SUPREME COURT
STATE OF FLORIDA

AMERICAN HEALTHCORP OF VERO BEACH, INC.,	:	
Appellant/Petitioner,	:	
v.	:	**CASE NO. 67448**
~~**AMERICAN HEALTHCORP OF VERO BEACH, INC.,**~~ Dept of HRS	:	**DCA CASE NO. AX-36**
Appellee/Respondent.	:	

BRIEF OF AMICUS CURIAE HUMANA, INC. d/b/a SEBASTIAN RIVER MEDICAL CENTER, INC.

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PRELIMINARY STATEMENT

Humana, Inc. d/b/a Sebastian River Medical Center, Inc. appears as Amicus Curiae in this appeal. This Brief supports the position of the Respondents, the Florida Department of Health and Rehabilitative Services.

Throughout this Brief, Humana, Inc. d/b/a Sebastian River Medical Center, Inc. will be referred to as "Amicus." Petitioner/Appellee, American Healthcorp of Vero Beach, Inc., will be referred to as "American Healthcorp." The Florida Department of Health and Rehabilitative Services will be referred to as the "Department."

POINTS ON APPEAL

I.

AMERICAN HEALTHCORP IS NOT ENTITLED TO A CERTIFICATE OF NEED BY DEFAULT DUE TO SECTIONS 381.493-.499, FLORIDA STATUTES, AND ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION.

II.

WRITS OF MANDAMUS ORDERING THE DEPARTMENT TO AWARD CERTIFICATES OF NEED BY DEFAULT ARE INAPPROPRIATE.

STATEMENT OF CASE AND FACTS

Amicus adopts the Statement of the Case and Facts presented in the Answer Brief of the Department with the following additions.

Amicus is an existing 133-bed acute care hospital situated in Indian River County, the same county in which American Healthcorp proposed to construct a new hospital. Amicus requested leave of the Circuit Court to intervene as a party-respondent, but said request was denied. (ROA 112-115,134). However, the First District Court of Appeal permitted Amicus to file a brief in support of the Department.

SUMMARY OF THE ARGUMENT

Amicus maintains that American Healthcorp is not entitled to a Certificate of Need by default due to Section 381.494(8)(c), Florida Statutes, and established principles of statutory construction. Per Section 381.494(8)(c), an applicant may take appropriate legal action to compel the Department to render a decision on a Certificate of Need application, but cannot force the Department to grant an application. Also, Section 381.494(8)(c) supersedes Section 120.60(2) given that it is a specific statutory provision regarding certificate of need matters and is a later expression of the legislative will.

Further, it is not appropriate to issue a Writ of Mandamus ordering the Department to award a Certificate of Need by default. Mandamus can only be issued to force an agency or public officer to perform a ministerial act. Yet, it is undisputed that Certificate of Need Review by the Department is a discretionary act and, as such, forcing the Department to grant an application would be inappropriate.

ARGUMENT

I.

AMERICAN HEALTHCORP IS NOT ENTITLED TO A CERTIFICATE OF NEED BY DEFAULT DUE TO SECTIONS 381.493-.499, FLORIDA STATUTES, AND ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION.

The issue squarely presented in this appeal is whether a Certificate of Need must or can be issued by default due to allegedly untimely disposition of an application by the Department. Amicus suggests that, as a matter of law, this issue be answered in the negative.

A. SECTION 381.494(8)(c), FLORIDA STATUTES, DOES NOT ENTITLE AMERICAN HEALTHCORP TO ISSUANCE OF A CERTIFICATE OF NEED BY DEFAULT.

The Certificate of Need law is officially entitled the "Health Facilities and Health Services Planning Act" and is set forth in Sections 381.493-.499, Florida Statutes. Per this Act, new hospitals and other health-related projects cannot be constructed or established without Certificate of Need approval. The Department is statutorily designated as the only state agency authorized to issue or deny Certificates of Need. Section 381.494(8)(a).

Per this Act, a prospective health provider submits a Certificate of Need application to the Department for consideration

and review in accordance with enumerated statutory criteria and agency rules adopted thereunder. This Act also establishes a timetable for various stages of the application review process.

American Healthcorp contends that the Department failed to render a determination on its application in a timely manner and, therefore, it is entitled to a Certificate of Need by default pursuant to Section 120.60(2), Florida Statutes. This contention is inconsistent with the express language of Section 381.494(8)(c).

Section 381.494(8)(c) provides:

> If the Department fails to render a determination [on a Certificate of Need application] within 45 days, or within an otherwise extended period, from the day the application is declared to be complete, the applicant, within 30 days of the date the Department should have rendered a determination, may take appropriate legal action, including relief pursuant to the Administrative Procedure Act, to force the Department to render a determination. (Emphasis supplied).

