

STATE OF FLORIDA
DEPARTMENT OF HEALTH

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OFFICE OF THE CLERK

McCRORY'S SUNNY HILL NURSERY, LLC,

Petitioner,

CASE NO. _____

vs.

FLORIDA DEPARTMENT OF HEALTH,

Respondent.

PETITION FOR FORMAL ADMINISTRATIVE PROCEEDINGS

Pursuant to Sections 120.569 and 381.986, Florida Statutes, and Chapter 28-106, Florida Administrative Code (and other applicable statutes, if any), the Petitioner, **McCrorry's Sunny Hill Nursery, LLC** ("McCrorry's") hereby requests formal administrative proceedings to challenge Respondent, Florida Department of Health's, Office of Compassionate Use ("DOH"), intended decision to deny authorization to McCrorry's to become a Low-THC Cannabis Dispensing Organization for the Florida Central Region, pursuant to Section 381.986, Section 3.(1) as amended by HB 307 & HB 1313 (effective March 25, 2016) [Sec. 3, Ch. 2016-123 Laws of Florida]. In support of its petition, McCrorry's states as follows:

1. **Rule 28-106.201(2)(a), Florida Administrative Code. The name and address of each agency affected and each agency's file or identification number, if known.** The state agency affected by this proceeding is DOH, 2585 Merchants Row Boulevard, Bin # A, Tallahassee, FL 32399-3265. McCrorry's has no knowledge of an assignment by DOH of a file number to this matter.
2. **Rule 28-106.201(2)(b), Florida Administrative Code. The name, address, any e-mail address, any facsimile number, and telephone number of the petitioner, if the**

petitioner is not represented by an attorney or a qualified representative; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination.

Petitioner is McCrory's, a Florida limited liability company. McCrory's' Florida address is 35152 LaPlace Court, Eustis, Florida 32736, and its mailing address is 309 South Acuff Road, Lake Wales, Florida 33859. For the purposes of this proceeding, its email address, mailing address, and telephone number are those of its undersigned attorneys, David C. Ashburn, Esq. (ashburnd@gtlaw.com), and Lorence Jon Bielby, Esq. (bielbyl@gtlaw.com), Greenberg Traurig, P.A., 101 E. College Avenue, Tallahassee, Florida 32301, telephone (850) 222-6891.

3. **Rule 28-106.201(2)(c), Florida Administrative Code. an explanation of how the petitioner's substantial interests will be affected by the agency determination.** An explanation of how McCrory's substantial interests will be affected by the DOH determinations that are the subject of this Petition, and pertinent background information is provided as follows:

a. Pursuant to the Compassionate Medical Cannabis Act of 2014 (the "Medical Cannabis Act"), codified at Section 381.986, Florida Statutes, DOH was required, by January 1, 2015, to:

Authorize the establishment of five dispensing organizations to ensure reasonable statewide accessibility and availability as necessary for patients registered in the compassionate use registry and who are ordered low-THC cannabis under this section, one in each of the following regions: northwest Florida, northeast Florida, central Florida, southeast Florida, and southwest Florida. The department shall develop an application form and impose an initial application and biennial renewal fee that is sufficient to cover the costs of administering this section.

Sec. 381.986(5)(b), Fla. Stat.

b. In furtherance of its statutory mandate under the Medical Cannabis Act, DOH adopted rules now set forth in Chapter 64-4, Florida Administrative Code (the “Medical Cannabis Rule”), pursuant to which DOH, among other things, adopted and incorporated by reference:

- i. an application form for submission by entities seeking to become a “dispensing organization” (“DO”) as that phrase is defined in Section 381.986(1)(a), Florida Statutes (the “Application”), and
- ii. a “Scorecard for Low-THC Cannabis Dispensing Organization Selection” to be used by persons charged with the responsibility for reviewing submitted Applications.

c. The Medical Cannabis Rule provides that the following persons were to review Applications submitted by entities seeking to become a DO (collectively, the “DOH Reviewers”):

