power is

not unfettered, to be sure, but its exercise is not limited by section 120.57(1)(b)9. to situations where the HO's finding was not based upon CSE (although, as discussed, under the McDonald standard of review, if applied literally, *no* agency finding would be limited by that section[27/]); it is, rather, held in check by section 120.68, which imposes a "duty of exposition" on the agency to "explicate" in the final order the rationale behind its infusion of any "nonrule policy" into the PIFF. Id. Under the Doctrine, PIFFs are reviewable pursuant to section 120.68(7), Florida Statutes (Supp. 1976), as "determinations . . . of policy within the agency's exercise of delegated discretion." Id. at 579.

99. The idea of a category comprising PIFFs, occupying a no-man's-land between the section 120.57(1)(b)9. categories of "conclusions of law" and "findings of fact," did not come from Universal Camera or the Florida APA, but was, apparently, the McDonald court's original concept. Regardless, the McDonald court made it clear that under the PIFF Doctrine agencies would have more power over PIFFs than empirical facts. Less clear, if not buried under McDonald's elaborate sliding scale of factual issues, was just how radical a revision of section 120.57(1)(b)9. the court had slipped into the law.

100. By definition, a PIFF is an amalgam of empirical fact and policy. The PIFF Doctrine only comes into play, however,

when the agency and the HO disagree over the policy component of the discarded finding——indeed, such disagreement is what puts the "P" in PIFF. This is because, when the agency and the HO are in accord on the policy, all that remains for dispute are matters of empirical fact, and disagreements concerning empirical facts are, after Heifetz, 475 So. 2d at 1281-82, wholly within the realm of the HO's fact-finding discretion, which means that his or her findings will be conclusive if supported by CSE.

101. When used in connection with the PIFF Doctrine, the term "policy" includes any principle upon which a decision depends; such outcome-determining principles are otherwise known, in the broad sense, as "law." But "policy" here also means the result that follows from the application of general principle to empirical fact——what we would refer to, in other contexts, as the "holding" or "rule" of a judicial opinion. A holding establishes the outcome that should obtain when, in the future, the same general principle is applied to the same or similar empirical facts.

102. The HO and the agency might disagree over the general principle or, alternatively, over the "holding" that the general principle requires. If the former, the agency, under section 120.57(1)(b)9., had a free hand to reject or modify the HO's contrary legal conclusion regarding the controlling law. But

what was the agency to do if the HO, having applied a different general principle of decision, had not made the findings of empirical fact necessary for the application of the agency's substituted conclusion of law? The PIFF Doctrine supplied a handy solution: make substituted PIFFs. If the disagreement was over the correct holding, as opposed to the general principle, the PIFF Doctrine gave the agency a way to change the result. The agency's substituted finding of, say, guilty in place of not guilty, would no longer be a common ultimate fact, which triers of fact like HOs ordinarily decide, but a PIFF.

103. Simply put, the PIFF Doctrine gave agencies a license to change the facts, including, especially, the ultimate facts, to conform them to its substituted conclusions of law. Beneath the academic analysis, under layers of abstract concepts, the McDonald court thus gave birth to a dangerous new idea, one which seriously eroded the section 120.57(1)(b)9. law/fact dichotomy *where it most matters*, namely with respect to ultimate facts or "holdings."

104. In 1996, the Legislature substantially revised the APA. See Ch. 96-159, Laws of Fla. Two amendments, in particular, put the PIFF Doctrine in the crosshairs. The first of these, an amendment to section 120.68, was subtle but significant in light of the McDonald court's reliance on the "potentially conflicting demands" of sections 120.57(1)(b)9. and

120.68(10), which latter referred to "fact[s] found by the agency." That phrase was deleted in 1996, with the result that the statute currently calls for the reviewing court to remand when it finds that the "agency's action depends on any finding of fact [~~found by the agency~~] that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to ss. 120.569 and 120.57; however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact." Ch. 96-159, § 35, at 203, Laws of Fla. (codified at § 120.68(7)(b), Fla. Stat.). This change eliminated any implication that agencies have the authority to find facts qua a trier of fact.

105. The other relevant amendment, which replaced section 120.57(1)(b)9. with a substantially reworded section 120.57(1)(j), took direct aim at the PIFF Doctrine, imposing two new restrictions on the authority of agencies to edit recommended orders. One limits agencies to rejecting or modifying only conclusions of law "over which [they] ha[ve] substantive jurisdiction." The second provides that "[r]ejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact." Ch. 96-159, § 19, at 189, Laws of Fla. (currently codified at § 120.57(1)(*l*), Fla. Stat.). The latter restriction, alone, is

sufficient to overthrow the PIFF Doctrine, which is nothing if not a warrant to reject or modify findings of fact based upon substituted conclusions of law.

106. Also introduced in chapter 96-159 was a new section 120.57(1)(e), which provided that "[a]ny agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge." Id. at 187. The Legislature has amended this subsection from time to time over the years. It currently states: "An agency or an administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule or a rule that is an invalid exercise of delegated legislative authority." § 120.57(1)(e), Fla. Stat.

107. The undersigned concludes that, regardless of whether the PIFF Doctrine was *ever* consistent with the Florida APA, it cannot be squared with today's APA. Forty years after McDonald was decided, the time has come to let go of the PIFF Doctrine, which is bad law and should be discarded, once and for all.

108. Before turning to the Recommendation, the undersigned wants to acknowledge the recently approved amendment to article X of the Florida Constitution, which added a new section to the referenced article ("Section 29"), effective January 3, 2017, that embraces the subject of medical marijuana production,

possession, and use. The limited purpose behind mentioning Section 29 here is merely to suggest that the Department appears to have been granted constitutional authority that might be exercised in fashioning a remedy in this case.

109. Very broadly speaking, Section 29 expands the universe of medical conditions for which a qualifying patient might lawfully be treated under Florida law with marijuana, including but not limited to low-THC cannabis, provided a number of other qualifications are also met. For the production side of the medical marijuana economy, Section 29 introduces a new type of business operation, the Medical Marijuana Treatment Center ("MMTC"), which is defined as:

> an entity that acquires, cultivates, possesses, processes (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfers, transports, sells, distributes, dispenses, or administers marijuana, products containing marijuana, related supplies, or educational materials to qualifying patients or their caregivers and is registered by the Department.

Art. X, § 29(b)(5), Fla. Const.

110. As this is being written, it remains to be seen whether MMTCs and DOs will coexist in the future as separately licensed entities, or whether, as seems more likely, existing DO licenses will somehow be converted to, or reissued as, MMTC licenses, so that DOs will become MMTCs. (For what it's worth,

the preliminary text of DOH's proposed rule 64-4.012, published in a Notice of Development of Proposed Rules, at 43 Florida Administrative Register 262 (Jan. 10, 2017), defines MMTC as having the same meaning as DO.)