This provision makes clear that if an applicant believes the Department has not ruled on its application in a timely manner, the applicant may seek appropriate legal action to force the Department to either approve or deny the application.

Section 381.494(8)(c) does not compel or even allow the issuance of a Certificate of Need by default in the event the Department does not act upon an application in a timely manner. This statutory relief provision has also been adopted by the Department in its Rule 10-5.10(6), Florida Administrative Code.

Even before its opinion in this cause, the First District Court of Appeal had addressed the legal issue as to the relief

available to a Certificate of Need applicant whose application has not, purportedly, been ruled upon in a timely manner. In Johnson and Johnson Home Health Care v. Department of Health and Rehabilitative Services, Case No. AX-154 (February 27, 1984), a Certificate of Need applicant petitioned the Court for a Writ of Mandamus requiring the Department to issue it a Certificate of Need since its application had not been determined within the time period required by law. The First District held:

> [W]e note that the remedy for CON applicants aggrieved by a delay in determination of their applications, established in Section 381.494(8)(c), Florida Statutes (1983), is "appropriate legal action, including relief pursuant to the Administrative Procedure Act, to force the Department to render a determination. (Emphasis supplied).
> The language of this statute does not appear to encompass the remedy set forth in Section 120.60(2), Florida Statutes (1983). (License applications not acted on within the prescribed time periods are deemed approved.) Therefore, the relief sought by this Petition was "to force the Department to render a determination" of Petitioner's application.
> [Copy of Order is attached to this Brief].

Hence, Certificates of Need cannot, as a matter of law, be issued by default; instead, an applicant allegedly aggrieved by untimely disposition of its application can only seek to compel the Department to rule on its application.

B. ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION MANDATE THAT CERTIFICATES OF NEED CANNOT BE ISSUED BY DEFAULT.

American Healthcorp contends that the Department failed to rule upon its application in a timely manner, and, as such, Section 120.60(2), Florida Statutes, entitles it to issuance of a Certificate of Need by default. Yet, it is clear that Section 381.494(8)(c) only entitles an applicant to force the Department to make a decision; it does not authorize issuance of a Certificate by default.

It is well established that special or specific statutes on a subject should control over general ones in the event of a conflict. As noted in Beverly v. Division of Beverage, Department of Business Regulation, 282 So.2d 657, 659 (Fla. 1st DCA 1973):

> It is a rule of statutory construction that general and special statutes should be read together and, if possible, harmonized. However, in the event of a conflict, the special statute will prevail in the absence of a clear legislative intent to the contrary.

The Supreme Court of Florida has also adopted this principle of statutory construction. In Tribune Company v. School Board of Hillsborough County, 367 So.2d 627,629 (Fla. 1979),the Court held:

> Rather, we are obliged to read the provisions of the general law together with the subsequent special act and harmonize them if possible, and if there is unresolvable conflicts between the provisions, the later special act, as a more specific expression of the legislative will, will be given effect.

Clearly, Section 381.494(8)(c) is the specific statutory provision which defines the relief available to Certificate of Need applicants whose applications are allegedly not timely disposed of by the Department. On the other hand, Section 120.60(2) generally controls licensing matters in the absence of more specific legislation to the contrary. As such, the instant cause is a classic example of specific legislation carving out an exception to the general provision in Chapter 120. Therefore, Section 381.494(8)(c), as the specific provision, must control.

Interestingly, this is not the only instance wherein the Certificate of Need law (Sections 381.493-.499) modifies the general provisions in Chapter 120. For example, Section 120.68 establishes the standard of "competent, substandard evidence" for appellate review of final agency action. Yet, Section 381.494(8)(c) provides that appellate courts shall affirm decisions of the Department unless "arbitrary, capricious or not in compliance with this Act."

Clearly, these standards of appellate review vary, yet such variance does not vitiate the fact that the Section 381-494(8)(c) review standard governs appeals stemming from Certificate of Need applications. See University Community Hospital v. Department of HRS, 10 FLW 1318 (Fla. 2nd DCA 5/22/85). Similarly, the relief afforded in Section 381.494(8)(c) preempts the default language in Section 120.60(2).

In addition, it is a well-established principle of statutory construction that the last expression of the legislature

controls. As stated in Kiesel v. Graham, 388 So.2d 594, 596 (Fla. 1st DCA 1980):

> This result is further supported by the corollary principle that the last expression of legislative will is the law, and, therefore, that the last in point of time or order of arrangement prevails. This rule is applicable where the conflicting provisions appear in different statutes [Sharer v. Hotel Corporation of America, 144 So.2d 814 (Fla. 1962)], or in different provisions of the same statute.