- i. Director of the Office of Compassionate Use;
- ii. A member of the Drug Policy Advisory Council appointed by the State Surgeon General; and,
- iii. A Certified Public Accountant appointed by the State Surgeon General.

d. Applications seeking approval by DOH to become the DO in the Central Florida Region (as defined in Rule 64-4.001(9)(c), Florida Administrative Code, and hereinafter the “Central Region”) were submitted by the following (collectively the “Applicants”):

- i. McCrory’s
- ii. Knox
- iii. Deleon’s Bromeliads, Inc.
- iv. Dewar Nurseries, Inc.
- v. Razbuton, Inc.
- vi. Redland Nursery, Inc.
- vii. Spring Oaks Greenhouses, Inc.
- viii. Treadwell Nursery

e. McCrory's Application was timely submitted, along with its timely submission of requested additional information. McCrory's has an existing state of the art, highly secure and dedicated facility that is more than 180,000 square feet, and is available to immediately implement all DO activities, and upon receipt of approval from DOH, McCrory's is prepared to timely commence such operations in full compliance with applicable statute(s) and administrative rule(s).

f. The DOH Reviewers reviewed the Applications submitted by the Applicants and assigned scores to components of each Application pursuant to the Scorecard. DOH has posted on its website the Scorecards completed by each reviewer for each Applicant.

g. The scores assigned to each of the Applications submitted by the Applicants were to be weighted and tallied to determine a total score for each Applicant.

h. DOH has not revealed all relevant components of the required scoring methodology. For example, and without limitation, DOH has not revealed the methodology employed by DOH to assign weights to scores for Application components, or to calculate the total scores for each Application reviewed by the Reviewers.

i. A review of the Scorecards completed by the Reviewers for the Central Region Applications reveals clearly erroneously assigned scores, and scores that were assigned in an arbitrary and capricious manner. For example, and without limitation:

- i. One Reviewer assigned a score of 6 to McCrory's for a component of the Scorecard for which McCrory's was identified by that Reviewer as the Applicant that was superior to all other Applicants. In that case, McCrory's should have been assigned a score of 7.
- ii. Certain scores were revised by hand, striking scores and inserting replacement scores.

iii. Statewide, there were 26 scored Applications; each Application included 14 scoring sections in 5 regions. Therefore, there were 70 highest available scoring opportunities statewide. The highest available score was awarded to 69 of the 70 scoring opportunities. In only one instance, a highest score was erroneously not awarded.

j. Correction of the clearly erroneous scoring errors would result in McCrory's being the highest scoring Applicant in the Central Region, and DOH would have been required to select McCrory's as the DO for the Central Region.

k. DOH failed and/or refused to correct the scoring error as to McCrory's. On November 23, 2015, the Central Region Applicant purported to have received the highest aggregate score through the Department's evaluation process was preliminarily approved as the DO, despite McCrory's erroneous score being only 1/1000th of a point lower than the purported highest score.

l. Effective March 25, 2016, the Florida Legislature revised Section 381.986, Florida Statutes. The revisions included the following:

Section 3. (1) Notwithstanding s. 381.986(5)(b), Florida Statutes, a dispensing organization that receives notice from the Department of Health that it is approved as a region's dispensing organization, posts a \$ 5 million performance bond in compliance with rule 64-4.002(5)(e), Florida Administrative Code, meets the requirements of and requests cultivation authorization pursuant to rule 64-4.005(2), Florida Administrative Code, and expends at least \$100,000 to fulfill its legal obligations as a dispensing organization; **or any applicant that received the highest aggregate score through the department's evaluation process**, notwithstanding any prior determination by the department that the applicant failed to meet the requirements of s. 381.986, Florida Statutes, **must be granted cultivation authorization by the department and is approved to operate as a dispensing organization** for the full term of its original approval and all subsequent renewals pursuant to s. 381.986, Florida Statutes. **Any applicant that qualifies under this subsection which has not previously been approved as a dispensing organization by the department must be given approval within 10 days after the effective date of this act**, and within 10 days after receiving such approval must comply with the bond requirement in rule 64-4.002(5)(e), Florida Administrative Code, and must comply with all other applicable

requirements of chapter 64-4, Florida Administrative Code. [emphasis added].

