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**RUTLEDGE ECENIA
119 SOUTH MONROE STREET
SUITE 202
TALLAHASSEE, FLORIDA 32301**

PHONE: (850) 681-6788 FAX: (850) 681-6515

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Date: November 25, 2015 From: Roxanne Levingston

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RUTLEDGE ECENIA
PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

OFFICE OF THE CLERK
MICHAEL J. BARRY
STEPHEN A. ECENIA
DIANA M. FERGUSON
MARTIN P. McDONNELL
J. STEPHEN MENTON
CRAIG D. MILLER
R. DAVID PRESCOTT

POST OFFICE BOX 551, 32302-0551
119 SOUTH MONROE STREET, SUITE 202
TALLAHASSEE, FLORIDA 32301-1841

TELEPHONE (850) 681-6788
TELECOPIER (850) 681-8515
www.rutledge-ecenia.com

November 25, 2015

MARSHA E. RULE
GARY R. RUTLEDGE
MAGGIE M. SCHULTZ
GABRIEL F.V. WARREN
GOVERNMENTAL CONSULTANT
JONATHAN M. COSTELLO
OF COUNSEL
HAROLD F. X. PURNELL

VIA HAND DELIVERY AND FACSIMILE

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

Dear Agency Clerk:

This letter provides notice of the intent of Tornello Landscape Corp. d/b/a 3 Boys Farm ("3 Boys Farm") to challenge the Department's preliminary selection of Alpha Foliage, Inc. to become the Low-THC Cannabis Dispensing Organization for the Southwest Region. 3 Boys Farm timely filed an application in accordance with Rule 64-4, Fla. Adm. Code to be selected as the dispensing organization in the Southwest Region. On November 23, 2015, the Department provided notice that Alpha Foliage had been selected and the 3 Boys Farm application was denied. 3 Boys Farm contends that its application best satisfies the selection criteria in the Southwest Region. 3 Boys Farm intends to challenge the proposed selection of Alpha Foliage. In accordance with the notice issued on November 23, 2015, 3 Boys Farm will file its Petition within twenty-one (21) days of November 23, 2015.

The right of 3 Boys Farm to an administrative hearing prior to finalization of the selection of the dispensing organization in the Southwest Region is expressly recognized in the Final Order issued on the administrative challenges to the Department's initial proposed rules which sought to implement the Compassionate Medical Cannabis Act of 2014. Because the process adopted by the Department results in the selection of one applicant for a license to the exclusion of others, due process considerations must be followed in order to ensure that a competitive process exists. *See, Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 66 S.Ct. 148, 90 L.Ed. 108 (1945) (involving the award of broadcast licenses). These due process considerations are commonly referred to as the "Ashbacker Doctrine" and establish the right of a competitor to seek a comparative hearing when a governmental entity selects between competing applicants when a limited number of applications can/will be granted. The due process considerations have been described as follows:

... When the decision on one application will substantially prejudice other simultaneously pending applications because all

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Agency Clerk
Page 2
November 25, 2015

applicants are competing for a franchise to serve a market that only one of them in practical effect will be given authorization to serve, the applications are mutually exclusive. In this situation, any of the applicants may request a comparative hearing in which the merits of all applications will be tried together and against each other.

Section 2.32, Boyd, Overview of the Administrative Procedure Act, Florida Administrative Practice, Florida Bar, 6th Edition (2001, p. 2-38). The Ashbacker Doctrine has been applied by Florida courts in a number of settings. See, Bio-Medical Applications of Clearwater, Inc. v. Dep't. of Health & Rehab. Svcs., 370 So.2d 19 (Fla. 2 DCA 1979); Bio-Medical Applications of Ocala, Inc. v. Dep't. of Health & Rehab. Svcs., 274 So.2d 88 (Fla. 1 DCA 1979); and South Broward Hospital District v. Dep't. of Health & Rehab. Svcs., 385 So.2d 1094 (Fla. 4 DCA 1980). These court decisions recognize that due process rights include the right of applicants to bring forth evidence and challenge issues regarding competitors when the selection was mutually exclusive. 370 So.2d at 23. Thus, in order to meet the requirements for competitive process and to satisfy the due process requirements of the Ashbacker Doctrine, an applicant, such as 3 Boys Farm, is entitled to challenge the information submitted by other competing applicants, including the accuracy of information provided to the Department in order to secure verification.

The applicability of the Ashbacker Doctrine to the selection of entities to be dispensing organizations under the Compassionate Use Law was expressly confirmed by Administrative Law Judge David Watkins in Costa Farms, LLC v. Dep't. of Health, 2014 WL 65 § 7375 DOAH Case No. 14-4296RP. Judge Watkins specifically determined that the Ashbacker Doctrine and its Florida progeny compel a process which allowed the competing applicants to challenge the merits of the other applications before final selection.

In order to prepare its challenge, 3 Boys Farm needs access to the unredacted applications filed by Alpha Foliage in the Southwest Region and by Alpha Foliage's affiliates in other regions. Accordingly, pursuant to the Florida Public Records Act, Chapter 119, Florida Statutes, 3 Boys Farm requests copies of the unredacted applications filed by Redland Nursery in the Central Region, Alpha Foliage in the Northwest Region, Redland Nursery in the Southeast Region and Alpha Foliage in the Southwest Region. Please contact my office to make arrangements for copying and pick-up of the requested documents.

Sincerely,


J. Stephen Menton

JSM/rl