111. Subsections (d) and (e) provide as follows:

> (d) DUTIES OF THE DEPARTMENT. The Department shall issue reasonable regulations necessary for the implementation and enforcement of this section. The purpose of the regulations is to ensure the availability and safe use of medical marijuana by qualifying patients. It is the duty of the Department to promulgate regulations in a timely fashion.
>
> (1) Implementing Regulations. In order to allow the Department sufficient time after passage of this section, the following regulations shall be promulgated no later than six (6) months after the effective date of this section:
>
> * * *
>
> c. Procedures for the registration of MMTCs that include procedures for the issuance, renewal, suspension and revocation of registration, and standards to ensure proper security, record keeping, testing, labeling, inspection, and safety.
>
> * * *
>
> (e) LEGISLATION. Nothing in this section shall limit the legislature from enacting laws consistent with this section.

112. Insofar as Section 29 bestows specific power on the Department to issue reasonable regulations necessary to implement Florida's constitutionally mandated medical marijuana

program, it appears to be self-executing because the regulation-making authority is not explicitly made dependent on any delegation from the Legislature. See, e.g., NAACP, Inc. v. Fla. Bd. of Regents, 876 So. 2d 636, 639-40 (Fla. 1st DCA 2004). If the Department's regulation-making authority flows directly from the constitution, as seems to be the case, then so long as the Department is acting within the scope of its constitutional authority, it does not need a grant of legislative authority to adopt a regulation. Indeed, so long as DOH acts within the scope of its constitutional authority, it is not an "agency" subject to the APA disciplines. See § 120.52(1), Fla. Stat. (defining "agency" as meaning designated officers and governmental entities, but only "if acting pursuant to powers other than those derived from the constitution"); Couchman v. Univ. of Cent. Fla., 84 So. 2d 445, 447 (Fla. 5th DCA 2012)("The APA applies only to those administrative bodies that come within the Act's definition of "agency," and hence when an administrative body "is acting pursuant to authority derived from Florida's Constitution, the APA does not apply.").

113. Consequently, it is quite possible that regulations issued by the Department for the implementation and enforcement of Section 29, including those establishing procedures for licensing MMTCs, will not be subject to administrative challenge under the APA. NAACP, Inc., 876 So. 2d at 640. Intriguingly,

it is even possible that DOH has the constitutional power to issue regulations that trump inconsistent statutes within the scope of DOH's regulation-making authority, although that issue will not be ripe for judicial resolution unless and until DOH issues a regulation that conflicts with a statute, or the Legislature enacts a statute that conflicts with a DOH regulation. Cf. Florida Carry, Inc. v. Univ. of N. Fla., 133 So. 3d 966, 979-80 (Fla. 1st DCA 2013)(Wetherell, J., specially concurring).

114. Section 29(d)(2) requires the Department to begin licensing MMTCs "no later than nine (9) months after the effective date of this section," which was January 3, 2017. Thus, the Department has until around October 3, 2017, to start this process, but it could start right away.

115. Section 29 does not impose a limit on the number of MMTCs that the Department may license. As of this writing, neither DOH nor the Legislature has placed a cap on the number of MMTCs that may be licensed to operate in the state of Florida.

116. In the absence of legislation capping the number of MMTC licenses available for issuance, the Department could decide (i) that the existing statutory restrictions on the number of DO licenses apply equally to MMTC licenses; (ii) that it may issue an unlimited number of MMTC licenses; or (iii) to

impose a higher cap on MMTC licenses than currently applies to DO licenses. (Logically, the Department could (iv) cap the number of MMTC licenses at less than the number of authorized DOs, but that would seem to thwart the manifest objectives of Section 29 and thus might not survive a review for reasonableness.) Electing option (ii) or (iii) might open the door to granting both POR and 3BF relief in this case.

117. Given that POR and 3BF are indistinguishable in fact in terms of comparative qualities, the undersigned recommends that the Department consider whether it has the constitutional authority to license them both at this juncture and, if it believes it has such authority, to consider exercising it. The undersigned recognizes that it is for the Department and the Department alone, in the first instance, to determine the scope of its constitutional authority, and for the Department to decide whether and how to exercise such authority. Ordinarily, the undersigned would not even identify unasked questions of constitutional concern, much less suggest that they be considered, but this is an exceptionally unusual case involving an important new regulatory regime of great public interest, governed by a fluid body of law that, as of this writing, appears unlikely to solidify for some time.

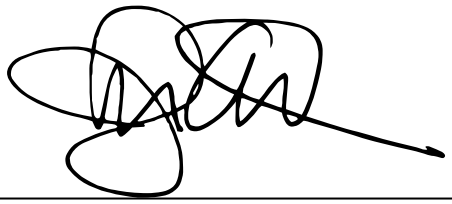
RECOMMENDATION

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

1. The Department of Health consider whether, in the exercise of newly acquired constitutional authority, it may license both Plants of Ruskin, Inc., and Tornello Landscape Corp., d/b/a 3 Boys Farm, as MMTCs; and then consider exercising such authority, if thought to exist, because there is no meaningful qualitative difference between these applicants, as a matter of ultimate fact.

2. If the Department chooses not to license both applicants as MMTCs, then a final order should be entered approving the application of Tornello Landscape Corp., d/b/a 3 Boys Farm, whose score of 96.12 is the highest, if only by a mathematically insignificant margin.

DONE AND ENTERED this 23rd day of May, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of May, 2017.

ENDNOTES

[1/] On November 10, 2016, Plants of Ruskin, Inc., filed a motion to strike Tornello Landscape Corp.'s Proposed Recommended Order because it had been filed a day late, on November 8, 2016. While the undersigned does not condone untimely filings, it would be unduly harsh to strike a party's proposed recommended order for a minor (and undeniably harmless) infraction that clearly meant no disrespect for this forum or its rules. The undersigned is certain, moreover, that the attorneys in this case, all of whom are highly experienced and preeminent practitioners of administrative law, will not mistake leniency in this instance for a license to flout future deadlines. The motion, therefore, is hereby denied.

[2/] The dispensing organizations, collectively, are intended to be the state's exclusive suppliers of medical cannabis, but they may engage in oligopolistic competition.

[3/] Section 381.986(5)(b) divides the state into five regions: northwest, northeast, central, southeast, and southwest Florida.

[4/] Florida Administrative Code Rule 64-4.002(5) provides that applications were due no later than 21 days after the effective date of the rule, which became effective June 17, 2015.

[5/] Seven and one-half percent is equal to one-quarter of 30%.

[6/] Three and three-quarters percent is equal to one-quarter of 15%.

[7/] In practice, the evaluators seem to have ranked and scored simultaneously, so that the most preferred southwest regional applicant in each Domain was simply "ranked" No. 5.

[8/] The Info-Order, available at https://www.doah.state.fl.us/DocDoc/2015/007270/15007270OGEN-090816-08302630.pdf, is incorporated herein by reference.

[9/] The margins would be narrower if there were more than five applications being reviewed, and wider if there were fewer. For example, with seven applications, the second-ranked applicant in a given Domain would receive 86% of the available points (6/7). If there were four applications, then second place was worth only 75% of the maximum score (3/4).