m. McCrory's meets the criteria set forth in the newly revised Section 381.986, Florida Statutes, to-wit: "...any applicant that received the highest aggregate score through the department's evaluation process..." DOH failed to correct the clearly erroneous scoring errors; McCrory's had, in fact, received the highest aggregate score.

n. By letter dated March 31, 2016, McCrory's demanded for DOH to award McCrory's as a Dispensing Organization for the Central Region, per Section 381.986 (as amended March 25, 2016) (**copy of demand letter attached as Exhibit 1**).

o. By letter dated April 4, 2016, DOH refused to grant the award to McCrory's (the "McCrory's/DOH Denial Letter") (**copy of response letter attached as Exhibit 2**).

p. Prior to the enactment of the newly revised Section 381.986, Florida Statutes, McCrory's filed a Petition challenging DOH's preliminary award to Knox Nursery, Inc ("Knox"), as the sole Dispensing Organization in the Florida Central Region. The clear intent of the newly revised Section 381.986, Florida Statutes, is to fully and finally approve the original preliminary award to Knox, and to additionally fully and finally approve an Applicant that received the highest aggregate score through the department's evaluation process. The language is clear and unequivocal. The legislative intent is to create an additional license.

q. McCrory's substantial interests will be affected by this proceeding because McCrory's is an Applicant seeking approval as one of the DO's for the Central Region, and this proceeding will determine whether McCrory's will receive that approval. Under Section 381.986, Section (3).1, as amended by HB 307 & HB 1313

(effective March 25, 2016) [Sec. 3, Ch. 2016-123, Laws of Florida], DOH must approve McCrory's Application.

4. **Rule 28-106.201(2)(c), Florida Administrative Code. A statement of when and how the petitioner received notice of the agency decision.** McCrory's received notice of the DOH decision that is the subject of this challenge upon its receipt on April 4, 2016, of the DOH/McCrory's Denial Letter.

5. **Rule 28-106.201(2)(d), Florida Administrative Code. A statement of all disputed issues of material fact.** Disputed issues of material fact included, without limitation, and subject to receipt of documents responsive to public records requests and discovery:

a. Whether the facts set forth in Paragraph 3 of this Petition, above demonstrate that DOH's intended decision to deny McCrory's right to an award as a dispensing organization for the Central Region, must be reversed.

b. Whether DOH's intended decision to deny McCrory's Application should be reversed, and McCrory's Application should be approved.

c. Whether DOH must select McCrory's as a DO for the Central Region.

d. Whether the methodology applied by DOH to score Applications was clearly erroneous, arbitrary, capricious, or failed to comply with applicable statutes and rules.

6. **Rule 28-106.201(2)(e), Florida Administrative Code. A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action.** As a matter of ultimate fact and law, for the reasons set forth in Paragraph 3 of this Petition, DOH's intended decision to deny McCrory's Application should be reversed, and McCrory's Application should be approved.

7. **Rule 28-106.201(2)(f), Florida Administrative Code. A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes.** For the reasons set forth in Paragraph 3 of this Petition, applicable statutes and rules that require reversal of the DOH decisions at issue in this proceeding include:

- a. Section 381.986, Florida Statutes;
- b. Section 381.986 as amended (effective March 25, 2016) [Sec. 3, Ch. 2016-123, Laws of Florida];
- c. Sections 120.569, 120.57, Florida Statutes;
- d. Rule Chapter 64-4, Florida Administrative Code; and
- e. All statutes and rules cited in this Petition.

8. **Rule 28-106.201(2)(g), Florida Administrative Code. A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.** McCrory's requests that:

- a. This Petition be referred to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct formal administrative proceedings;
- b. Recommended and Final Orders be entered approving McCrory's Application for approval as a DO for the Central Region; and
- c. Such other relief be granted, including an award of costs and attorney fees, as available under law.

Reservation of Right to Amend

McCrory's reserves its right to amend this Petition following its receipt and review of additional documents and information that will be received through public records requests and discovery conducted in this proceeding and those materials are analyzed.