In the instant case, Section 381.494(8)(c) was enacted by the Florida Legislature later than Section 120.60(2). Specifically, the default language in Section 120.60(2) ("any application for a license not approved or denied within . . . shall be deemed approved") first appeared in 1976. Chapter 76-131, Section 10, Laws of Florida. The provision that a Certificate of Need applicant may take appropriate legal action to force the Department to render a determination first appeared in 1980. See Chapter 80-187, Section 4, Laws of Florida.

Therefore, the relief provision in Section 381.494(8)(c) represents the later expression of the legislature. As such, it must again be concluded that Section 381.494(8)(c) carves out an exception to the general default language in Section 120.60(2).

Finally, it is well-established that statutes on the same subject should be harmonized whenever possible. As stated by The Supreme Court in State ex rel. School Board v. Department of Education, 317 So.2d 68, 73 (Fla. 1975):

> The legal presumption is that the legislature does not intend to keep contradictory enactments in the statute books, or to effect so important a measure as the repeal of a law without expressing an intention to do so; an interpretation leading to such a result should not be adopted, unless it be inevitable. The rule of construction in such cases is that if the Courts can, by any fair, strict, or liberal construction, find for the two provisions a reasonable field of operation, without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with the whole course of legislation upon the subject it is their duty to do so.

The relief provisions in Section 381.494(8)(c) and 120.60(2) can be harmonized in a meaningful way. The default language in Section 120.60(2) generally applies to licensing procedures in the absence of specific provisions to the contrary. However, Section 381.494(8)(c) is a specific provision to the contrary for Certificate of Need applications.[1] This statute simply creates an exception to the general rule in Chapter 120 and, also being the later expression of the legislature, it must control the legal issue raised in this Appeal.

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[1]This explains why World Bank v. Lewis, 406 So.2d 541 (Fla. 1st DCA 1981), cited by American Healthcorp, is not dispositive herein. In World Bank, there was no specific statutory provision which carved out an exception to Chapter 120. Thus, license by default was appropriate. In the case at bar, Section 381.494(8)(c) clearly carves out an exception.

C. ISSUANCE OF A CERTIFICATE OF NEED BY DEFAULT IS CONTRARY TO THE LEGISLATIVE INTENT UNDERLYING THE CERTIFICATE OF NEED LAW.

The Certificate of Need law establishes a uniform mechanism by which the Department considers and reviews all applications to construct new or expand existing health-related facilities throughout the State of Florida. The express legislative intent of this law is as follows:

> It is the intent of the Legislature to stimulate the establishment and continuous reevaluation of community-oriented health goals by providers, consumers, and public agencies; to assist in the rational examination of alternate methods of achieving those goals; and to aid in their achievement through the most effective means possible within the limits of available resources. Section 381.493(2).

It is further clear that the legislature established this law to avoid the establishment of unnecessary hospital or health-related facilities:

> Every consideration shall be given to the elimination of unnecessary duplication of health services which are not currently available or which are insufficiently provided within the community. Section 381.493(2).

Section 381.494(6)(c)1-13 enumerates the criteria by which the Department reviews Certificate of Need applications. Such criteria include the following:

> (2) The availability, quality of care, efficiency, appropriateness, accessibility, extent of utilization, and adequacy <u>of like and existing health care services and hospices in the service district of the applicant.</u>
>
> (4) <u>The availability and adequacy of other health care facilities and services and hospices in the service district of the applicant</u>, such as out-patient care

> and ambulatory or home care services, which may serve as alternatives for their health care facilities and services to be provided by the applicant.
>
> (12) The probable impact of the proposed project on the cost of providing health services proposed by the applicant, upon consideration of factors including . . . the improvements or innovations in the financing and delivery of health services which foster competition and service to promote quality assurance and cost-effectiveness.
>
> (13) The costs and methods of the proposed construction, including . . . the availability of alternative, less of alternative, less costly, or more effective methods of construction. (Emphasis supplied).

These criteria reflect the legislative mandate to consider the availability of existing hospital resources before the construction of additional facilities can be deemed necessary. Consideration of these criteria ensures that proposed new facilities facilitate cost containment and cost-effectiveness. Given the great public interests at stake, the legislature deemed it imperative that the Department take these considerations into account before approving applications.