[10/] In testifying about the Department's scoring system, Mr. Bax was clear, forthcoming, and direct, evincing nothing but confidence in the soundness of the approach. His candor convinced the undersigned that the Department genuinely believes its system will produce reliable results. Nevertheless, for reasons explained in the text, the undersigned is compelled to conclude that the Department's system was irrational. He does not conclude, however, nor mean to imply, that the Department's personnel were capricious or irrational, or that they conducted a pretextual substantive review. On the contrary, to be clear, it is the undersigned's opinion that the evaluators did the best they could, in good faith, to discharge the Department's extraordinarily demanding duties under section 381.986. It was the methodology that failed, not the other way around.

[11/] The undersigned does not have the benefit of a written legal analysis of DOH's contentions because the Department elected to file a bare-bones Proposed Recommended Order that obviously was not intended to persuade the undersigned or show any cards.

[12/] In practice, cumulative scores probably were not calculated until after all of the domanial rankings had been completed.

The undersigned is using a narrative license in the example for the sake of simplification in making the point.

[13/] Another narrative license is being used here, as *A* and *B* would not——except by extraordinary coincidence——have the same respective cumulative scores of 3.625 and 3.575 based on the first 13 Domains if the evaluator awarded points based on qualitative assessments.

[14/] To be clear, scoring based on actual relative quality would not have changed the evaluators' domanial *rankings*. But it likely, although not necessarily, would have altered the *final rank* because the aggregate scores would have been different. We cannot know what the evaluators' final rank would have looked like, however, in this counterfactual situation.

[15/] If this were a review proceeding, which it is not, the undersigned, instead of scoring the applications, would remand the case to DOH for that purpose.

[16/] Furthermore, in a two-applicant field, DOH's ranking method of assigning points would automatically award *half* the number of points per Domain to the second-ranked applicant as compared to the BGD, which would be unjust and unfair.

[17/] Each Factor was scored individually because none is separately weighted and collectively they are exclusive. This means that non-Factor criteria cannot be considered, but also that no Factor can be treated as more important than another within the same Domain. Scoring every Factor, and only every Factor, systematically prevents an evaluator from making either mistake. This is because, in computing an applicant's domanial Composite Score, no relative-importance adjustment is made to the IPPs awarded for each Factor, ensuring that no separate weight is silently attached to any Factor; each Factor receives a score so that no Factor is ignored; and no IPPs are awarded for non-Factors.

[18/] Strictly speaking, this scale probably cannot be viewed as expressing interval data because the difference between, say, 2 and 3 is perhaps not the same as the difference between 4 and 5, in view of the uneliminatable subjectivity involved. The undersigned is simply unable to come up with a better alternative. At any rate, to the extent this scale, as a technical matter, reflects ordinal data, they are data that more

closely resemble interval data than any information previously considered in evaluating these applicants.

[19/] The undersigned did not make qualitative judgments regarding the applicants' responses to Factors that both agreed were not points of preference. It was necessary to score these uncontested Factors, nonetheless, because doing otherwise would be tantamount to awarding a score of 0 to them, which in turn would give an unfair boost to the applicant with the highest Cumulative Score for the Domain. The undersigned opted to award exactly half (2.5) of the maximum IPPs available for each uncontested Factor in order to reduce the margin for error, given that a higher score would advantage the second-place applicant in each Domain, while a lower score would advantage the BGD.

[20/] As mentioned previously, however, the applicant is always entitled to due process. If the agency proposes to deny the application based upon reasons not raised in the original notice of intent, it must issue an amended notice pursuant to section 120.60(3) affording the applicant a reasonable opportunity to be heard. Thus, in Mata, for example, the court remanded the case so that the hearing officer could consider evidence of events that had transpired after the final hearing, make additional findings of fact based on such evidence, and recommend whether, in light of the current facts, the applicant was fit to practice medicine. Id. at 377.

[21/] By "in midproceeding," the court meant "during the free-form proceeding leading to preliminary agency action." The court was saying, in other words, that the agency may, by rule, limit an applicant's ability to amend his application *while that application is pending before the agency, and the agency is coming to its intended decision*. This point is underscored by footnote 14, where the court summarized the agency's rule on the amendment of applications, which if applicable to the formal hearing would have precluded the hearing officer from admitting evidence of contemporaneous factual circumstances. Id. at 584 n.14. As the court proceeded to explain, the agency cannot, by rule or otherwise, prohibit an ALJ from receiving evidence the APA itself allows.

[22/] The Department assumes further that (i) the ALJ should look back to the specific period from July 8 to November 23, 2015, and (ii) confine his gaze to the materials filed with DOH during that time frame. None of these assumptions finds any support in

the 2016 Amendment other than the one word, *was*, which the Department is asking to bear an awful lot of inferential meaning.

[23/] The term "court of competent jurisdiction" literally includes circuit courts, but as used in the subsection (2) it is almost certainly meant to reference appellate courts only, since disappointed applicants have administrative remedies that they must exhaust, as a general rule. In any event, if subsection (2) authorizes a DO applicant to sue for a license in a civil proceeding, the ensuing trial in circuit court would not be a comparative hearing conducted under the auspices of the APA, and the action would, presumably, involve substantially different issues of fact and law.

[24/] There is always, of course, an end to the period of time that can be considered in any final hearing, even if relevant evidence of very recent developments is admitted. But the Department simply begs the question by assuming that, as used in subsection (2), "was entitled" imposes the temporal qualifications: as of November 2015 and regardless of subsequent developments. The words "was entitled" do not, by themselves, prescribe or imply such restrictions.

[25/] Section 120.68(10) should not have been understood as giving agencies a warrant to make findings of fact in contravention of section 120.57(1)(b)9., which latter established precisely two situations in which a fact might correctly be "found by the agency." The first would occur when an agency adopted an HO's finding of fact, either out of agreement with the finding or because there were no legitimate grounds for rejecting it, whereupon such finding would become a "fact found by the agency." The second, when an agency rejected or modified a finding, as happened in McDonald. That second situation, however, could occur *in accordance with the law* only if the agency, following section 120.57(1)(b)9., correctly found that the HO's discarded finding was not based upon CSE. Inexplicably, the McDonald court assumed that *all* facts found by the agency (as opposed to all facts *correctly* found by the agency pursuant to section 120.57(1)(b)9.) were equal in the eyes of section 120.68(10), so that fact-findings substituted by the agency in place of an HO's contrary findings would be taken at face value and be upheld if supported by CSE——notwithstanding that the HO's displaced findings were *also* supported by CSE.