Respectfully submitted,

GREENBERG TRAUIG, P.A.

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DAVID C. ASHBURN

Fla. Bar No. 0708046
AshburnD@gtlaw.com

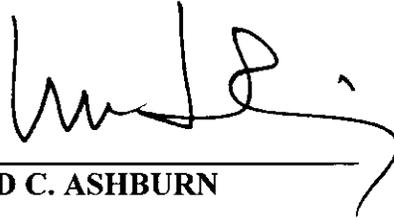
LORENCE JON BIELBY

Florida Bar No. 393517
BielbyL@gtlaw.com

*Attorneys for the Petitioner, McCrory's Sunny Hill
Nursery, LLC*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that original and one copy of the foregoing has been furnished by **Hand Delivery** to the Agency Clerk, Office of General Counsel, Florida Department of Health, 2585 Merchant's Row Boulevard, Suite 110, Tallahassee, Florida 32399, and a true and correct copy by hand delivery to Nichole Geary, Esq., General Counsel, Florida Department of Health at the same address this 5th day of April, 2016.

A handwritten signature in black ink, appearing to read 'David C. Ashburn', written over a horizontal line.

DAVID C. ASHBURN

EXHIBIT 1



David C. Ashburn
AshburnD@gtlaw.com

Tallahassee
850.222.6891

March 31, 2016

BY EMAIL

Nichole Geary, Esq.
General Counsel
Department of Health
4052 Bald Cypress Way
Bin A-02
Tallahassee, FL 32399-0001

RE: McCrory's Sunny Hill Nursery, LLC;
Low-THC Cannabis Dispensing Organization for the Florida Central Region

Dear Ms. Geary:

Thank you for meeting with us earlier this week. As we discussed, and as further described below, pursuant to Section 386.986, Florida Statutes, as amended effective March 25, 2016, our client, McCrory's Sunny Hill Nursery, LLC, "must be granted cultivation authorization by the department and is approved to operate as a dispensing organization" in the Florida Central Region. Sec. 3, Ch. 2016-123, Laws of Florida.

McCrory's Application was timely submitted, along with its timely submission of requested additional information. McCrory's has an existing state of the art, highly secure and dedicated facility that is more than 180,000 square feet, and is available to immediately commence implementation of all Dispensing Organization activities, and upon receipt of approval from DOH, McCrory's is prepared to timely commence such implementation in full compliance with applicable statute(s) and administrative rule(s).

Effective March 25, 2016, the Florida Legislature amended Section 386.986, the pertinent portion of which included the following:

Section 3. (1) Notwithstanding s. 381.986(5)(b), Florida Statutes, a dispensing organization that receives notice from the Department of Health that it is approved as a region's dispensing organization, posts a \$5 million performance bond in compliance with rule 64-4.002(5)(e), Florida Administrative Code, meets the requirements of and requests cultivation authorization pursuant to rule 64-4.005(2), Florida Administrative Code, and expends at least \$100,000 to fulfill its legal obligations as a dispensing organization; **or any applicant that received the highest aggregate score through the department's evaluation process, notwithstanding any prior determination by the department that the applicant failed to meet the requirements of s. 381.986, Florida Statutes, must be granted cultivation authorization by the department and is approved to operate as a dispensing organization** for the full term of its original approval and all subsequent renewals pursuant to s. 381.986, Florida Statutes. **Any applicant that**

qualifies under this subsection which has not previously been approved as a dispensing organization by the department must be given approval within 10 days after the effective date of this act, and within 10 days after receiving such approval must comply with the bond requirement in rule 64-4.002(5)(e), Florida Administrative Code, and must comply with all other applicable requirements of chapter 64-4, Florida Administrative Code. [emphasis added].