In addition, this law expressly provides that substantially affected persons who are aggrieved by the issuance or denial of a Certificate of Need shall have the right to seek judicial review of decisions resulting from these administrative hearings. Section 381.494(8)(e). In this way, existing facilities and other entities can challenge the Department's initial (free-form) determination on a Certificate of Need application in a "de novo" administrative proceeding to ascertain that the proposed new facility is needed,

that it would not adversely impact their facilities, and that it would not adversely impact patient charges or hospital costs.

Issuance of a Certificate of Need by default would defeat these legislative intents and considerations and also deprive substantially affected parties the right to administratively challenge an application. Issuance by default avoids a comprehensive need analysis by the Department, consideration of existing hospital capacity in the proposed service area, and consideration of whether the new facility promotes cost containment and costeffectiveness. It is clear that the legislature never intended such a result and the relief provision in Section 381.494(8)(c) is obviously aimed to avoid such a default situation.

In sum, issuing Certificates of Need by Default usurps this comprehensive statutory scheme and ignores the public purposes and policies underlying its enactment.

II.

WRITS OF MANDAMUS ORDERING THE DEPARTMENT TO AWARD CERTIFICATES OF NEED BY DEFAULT ARE INAPPROPRIATE.

Mandamus is a remedy to command performance of a ministerial act by public officials or agencies who have a clear legal duty to perform. The duties that fall within the scope of mandamus are legal duties of a specific, imperative and ministerial character, as distinguished from those duties which are permissive or discretionary.

As stated in Florida Department of Health and Rehabilitative Services v. Hartsfield, 399 So.2d 1019, 1020 (Fla. 1st DCA 1981):

> In order to show entitlement to the extraordinary Writ of Mandamus, the petitioner must demonstrate a clear legal right on his part, and indisputable legal right on the part of respondents, and that no other adequate remedy exists.

However, in matters involving discretion, when a public officer or agency refuses to act at all, mandamus may issue to move the person or agency to action and to exercise his discretion in the matter. Under these circumstances, the petitioner merely asks that the officer or agency make a decision one way or the other; it does not seek to use the Writ to compel a particular decision. See Moore v. Florida Parole and Probation Commission, 289 So. 2d 719 (Fla. 1974).

In sum, if an officer or agency is obliged to perform a ministerial act which involves no discretion, then mandamus

may be appropriate to compel the officer or agency to take particular action. However, if the duty involves an exercise of discretion, mandamus can compel the officer or agency to make a decision on the matter, but not a particular decision.

In General Care Corporation v. Forehand, 329 So. 2d 49 (Fla. 1st DCA 1976), the First District determined that Certificate of Need review by the Department is a discretionary act, not a ministerial one:

> In spite of the legislature having provided for such method of review, a Writ of Mandamus is not a proper action for review of the denial or grant of a Certificate of Need since such grant or denial involves an exercise of discretion by the Bureau [Department]. Id. at 50. (Emphasis supplied).

Also, in Page v. Capital Medical Center, Inc., 371 So.2d 1087, 1088 (Fla. 1st DCA 1979), it was expressly acknowledged that "the decision to issue or deny Certificates of Need under Section 381.494(6), Florida Statutes (1973), was not ministerial." Hence, it is beyond dispute that Certificate of Need review is a discretionary act and that mandamus is not appropriate to compel the Department to render a particular decision.

Section 381.494(8)(c) implicitly incorporates this statement of law. This provision permits an applicant to seek relief to compel the Department to make a decision on its application, but does not permit the applicant to force the Department to make a particular decision on its application. That is precisely the law and scope of the mandamus remedy.

American Healthcorp concedes that departmental review of a Certificate of Need application involves discretion, but asserts

that this discretion magically transforms into a ministerial act upon default. Such a creative suggestion squarely contradicts the express language in Section 381.494(8)(c) in addition to well-established principles of law. See Moore v. Florida Parole and Probation Commission, supra.

Therefore, it is clear that mandamus is not appropriate to force the Department to approve an application.

CONCLUSION

Based upon the foregoing, it is clear that American Healthcorp has no legal right to obtain a Certificate of Need by default. Amicus respectfully requests this Court to affirm the opinion of the First District Court of Appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Brief of Amicus Curiae Humana, Inc. d/b/a Sebastian River Medical Center, Inc. has been furnished by U.S. Mail to **M. STEPHEN TURNER, ESQ.**, 318 North Calhoun Street, Tallahassee, Florida 32301; **MICHAEL J. CHERNIGA, ESQ.**, 101 East College Avenue, P. O. Drawer 1838, Tallahassee, Florida 32302; and **KENNETH HOFFMAN, ESQ.**, 2700 Blair Stone Road, Suite C, Tallahassee, Florida 32301, this 19th day of September, 1985.

James C. Hauser

JAMES C. HAUSER