For an example of how the court should have conducted its judicial review, read Venetian Shores Home and Property Owners v. Ruzakawski, 336 So. 2d 399 (Fla. 3d DCA 1976), a case decided nine months before McDonald. (Venetian Shores is cited——and rejected sub silentio——in McDonald, 346 So. 2d at 578.) There, the Third District Court of Appeal reversed a final order because "the agency violated [section 120.57(1)(b)9.] in that it did 'reject or modify the findings of fact' without 'stat[ing] with particularity in the order, that the findings of fact were not based upon competent substantial evidence.'" 336 So. 2d at 401 (emphasis added). Further, the court's review of the record "compel[led it] to hold that there is competent, substantial evidence to support the finding of the examiner." Id. The court concluded:

> [T]here is no provision [in the APA] which suggests that the agency should make a new judgment upon the evidence. This relationship between agency and examiner is not new to the law. The rule long applied in chancery matters is that where a master is appointed to take the evidence and report the same, together with his findings of fact and conclusions of law, his findings should be approved by the chancellor unless clearly erroneous or it appears that the master has misconceived the legal effect of the evidence. . . . We do not think that the Administrative Procedure Act can be read to grant to the head of an agency greater powers over an examiner's findings than those of a trial judge over the findings of a master in chancery.

Id.

[26/] Because the notion that an agency has the power to reverse findings *only* when they are clearly erroneous is false, then a true statement is that the agency has the power to reverse findings *even* when they are *not* clearly erroneous. (For ease of discussion, the undersigned will use the term "legally correct" as shorthand for "not reversible under the clearly erroneous standard" or simply "not clearly erroneous." According to Universal Camera, therefore, federal agencies have the power to reverse not only findings that are clearly erroneous, but also findings that are legally correct.) The clearly erroneous

standard of review, moreover, is, if anything, less restrictive (i.e., less deferential) than the CSE standard that limits Florida agencies' power to reverse HO findings. That is, it is theoretically easier to reverse a finding under the clearly erroneous standard. See Chubb Custom Ins. Co. v. U.T. Invs., LLC, 113 So. 3d 1017, 1019 (Fla. 5th DCA 2013)("A trial court's finding of fact based on conclusions drawn from undisputed evidence is subject to review by the less restrictive 'clearly erroneous' standard of review."); Bradley v. Waldrop, 611 So. 2d 31, 32 (Fla. 1st DCA 1992)(findings reviewed under the clearly erroneous standard carry less "conclusiveness" than other findings of fact).

It follows that while a finding not based on CSE would certainly be clearly erroneous, a clearly erroneous finding might, in theory at least, be supported by CSE. (This latter could occur, for example, where a finding is based on *some* CSE, but is contrary to the overwhelming weight of *other, conflicting* CSE. To illustrate with an extreme example, a finding based on the testimony of a drunken felon, which would be supported by CSE, might be reversed as clearly erroneous if contrary to the accounts of several unimpeachable witnesses and a videotape.) A finding which is legally correct, on the other hand, would almost certainly have to be based on CSE because, again, the *absence* of supporting CSE would make the finding clearly erroneous. So, an agency that has the power to reverse even findings that are legally correct, as federal agencies do, is necessarily empowered to reverse findings based on CSE. But an agency that has the limited power to reverse findings only when they are based on CSE, which is all that Florida agencies have, arguably cannot reverse a finding that is *merely* clearly erroneous. Thus, it is conceivable, if admittedly highly unlikely in practice, that a Florida agency could be compelled to adopt a clearly erroneous finding that is nevertheless based on some, albeit weak, CSE, e.g., the drunken felon's testimony.

[27/] In Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985), the First District Court of Appeal modified the McDonald standard, stating: "Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact." With that, the sliding scale of factual disputes was discarded. "[O]rdinary factual issues not requiring agency expertise" would henceforth be seen as falling exclusively within the HO's "fact-finding discretion." Id. at 1282. The PIFF Doctrine, however, survived, and persisted.

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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.

MAIN TOPIC (Weight)	SUBTOPIC (Weight)	**DOMAIN — WEIGHT**	FACTOR	SUBFACTOR
A. Cultivation (30%)	1. Technical Ability (25%)	**I.A.1. — 7.50%**	a. Experience cultivating cannabis	
			b. Experience cultivating in Florida plants not native to Florida	
			c. Experience introducing new varieties of plants	
			d. Regional cultivation knowledge and experience	
			e. Experience cultivating plants for human consumption such as food or medicine products	
			f. Experience with in-house propagation	
			g. Experience with genetic modification or breeding	
			h. Experience using clean growing rooms	
			i. Knowledge of cannabis cultivation, including:	i. Proper cultivation conditions and techniques
				ii. Additives that can be used when growing cannabis
				iii. Pests, disease and deficiencies common for cannabis
				iv. Production of high quality product in a short time
			j. Experience with tracking each plant in a harvest	
			k. Experience with good agricultural practices	
			l. Experience with good handling practices	
			m. Experience with recalls	

APPENDIX A

MAIN TOPIC (Weight)	SUBTOPIC (Weight)	**DOMAIN — WEIGHT**	FACTOR	SUBFACTOR
			n. Any awards, recognition, or certifications received for relevant expertise	
A. Cultivation (30%)	2. Infrastructure (25%)	**II.A.2. — 7.50%**	a. Vehicles that will be used to transport product among cultivating, processing, and dispensing facilities	
			b. Communication systems	
			c. Methods of mitigating odors if applicable	
A. Cultivation (30%)	3. Premises, Resources, Personnel (25%)	**III.A.3. — 7.50%**	a. Location of all properties Applicant proposes to utilize to cultivate low-THC cannabis, including ownership information for the properties and any lease terms if applicable:	i. For any property that is leased by the Applicant, include documentation that the property owner consents to the use of the property for the purposes of cultivation of low-THC cannabis and documentation that the mortgagor or lienholder has been given notice of the use of the property for the purpose of cultivation of low-THC cannabis
				ii. For any property owned by the Applicant but subject to a mortgage or lien, include documentation that the mortgagor or lienholder has been notified of the use of the property for the purpose of cultivation of low-THC cannabis
			b. Compliance with local regulations regarding sanitation and waste disposal	
			c. The ability to obtain zoning approval	

MAIN TOPIC (Weight)	SUBTOPIC (Weight)	**DOMAIN — WEIGHT**	FACTOR	SUBFACTOR
			d. Sketch or other illustration approximating the property boundaries, land topography, vegetation, proposed and/or existing structures, easements, wells, and roadways for each cultivation property proposed	
			e. Description of the areas proposed for the cultivation of low-THC cannabis, including the following:	i. Capacity, in square feet of growing area
				ii. Cultivation environment, e.g., greenhouse, clean room, aseptic, et cetera
				iii. Irrigation system(s)
				[iv.] Environmental control system(s).
			f. A description of the ability or plan to expand any of the areas proposed for cultivating low-THC cannabis	
			g. Back-up systems for all cultivation systems	
			h. A description of one or more strains of low-THC cannabis the applicant intends to cultivate	
			i. Access to water resources that allow for sufficient irrigation	
			j. A list of current and proposed staffing for cultivation, including:	i. Position, duties and responsibilities
				ii. Resume
				iii. Professional licensure disciplinary action in all jurisdictions