DOH Office of Compassionate Use reviewed all of the seven Applications for the Central Region, and assigned scores to components of each Application, using a scale of 1 to 7. The scores for specific components were to be weighted and tallied to determine a total score for each Applicant. The scores assigned to McCrory's included several errors, including one erroneous score of 6 assigned to McCrory's for a component of the scorecard for which McCrory's was identified by that reviewer as the Applicant that was superior to all other Applicants. On that component, McCrory's should have been assigned a score of 7, which would have resulted in McCrory's receiving the highest score, instead of receiving a score approximately 1/1000th of a point less than Knox Nursery. Correction of that one scoring error reveals that McCrory's was in fact the highest scoring Applicant in the Central Region, and DOH is required to select McCrory's as the Dispensing Organization for the Central Region.

McCrory's, as the recipient of "the highest aggregate score through the department's evaluation process... must be granted cultivation authorization by the department and is approved to operate as a dispensing organization" in the Florida Central Region. Sec. 3, Ch. 2016-123, Laws of Florida."

Further, McCrory's demands that the Department of Health comply with the newly amended Section 386.986, Florida Statutes, and provide notice of approval of McCrory's as a Dispensing Organization for the Florida Central Region, and grant to McCrory's cultivation authorization to operate as a Dispensing Organization, on or before close of business on Monday, April 4, 2016, as that is the tenth day following the effective date of the amendments to Section 386.986, Florida Statutes. McCrory's requests a written response to this demand, such that if the Department of Health does not comply with this demand, McCrory's may immediately avail itself of rights afforded by Chapter 120, Florida Statutes, and file a petition for formal administrative proceedings.

Cordially,



David C. Ashburn
For the Firm

EXHIBIT 2

Mission:

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



Rick Scott
Governor

Celeste Philip, MD, MPH
Interim State Surgeon General

Vision: To be the Healthiest State in the Nation

April 4, 2016

David C. Ashburn
Greenberg Traurig, P.A.
101 East College Avenue
Tallahassee, Florida 32301

RE: McCrory's Sunny Hill Nursery, LLC

Dear Mr. Ashburn:

The Department of Health received your letter dated March 31, 2016, demanding approval of McCrory's Sunny Hill Nursery, LLC (McCrory's) as a dispensing organization in the Central region, pursuant to chapter 2016-123, § 3, Laws of Florida. McCrory's did not receive the highest aggregate score in the Central region and is not entitled to approval as a dispensing organization.

Sincerely,

A handwritten signature in black ink, appearing to read "Nichole C. Geary".

Nichole C. Geary
General Counsel

JM/ab

cc: Office of Compassionate Use

Florida Department of Health

Office of the General Counsel
4052 Bald Cypress Way, Bin A 02 • Tallahassee, FL 32399-1703
PHONE: (850) 245-4005 • FAX (850) 413-8743

www.FloridaHealth.gov

TWITTER: HealthyFLA
FACEBOOK: FLDepartmentofHealth
YOUTUBE: fldoh
FLICKR: HealthyFla
PINTEREST: HealthyFla



Lorence Jon Bielby
BielbyL@gtlaw.com

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OFFICE OF THE CLERK
April 5, 2016

Tallahassee
850.222.6891

BY HAND DELIVERY

Agency Clerk
Office of the General Counsel
Florida Department of Health
2585 Merchants Row Blvd, Suite 110
Tallahassee, FL 32399

Re: *McCrory's Sunny Hill Nursery, LLC, v. DOH, et al.*
Department of Health Case No. TBD

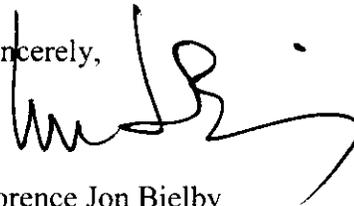
Dear Agency Clerk:

In connection with the above-referenced matter, enclosed is an original plus one copy of a Petition for Formal Administrative Proceedings.

Please file the original Petition with the Department of Health and return a date stamped as filed copy to me via our courier.

Thank you for your assistance in this matter. Should you have any questions regarding the enclosed, please do not hesitate to contact me.

Sincerely,



Lorence Jon Bielby
For the Firm

LJB/mh
Encls.
cc: Office of General Counsel, DOH

TAL 452034105v1