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Florida Supreme Court Requests Additional Oral Argument in Major Medical Marijuana Licensure Case

In *Florida Dept. of Health, et. al. v. Florigrown, LLC, et. al.*, a major case challenging the Florida medical marijuana statutory licensing procedures as unconstitutional, on July 14, 2020, the Florida Supreme Court issued an extraordinary Order on the court's own motion, requesting additional oral argument on "whether [Florigrown, et. al.] have a substantial likelihood of success on the merits of their challenge to §381.986(8)(a)1., (a)2.a., and (a)3., Fla. Statutes (2017), as "a special law granting a privilege to a private corporation" (the Order). The additional oral argument is set for Oct. 7, 2020. Each of the sections referenced in the Order are separate avenues for licensure under the 2017 amendment to §381.986(8): §381.986(8)(a)1. *See* Fla. S. Ct. case no. SC19-1464 (lower court, Fla. 1st DCA case no.1D18-4471).

The *Florigrown* case was originally filed in the Leon County Circuit Court, which held that the current Florida statutory licensing procedures found in §381.986(8)(a), Fla. Statutes were unconstitutional when compared with the 2016 citizen's constitutional amendment now found in Art. X, Section 29, Fla. Constitution (the Amendment).

On appeal to the First District Court of Appeal (DCA), the DCA affirmed the Circuit Court, in part, determining that §381.986 (8), Fla. Statutes "directly conflicts" with the Amendment because the statutory requirement for Medical Marijuana Treatment Centers (MMTCs) to "cultivate, process, transport, and dispense marijuana for medical use" (known as "vertical licensure" because each licensee is

required to conduct all of those acts, known as "seed to sale"), amounts to a "more restricted definition" of MMTC than the definition found in the Amendment, which the DCA read not to require a licensee to conduct all of those acts. The DCA also held that its ruling "renders the statutory cap on the number of facilities (licensed) in §381.986(8)(a) unreasonable.[1]

The Order requests additional oral argument on the 2017 legislative amendment to §381.986 (8) Fla. Statutes [enacted after the 2016 constitutional amendment]; each of the three sections referenced in the Order are separate avenues for licensure under the 2017 amendment to §381.986(8): *(1.)* Sec. 381.986(8)(a)1 awarded MMTC licenses to each of the then-existing "Dispensing Organizations" (which had been awarded a license before July 1, 2017, under former §381.986 after having been reviewed, evaluated, and scored by the DOH[2]; *(2.)* §381.986(8)(a)2[3] granted an MMTC license to any applicant whose application was reviewed, evaluated, and scored which was denied a dispensing organization license…which had one or more administrative or judicial challenges pending as of Jan. 1, 2017, or had a final ranking within one point of the highest final ranking in its region ("region" meaning one of the five original Florida geographic regions under the 2014 Act); *(3.)* §381.986(8)(a)3 provides: "…for up to two of the ten licenses, the Fla. Dept. of Health shall give preference to applicants that demonstrate in their applications that they own one or more facilities that are, or were, used for canning, concentrating, or otherwise processing of citrus fruit…" (known as the citrus preference).

Prior to the new Order requesting additional oral argument, the *Florigrown* case was fully briefed, and had been originally orally argued on May 6, 2020, after which the Court requested additional briefing, and now an additional oral argument. All parties, and the medical marijuana industry, anticipated the Florida Supreme Court would decide the case during late Summer 2020, either July or August. With this new oral argument set for Oct. 7, 2020, at a minimum a decision on the merits by the Supreme Court is delayed until the end of calendar year 2020 and possibly later depending upon any motions for rehearing or other post-opinion motion or appeal.

Ultimately, upon a final decision by the Supreme Court, the decision will result in the DOH issuing new rules, potentially revising and re-issuing its rules regarding applications for additional MMTC licenses, and if the Supreme Court upholds the DCA in whole or in part, the final decision could create a non-vertical licensure structure which allow for medical marijuana licenses to be limited to only one portion of the seed to sale (i.e., limited to cultivation only, or to processing only, or to dispensing only).

[1] §381.986 (8) Fla. Statutes contains a limit or "cap" on the total number of MMTC licenses that can be issued by the Florida Dept. of Health (DOH), limiting the total number of licenses to 10 plus the then-existing licenses awarded under §381.986(8)(a)1., along with an additional four (4) licenses for each 100,000 new qualified medical marijuana patients being added to the secure Florida medical marijuana registry. A limit or cap on the total number of licenses existed in the statute dating back to the origination of §381.986 in 2014, and the number or cap had been expanded in the 2017 statutory amendment, referenced above. As of July 17, 2020, there are 22 licensed Florida MMTCs, and 377,285 Florida-qualified medical marijuana patients.

[2] The applications for dispensing organizations were scored in accordance with Rule 64-4.002(5) of the Florida Administrative Code. The rule established a panel of three individuals to review and score the applications. R. 64-4.002(5)(a) and (b), Fla. Admin. Code. The rule required each reviewer to independently review each application and score the application by completing a scorecard. Id. The reviewer's scores were then combined to generate an aggregate score for each application, and the applicant with the "highest aggregate score" in each region was selected as the region's dispensing organization. Id. The methodology for scoring the applications and generating an aggregate score was not described in the rule or the scorecard.

[3] Sec. 2. awarded 10 licenses to applicants which met the requirements of Sec. 2.

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