MAIN TOPIC (Weight)	SUBTOPIC (Weight)	**DOMAIN — WEIGHT**	FACTOR	SUBFACTOR
			k. An organizational chart illustrating the supervisory structure of the cultivation function of the proposed Dispensing Organization	
			l. Plans and procedures for loss of key personnel	
			m. Plans and procedures for complying with OSHA regulations for workplace safety	
A. Cultivation (30%)	4. Accountability (25%)	**IV.A.4. — 7.50%**	a. Floor plan of each cultivation facility or proposed floor plans for proposed cultivation facilities, including the following:	i. Locking options for each means of ingress and egress
				ii. Alarm systems
				iii. Video surveillance
				iv. Name and function of each room;
				v. Layout and dimensions of each room
			b. Storage, including the following:	i. Safes
				ii. Vaults
				iii. Climate control
			c. Diversion and trafficking prevention procedures	
			d. A facility emergency management plan	
			e. System for tracking low-THC source plant material throughout cultivation	
			f. Inventory control system for low-THC cannabis	
			g. Policies and procedures for recordkeeping	

MAIN TOPIC (Weight)	SUBTOPIC (Weight)	**DOMAIN — WEIGHT**	FACTOR	SUBFACTOR
			h. Methods of screening and monitoring employees	
			i. Personnel qualifications and experience with chain of custody or other tracking mechanisms	
			j. Personnel reserved solely for inventory control purposes	
			k. Personnel reserved solely for security purposes	
			l. Waste disposal plan	
			m. Access to specialized resources or expertise regarding data collection, security, and tracking	
B. Processing (30%)	1. Technical Ability (25%)	**V.B.1. — 7.50%**	*a. Experience with good manufacturing practices*	
			b. Experience with analytical, organic chemistry, and micro-biology	
			c. Experience with analytical laboratory methods	
			d. Experience with analytical laboratory quality control, including maintaining a chain of custody	
			e. Knowledge of and experience with cannabis extraction techniques	
			f. Knowledge of cannabis routes of administration	
			g. Experience with recalls	
			h. Knowledge of and experience with producing cannabis products	

MAIN TOPIC (Weight)	SUBTOPIC (Weight)	**DOMAIN — WEIGHT**	FACTOR	SUBFACTOR
			i. Any awards, recognition or certifications received for relevant expertise	
B. Processing (30%)	2. Infrastructure (25%)	**VI.B.2. — 7.50%**	a. Vehicles that will be used to transport product among cultivating, processing, and dispensing facilities	
			b. Communication systems	
			c. Methods of mitigating odors if applicable	
B. Processing (30%)	3. Premises, Resources, Personnel (25%)	**VII.B.3. — 7.50%**	a. Location of all properties Applicant proposes to utilize to process low-THC cannabis and Derivative Products, including ownership information for the properties and any lease terms if applicable:	i. For any property that is leased by the Applicant, include documentation that the property owner consents to the use of the property for the purposes of processing of low-THC cannabis and Derivative Products and documentation that the mortgagor or lienholder has been given notice of the use of the property for the purposes of processing of low-THC cannabis and Derivative Products
				ii. For any property owned by the Applicant but subject to a mortgage or lien, include documentation that the mortgagor or lienholder has been notified of the use of the property for the purposes of processing of low-THC cannabis and Derivative Products
			b. Compliance with local regulations regarding sanitation and waste disposal	
			c. The ability to obtain zoning approval	

MAIN TOPIC (Weight)	SUBTOPIC (Weight)	**DOMAIN — WEIGHT**	FACTOR	SUBFACTOR
			d. Sketch or other illustration approximating the property boundaries, land topography, vegetation, proposed and/or existing structures, easements, wells, and roadways for each processing property proposed	
			e. A description of the ability or plan to expand any of the areas proposed for processing low-THC cannabis	
			f. Back-up systems for all processing systems	
			g. Description of the areas proposed for the processing of Derivative Products, including the following:	i. Extraction equipment and location
				ii. Concentration equipment and location
				iii. Access to sufficient potable water and hot water
				iv. Analytical equipment, including separators and detectors, and location
				v. Safety equipment and facilities and location
				vi. Computer systems and software
				vii. Ventilation and exhaust system
			h. A list of current and proposed staffing, including:	i. Position, duties and responsibilities
				ii. Resume
				iii. Professional licensure disciplinary action in all jurisdictions

MAIN TOPIC (Weight)	SUBTOPIC (Weight)	**DOMAIN — WEIGHT**	FACTOR	SUBFACTOR
			i. An organizational chart illustrating the supervisory structure of the processing function of the proposed Dispensing Organization	
			j. Plans and procedures for loss of key personnel	
			k. Plans and procedures for complying with OSHA regulations for workplace safety	
			l. Relationship(s) with an independent laboratory(ies) with cannabis testing protocols and methods	
B. Processing (30%)	4. Accountability (25%)	**VIII.B.4. — 7.50%**	a. Floor plan of each cultivation facility or proposed floor plans for proposed processing facilities, including the following:	i. Locking options for each means of ingress and egress
				ii. Alarm systems
				iii. Video surveillance
				iv. Name and function of each room
				v. Layout and dimensions of each room
			b. Storage, including the following:	i. Safes
				ii. Vaults
				iii. Climate control
			c. Diversion and trafficking prevention procedures for the processing facilities	
			d. A facility emergency management plan for the processing facilities	

MAIN TOPIC (Weight)	SUBTOPIC (Weight)	**DOMAIN — WEIGHT**	FACTOR	SUBFACTOR
			e. System for tracking low-THC source plant material throughout processing	
			f. Inventory control system for low-THC cannabis and Derivative Products	
			g. Policies and procedures for recordkeeping	
			h. Vehicle tracking systems	
			i. Vehicle security systems	
			j. Methods of screening and monitoring employees	
			k. Personnel qualifications and experience with chain of custody or other tracking mechanisms	
			l. Personnel reserved solely for inventory control purposes	
			m. Personnel reserved solely for security purposes;	
			n. Waste disposal plan	
			o. Access to specialized resources or expertise regarding data collection, security, and tracking	
C. Dispensing (15%)	1. Technical Ability (25%)	**IX.C.1. — 3.75%**	a. Experience interacting with patients	
			b. Experience with handling confidential information	
			c. A marketing plan	
			d. Experience gathering and managing data, i.e. data on patient reactions to products dispensed	
			e. Experience with recalls	

MAIN TOPIC (Weight)	SUBTOPIC (Weight)	**DOMAIN — WEIGHT**	FACTOR	SUBFACTOR
			f. Knowledge of cannabis routes of administration	
			g. Training programs for employees addressing:	i. The Health Insurance Portability and Accountability Act (HIPAA);
				ii. Patient education
				iii. Compliance
				iv. Patient counseling
				v. Data collection
			h. Any awards, recognition or certifications received for relevant expertise	
C. Dispensing (15%)	2. Infrastructure (25%)	**X.C.2. — 3.75%**	a. A map showing the location of the applicant's proposed dispensing facilities	
			b. A sketch or other illustration of the actual or proposed dispensing locations showing streets; property lines; buildings; parking areas; outdoor areas, if applicable; fences; security features; fire hydrants, if applicable; and access to water and sanitation systems	
			c. A floor plan of the actual or proposed building or buildings where dispensing activities will occur showing:	i. Areas designed to protect patient privacy
				ii. Areas designed for retail sales
			d. A HIPAA compliant computer network utilized by all facilities	
			e. Vehicles that will be used to transport product among cultivating, processing, and dispensing facilities	

MAIN TOPIC (Weight)	SUBTOPIC (Weight)	**DOMAIN — WEIGHT**	FACTOR	SUBFACTOR
			f. Communication systems	
			g. Hours of operation of each dispensing facility	
			h. Methods of mitigating odors if applicable	
C. Dispensing (15%)	3. Premises, Resources, Personnel (25%)	**XI.C.3. — 3.75%**	a. Location of all properties Applicant proposes to utilize to dispense Derivative Products, including ownership information for the properties and any lease terms if applicable:	i. For any property that is leased by the Applicant, include documentation that the property owner consents to the use of the property for the purposes of dispensing of Derivative Products and documentation that the mortgagor or lienholder has been given notice of the use of the property for the purposes of dispensing of Derivative Products
				ii. For any property owned by the Applicant but subject to a mortgage or lien, include documentation that the mortgagor or lienholder has been notified of the use of the property for the purposes of dispensing of Derivative Products
			b. Compliance with local regulations regarding sanitation and waste disposal	
			c. The ability to obtain zoning approval	
			d. Sketch or other illustration approximating the dispensing property boundaries, land topography, vegetation, proposed and/or existing structures, easements, wells, and roadways for each property proposed	

MAIN TOPIC (Weight)	SUBTOPIC (Weight)	**DOMAIN — WEIGHT**	FACTOR	SUBFACTOR
			e. A description of the ability or plan to expand any of the areas proposed for dispensing Derivative Products	
			f. Description of the methods proposed for the dispensing of Derivative Products, including the following:	i. Accessibility of dispensing facilities, e.g., centrally located to several populated areas, located on a main roadway, not in a high crime area, et cetera
				ii. Proximity of dispensing facilities to patient populations
				iii. Alternative dispensing, e.g. delivery
			g. A list of current and proposed dispensing staffing, including:	i. Position, duties and responsibilities;
				ii. Resume
				iii. Professional licensure disciplinary action in all jurisdictions
			h. An organizational chart illustrating the supervisory structure of the dispensing function of the proposed Dispensing Organization	
			i. Plans and procedures for loss of key personnel	
			j. Plans and procedures for complying with OSHA regulations for workplace safety	
C. Dispensing (15%)	4. Accountability (25%)	**XII.C.4. — 3.75%**	a. Floor plan of each facility or proposed floor plans for proposed dispensing facilities, including the following:	i. Locking options for each means of ingress and egress

MAIN TOPIC (Weight)	SUBTOPIC (Weight)	**DOMAIN — WEIGHT**	FACTOR	SUBFACTOR
				ii. Alarm systems
				iii. Video surveillance
				iv. Name and function of each room
				v. Layout and dimensions of each room
			b. Storage, including the following:	i. Safes
				ii. Vaults
				iii. Climate control
			c. Diversion and trafficking prevention procedures for the dispensing facilities	
			d. A facility emergency management plan for the dispensing facilities	
			e. System for tracking Derivative Products throughout dispensing	
			f. Inventory control system for Derivative Products	
			g. Policies and procedures for recordkeeping	
			h. Methods of screening and monitoring employees	
			i. Personnel qualifications and experience with chain of custody or other tracking mechanisms	
			j. Personnel reserved solely for inventory control purposes	
			k. Personnel reserved solely for security purposes	

MAIN TOPIC (Weight)	SUBTOPIC (Weight)	**DOMAIN — WEIGHT**	FACTOR	SUBFACTOR
			l. Plans for the recall of any Derivative Products that have a reasonable probability of causing adverse health consequences based on a testing result, bad patient reaction, or other reason	
			m. Access to specialized resources or expertise regarding data collection, security, and tracking	
D. Medical Director (5%)		**XIII.D — 5.00%**	a. Specialty area, if any	
			b. Experience with epileptic patients	
			c. Experience with cancer patients	
			d. Experience with patients with severe seizures or muscle spasms	
			e. Knowledge of the use of low-THC cannabis for treatment of cancer or physical medical conditions that chronically produce symptoms of seizures or severe and persistent muscle spasms	
			f. Knowledge of good manufacturing practices	
			g. Knowledge of analytical and organic chemistry	
			h. Knowledge of analytical laboratory methods	
			i. Knowledge of analytical laboratory quality control, including maintaining a chain of custody	

MAIN TOPIC (Weight)	SUBTOPIC (Weight)	**DOMAIN — WEIGHT**	FACTOR	SUBFACTOR
			j. Knowledge of and experience with CBD/low-THC extraction techniques	
			k. Knowledge of CBD/low-THC routes of administration	
			l. Experience in or knowledge of clinical trials or observational studies	
			m. Knowledge of and experience with producing CBD/low-THC products	
			n. Experience with or knowledge of botanical medicines	
			o. Experience with dispensing medications	
			p. Description of how the medical director will supervise the activities of the Dispensing Organization	
			q. Description of how the Dispensing Organization will ensure it has a medical director at all times	
E. Financials		**XIV.E — 20%**	a. Certified Financials issued within the immediately preceding 12 months	
			b. Applicant's corporate structure	
			c. All owners of the Applicant	
			d. All individuals and entities that can exercise control of the Applicant	
			e. All individuals and entities that share in the profits and losses of the Applicant	

MAIN TOPIC (Weight)	SUBTOPIC (Weight)	**DOMAIN — WEIGHT**	FACTOR	SUBFACTOR
			f. All subsidiaries of the Applicant	
			g. Any other individuals or entities for which the Applicant is financially responsible	
			h. Assets of the Applicant and Applicant's subsidiaries	
			i. Liabilities of the Applicant and Applicant's subsidiaries	
			j. Any pending lawsuits to which the Applicant is a party	
			k. Any lawsuits within the past 7 years to which the Applicant was a party	
			l. All financial obligations of Applicant that are not listed as a "liability" in the Certified Financials	
			m. A projected two year budget for the Dispensing Organization	
			n. Specific reference to sufficient assets available to support the Dispensing Organization activities.	

DOMAIN		FACTOR	POR	3BF
I. A. Cultivation	**1. Technical Ability — 7.50%**	a. Experience cultivating cannabis	4	3
		b. Experience cultivating in Florida plants not native to Florida	2	4
		c. Experience introducing new varieties of plants	2	2
		d. Regional cultivation knowledge and experience	3	3
		e. Experience cultivating plants for human consumption such as food or medicine products	3	3
		f. Experience with in-house propagation	4	4
		g. Experience with genetic modification or breeding	4	4
		h. Experience using clean growing rooms	2	3
		i. Knowledge of cannabis cultivation	3	3
		j. Experience with tracking each plant in a harvest	3	3
		k. Experience with good agricultural practices	3	4
		l. Experience with good handling practices	3	4
		m. Experience with recalls	2	2
		n. Any awards, recognition, or certifications received for relevant expertise	2	4
	Composite Score (IPPs)		40	46
	Scaled Percentage		87%	100%
	Domanial Score (RQPs)		6.53	7.50
II. A. Cultivation	**2. Infrastructure — 7.50%**	a. Vehicles that will be used to transport product among cultivating, processing, and dispensing facilities	NC	NC
		b. Communication systems	NC	NC

APPENDIX B

DOMAIN		FACTOR	POR	3BF
		c. Methods of mitigating odors if applicable	3	2
	Composite Score (IPPs)		8	7
	Scaled Percentage		100%	88%
	Domanial Score (RQPs)		7.50	6.60
III. A. Cultivation	**3. Premises, Resources, Personnel — 7.50%**	a. Location of all properties Applicant proposes to utilize to cultivate low-THC cannabis, including ownership information for the properties and any lease terms if applicable	NC	NC
		b. Compliance with local regulations regarding sanitation and waste disposal	1	2
		c. The ability to obtain zoning approval	NC	NC
		d. Sketch or other illustration approximating the property boundaries, land topography, vegetation, proposed and/or existing structures, easements, wells, and roadways for each cultivation property proposed	NC	NC
		e. Description of the areas proposed for the cultivation of low-THC cannabis	3	3
		f. A description of the ability or plan to expand any of the areas proposed for cultivating low-THC cannabis	NC	NC
		g. Back-up systems for all cultivation systems	2	4
		h. A description of one or more strains of low-THC cannabis the applicant intends to cultivate	1	3
		i. Access to water resources that allow for sufficient irrigation	3	3
		j. A list of current and proposed staffing for cultivation	3	3

DOMAIN		FACTOR	POR	3BF
		k. An organizational chart illustrating the supervisory structure of the cultivation function of the proposed Dispensing Organization	3	3
		l. Plans and procedures for loss of key personnel	NC	NC
		m. Plans and procedures for complying with OSHA regulations for workplace safety	3	2
	Composite Score (IPPs)		31.50	35.50
	Scaled Percentage		89%	100%
	Domanial Score (RQPs)		6.68	7.50
IV. A. Cultivation	**4. Accountability — 7.50%**	a. Floor plan of each cultivation facility or proposed floor plans for proposed cultivation facilities, including the following:	NC	NC
		b. Storage, including the following:	NC	NC
		c. Diversion and trafficking prevention procedures	NC	NC
		d. A facility emergency management plan	3	3
		e. System for tracking low-THC source plant material throughout cultivation	3	3
		f. Inventory control system for low-THC cannabis	2	2
		g. Policies and procedures for recordkeeping	NC	NC
		h. Methods of screening and monitoring employees	NC	NC
		i. Personnel qualifications and experience with chain of custody or other tracking mechanisms	NC	NC
		j. Personnel reserved solely for inventory control purposes	NC	NC

DOMAIN		FACTOR	POR	3BF
		k. Personnel reserved solely for security purposes	3	2
		l. Waste disposal plan	NC	NC
		m. Access to specialized resources or expertise regarding data collection, security, and tracking	NC	NC
	Composite Score (IPPs)		33.50	32.50
	Scaled Percentage		100%	97%
	Domanial Score (RQPs)		7.50	7.28
V. B. Processing	**1. Technical Ability — 7.50%**	a. Experience with good manufacturing practices	2	2
		b. Experience with analytical, organic chemistry, and micro-biology	2	4
		c. Experience with analytical laboratory methods	3	4
		d. Experience with analytical laboratory quality control, including maintaining a chain of custody	3	4
		e. Knowledge of and experience with cannabis extraction techniques	3	1
		f. Knowledge of cannabis routes of administration	3	3
		g. Experience with recalls	2	2
		h. Knowledge of and experience with producing cannabis products	1	1
		i. Any awards, recognition or certifications received for relevant expertise	0	3
	Composite Score (IPPs)		19	24
	Scaled Percentage		79%	100%
	Domanial Score (RQPs)		5.93	7.50
VI. B. Processing	**2. Infrastructure — 7.50%**	a. Vehicles that will be used to transport product among cultivating, processing, and dispensing facilities	NC	NC
		b. Communication systems	NC	NC
		c. Methods of mitigating odors if applicable	NC	NC
	Composite Score (IPPs)		7.50	7.50
	Scaled Percentage		100%	100%
	Domanial Score (RQPs)		7.50	7.50

DOMAIN		FACTOR	POR	3BF
VII. B. Processing	**3. Premises, Resources, Personnel — 7.50%**	a. Location of all properties Applicant proposes to utilize to process low-THC cannabis and Derivative Products, including ownership information for the properties and any lease terms if applicable:	NC	NC
		b. Compliance with local regulations regarding sanitation and waste disposal	1	2
		c. The ability to obtain zoning approval	NC	NC
		d. Sketch or other illustration approximating the property boundaries, land topography, vegetation, proposed and/or existing structures, easements, wells, and roadways for each processing property proposed	NC	NC
		e. A description of the ability or plan to expand any of the areas proposed for processing low-THC cannabis	NC	NC
		f. Back-up systems for all processing systems	2	4
		g. Description of the areas proposed for the processing of Derivative Products, including the following:	NC	NC
		h. A list of current and proposed staffing, including:	3	3
		i. An organizational chart illustrating the supervisory structure of the processing function of the proposed Dispensing Organization	3	3

DOMAIN		FACTOR	POR	3BF
		j. Plans and procedures for loss of key personnel	NC	NC
		k. Plans and procedures for complying with OSHA regulations for workplace safety	3	2
		l. Relationship(s) with an independent laboratory(ies) with cannabis testing protocols and methods	0	1
	Composite Score (IPPs)		27	30
	Scaled Percentage		90%	100%
	Domanial Score (RQPs)		6.75	7.50
VIII. B. Processing	**4. Accountability — 7.50%**	a. Floor plan of each cultivation facility or proposed floor plans for proposed processing facilities, including the following:	NC	NC
		b. Storage, including the following:	NC	NC
		c. Diversion and trafficking prevention procedures for the processing facilities	NC	NC
		d. A facility emergency management plan for the processing facilities	3	3
		e. System for tracking low-THC source plant material throughout processing	3	3
		f. Inventory control system for low-THC cannabis and Derivative Products	2	2
		g. Policies and procedures for recordkeeping	NC	NC
		h. Vehicle tracking systems	NC	NC
		i. Vehicle security systems	NC	NC
		j. Methods of screening and monitoring employees	NC	NC

DOMAIN		FACTOR	POR	3BF
		k. Personnel qualifications and experience with chain of custody or other tracking mechanisms	3	3
		l. Personnel reserved solely for inventory control purposes	NC	NC
		m. Personnel reserved solely for security purposes;	3	2
		n. Waste disposal plan	NC	NC
		o. Access to specialized resources or expertise regarding data collection, security, and tracking	NC	NC
	Composite Score (IPPs)		39	38
	Scaled Percentage		100%	97%
	Domanial Score (RQPs)		7.50	7.28
IX. C. Dispensing	**1. Technical Ability — 3.75%**	a. Experience interacting with patients	4	4
		b. Experience with handling confidential information	NC	NC
		c. A marketing plan	3	3
		d. Experience gathering and managing data, i.e. data on patient reactions to products dispensed	NC	NC
		e. Experience with recalls	2	2
		f. Knowledge of cannabis routes of administration	3	3
		g. Training programs for employees	3	3
		h. Any awards, recognition or certifications received for relevant expertise.	2	0
	Composite Score (IPPs)		22	20
	Scaled Percentage		100%	91%
	Domanial Score (RQPs)		3.75	3.41
X. C. Dispensing	**2. Infrastructure — 3.75%**	a. A map showing the location of the applicant's proposed dispensing facilities	NC	NC

DOMAIN		FACTOR	POR	3BF
		b. A sketch or other illustration of the actual or proposed dispensing locations showing streets; property lines; buildings; parking areas; outdoor areas, if applicable; fences; security features; fire hydrants, if applicable; and access to water and sanitation systems	NC	NC
		c. A floor plan of the actual or proposed building or buildings where dispensing activities will occur showing:	NC	NC
		d. A HIPAA compliant computer network utilized by all facilities	3	3
		e. Vehicles that will be used to transport product among cultivating, processing, and dispensing facilities	NC	NC
		f. Communication systems	NC	NC
		g. Hours of operation of each dispensing facility	NC	NC
		h. Methods of mitigating odors if applicable	NC	NC
	Composite Score (IPPs)		20.50	20.50
	Scaled Percentage		100%	100%
	Domanial Score (RQPs)		3.75	3.75
XI. C. Dispensing	**3. Premises, Resources, Personnel — 3.75%**	a. Location of all properties Applicant proposes to utilize to dispense Derivative Products, including ownership information for the properties and any lease terms if applicable:	NC	NC
		b. Compliance with local regulations regarding sanitation and waste disposal	2	2
		c. The ability to obtain zoning approval	3	2

DOMAIN		FACTOR	POR	3BF
		d. Sketch or other illustration approximating the dispensing property boundaries, land topography, vegetation, proposed and/or existing structures, easements, wells, and roadways for each property proposed	NC	NC
		e. A description of the ability or plan to expand any of the areas proposed for dispensing Derivative Products	NC	NC
		f. Description of the methods proposed for the dispensing of Derivative Products, including the following:	3	3
		g. A list of current and proposed dispensing staffing, including:	3	3
		h. An organizational chart illustrating the supervisory structure of the dispensing function of the proposed Dispensing Organization	3	3
		i. Plans and procedures for loss of key personnel	NC	NC
		j. Plans and procedures for complying with OSHA regulations for workplace safety	3	2
	Composite Score (IPPs)		27	25
	Scaled Percentage		100%	93%
	Domanial Score (RQPs)		3.75	3.49
XII. C. Dispensing	**4. Accountability — 3.75%**	a. Floor plan of each facility or proposed floor plans for proposed dispensing facilities, including the following:	NC	NC
		b. Storage, including the following:	NC	NC

DOMAIN	FACTOR	POR	3BF
	c. Diversion and trafficking prevention procedures for the dispensing facilities	NC	NC
	d. A facility emergency management plan for the dispensing facilities	3	3
	e. System for tracking Derivative Products throughout dispensing	3	3
	f. Inventory control system for Derivative Products	2	2
	g. Policies and procedures for recordkeeping	NC	NC
	h. Methods of screening and monitoring employees	NC	NC
	i. Personnel qualifications and experience with chain of custody or other tracking mechanisms	3	3
	j. Personnel reserved solely for inventory control purposes	NC	NC
	k. Personnel reserved solely for security purposes	3	2
	l. Plans for the recall of any Derivative Products that have a reasonable probability of causing adverse health consequences based on a testing result, bad patient reaction, or other reason	3	2
	m. Access to specialized resources or expertise regarding data collection, security, and tracking	NC	NC
Composite Score (IPPs)		34.50	32.50
Scaled Percentage		100%	94%
Domanial Score (RQPs)		3.75	3.53
XIII. D. Medical Director — 5%	a. Specialty area, if any	4	4
	b. Experience with epileptic patients	3	3

DOMAIN	FACTOR	POR	3BF
	c. Experience with cancer patients	3	2
	d. Experience with patients with severe seizures or muscle spasms	3	3
	e. Knowledge of the use of low-THC cannabis for treatment of cancer or physical medical conditions that chronically produce symptoms of seizures or severe and persistent muscle spasms	3	5
	f. Knowledge of good manufacturing practices	2	2
	g. Knowledge of analytical and organic chemistry	2	4
	h. Knowledge of analytical laboratory methods	3	4
	i. Knowledge of analytical laboratory quality control, including maintaining a chain of custody	3	4
	j. Knowledge of and experience with CBD/low-THC extraction techniques	1	1
	k. Knowledge of CBD/low-THC routes of administration	3	3
	l. Experience in or knowledge of clinical trials or observational studies	4	4
	m. Knowledge of and experience with producing CBD/low-THC products	1	1
	n. Experience with or knowledge of botanical medicines	3	3
	o. Experience with dispensing medications	4	3
	p. Description of how the medical director will supervise the activities of the Dispensing Organization	3	2

DOMAIN		FACTOR	POR	3BF
		q. Description of how the Dispensing Organization will ensure it has a medical director at all times	2	2
	Composite Score (IPPs)		47	50
	Scaled Percentage		94%	100%
	Domanial Score (RQPs)		4.70	5.00
XIV. E. Financials — 20%		a. Certified Financials issued within the immediately preceding 12 months	3	2
		b. Applicant's corporate structure	NC	NC
		c. All owners of the Applicant	NC	NC
		d. All individuals and entities that can exercise control of the Applicant	NC	NC
		e. All individuals and entities that share in the profits and losses of the Applicant	NC	NC
		f. All subsidiaries of the Applicant	NC	NC
		g. Any other individuals or entities for which the Applicant is financially responsible	NC	NC
		h. Assets of the Applicant and Applicant's subsidiaries	NC	NC
		i. Liabilities of the Applicant and Applicant's subsidiaries	NC	NC
		j. Any pending lawsuits to which the Applicant is a party	NC	NC
		k. Any lawsuits within the past 7 years to which the Applicant was a party	NC	NC
		l. All financial obligations of Applicant that are not listed as a "liability" in the Certified Financials	NC	NC
		m. A projected two year budget for the Dispensing Organization	3	1

DOMAIN		FACTOR	POR	3BF
		n. Specific reference to sufficient assets available to support the Dispensing Organization activities.	2	2
	Composite Score (IPPs)		35.50	32.50
	Scaled Percentage		100%	92%
	Domanial Score (RQPs)		20.00	18.40